United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Tinton Falls Lodging Realty, LLC Appellant, RE: DMC Management Services, LLC Appealed From Size Determination No. 1-SD-2014-14	SBA No. SIZ-5546 Decided: April 3, 2014

APPEARANCES

Steven J. Koprince, Esq., Petefish, Immel, Heeb & Hird, LLP, Lawrence, Kansas, for Appellant

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DECISION[1]

I. Introduction and Jurisdiction

On December 5, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 1-SD-2014-14 concluding that DMC Management Services, LLC (DMC) is an eligible small business.

Tinton Falls Lodging Realty LLC (Appellant) contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant is not a small business for the instant procurement. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within

[1] I originally issued this Decision under a Protective Order and ordered the parties to file any requests for redactions. OHA received one or more timely requests and I considered them in redacting the Decision. I now issue the redacted version of the Decision for public release.

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 February 19, 2013, the U.S. Department of the Navy, Military Sealift Command — Norfolk, in Norfolk, Virginia (MSC or Government), issued Solicitation No. N32205-13-R-6005 for lodging and transportation of Civil Service Mariners (CIVMARs). The procurement is for an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract and is a total small business set-aside under North American Industry Classification System (NAICS) code 721110, Hotels (except Casino Hotels) and Motels, which has a size standard of $30 million in annual receipts. DMC timely submitted its offer on March 27, 2013, and its final proposal revisions on May 20, 2013.

Following disqualification of the original successful offeror as other than a small business,[2] on October 18, 2013, the Contracting Officer (CO) issued notice that DMC was now the successful offeror. Appellant timely filed a size protest with the CO on October 25, 2013. Appellant alleged that DMC's proposal violates the ostensible subcontractor rule because, according to its website, DMC "merely 'represents' hotels owned by others." Thus, DMC is only a broker and not a lodging provider and, therefore, is unduly reliant on its subcontractors. The CO referred the matter to the SBA Area Office for a size determination.

B. Statement of Work (SOW)

The Contractor shall provide lodging and transportation to CIVMARs assigned to the MSC Training Center. The Contractor shall furnish necessary facilities including furniture, equipment and supplies, management, and supervision of the hotel labor force.

The Contractor must provide one primary lodging facility (hotel) and at least two overflow hotels. The primary hotel will lodge at least 50% of the assigned CIVMARs at all times. The overflow hotels will be used only when the primary hotel exceeds its capacity. The Contractor shall include a list of known blackout dates during the period of performance, in which all or a portion of the CIVMARs residing in the hotel must be relocated due to pre-committed business. No additional blackout dates shall be added after award of the contract.

All hotels must meet or exceed the AAA Three Diamond hotel rating, be within a specified distance and commuting time of the MSC Training Center, and meet the other detailed specifications set out in the Scope of Work. Either the Contractor shall provide dining facilities for breakfast, lunch and dinner, or there must be dining facilities within half a mile of each hotel.

The Contractor shall provide a single point of contact (POC) for all task orders issued and this POC shall be available to the MSC on a 24-hour emergency basis. The Contractor shall provide hotel rooms when called for by the Government. Each CIVMAR shall have a single

[2] For prior size proceedings see *Size Appeal of Mali, Inc.*, SBA No. SIZ-5506 (2013).

room, and the number of single rooms actually used on any one day will vary depending on how many CIVMARs are in training. Based on previous history, the room nights vary from 25 to 120 rooms per night, but the Government estimate is 65 rooms per night and 23,600 room nights during the base year.

The Contractor shall provide each CIVMAR staying at the hotel with transportation to and from the MSC Training Center whenever classes are scheduled, including weekends and Federal holidays, if required. The Contractor shall coordinate travel arrangements daily with the Training Center POC in sufficient time to ensure timely logistical arrangements. The contractor shall insure all CIVMARs arrive at the Training Center 15 minutes prior to scheduled class start times to include any multiple pick-ups due to the use of overflow facilities. There will be at least 2 single trips each day (one from the hotel to the Training Center in the morning, and one back in the afternoon). There could be times when more than one single trip is required each way. The Government estimates the total number of single trips is 550 per year.

The Contractor must verify the identification of each CIVMAR at check-in using two required identification cards. The Contractor must maintain a daily sign-in record containing the name, pay code, date of birth, and Department for each CIVMAR and fax the daily sign in sheets to the MSC POC each day. The Contractor must keep a daily transportation log, to include date, time, number of passengers, and destination to and from.

C. Evaluation Criteria

The solicitation contains FAR 52.212-2, Evaluation—Commercial Items (Jan 1999), which provides:

> Award will be made to that responsible, technically acceptable offeror with acceptable past performance whose proposal, conforming to the solicitation, has offered the lowest total evaluated price and is deemed to be responsible.... Any proposal with a rating of unacceptable for any sub-factor will result in the appropriate factor being rated unacceptable. Any offer rated unacceptable for any factor may be ineligible for award or will be excluded from the competitive range unless the deficiency is corrected through discussions.

Solicitation at 18 (quoting 48 C.F.R. § 52.212-2(a)). The Technical Proposal factor consists of four subfactors. These are:

> I: General requirements of primary and overflow hotels
> II: Primary and overflow hotels' fire and safety policies and procedures
> III: Health and sanitation of primary and overflow facilities
> IV: Transportation to and from primary and overflow hotel(s)

Amendment 0004 at 3-5. These subfactors list various required documents pertaining to each facility and statements from the offeror regarding the facility.

D. DMC's Proposal

DMC proposes [xxx] as the Primary Hotel, and [xxx] and [xxx] as the Overflow Hotels. (Technical Proposal at 3.) The number of CIVMARs will vary as will length of each CIVMAR's stay; however, DMC will ensure enough rooms are available at all times to meet the Government's needs. (Technical Proposal at 5.) DMC will fax the daily sign-in rooming rosters to MSC. (Technical Proposal at 9.)

CIVMARs may not be moved to a different facility without MSC approval. (*Id.*) DMC will notify MSC of any Department of Health closures or if a substantial and imminent health hazard such as substantial power outage occurs at a hotel, and advise MSC of its plan to transfer CIVMARs to another approved facility. (Technical Proposal at 7-8.) DMC will notify MSC of any proposed hotel renovations and upgrades. (Technical Proposal at 10.) DMC will report to MSC if any CIVMAR declines housekeeping for more than two consecutive days, and if any illegal act occurs, DMC will provide the police report to MSC. (Technical Proposal at 7-8.)

DMC will provide transportation to MSC and back to the hotel whenever classes are held, to include at least two single trips daily and more if needed based on class schedule, including weekends and holidays. (Technical Proposal at 8.) DMC proposes [xxx] as the bus company. (Technical Proposal at 9.) DMC will ensure there are sufficient vehicles to support the program. (Technical Proposal at 8.) DMC will coordinate travel arrangements daily with MSC in sufficient time to ensure timely logistical arrangements so that CIVMARs arrive 15 minutes before class starts. (*Id.*) DMC will maintain the daily transportation log and submit it to MSC with invoices. (Technical Proposal at 9.)

DMC's Quality Assurance Plan requires DMC to control the quality of service delivery and conform to contract requirements. DMC's on-site and off-site quality control includes training staff in the needs of the Government and any “nuances” in the SOW. (Technical Proposal at 11.) DMC also will use weekly teleconferences, site visits, and internal and customer feedback surveys to review contract performance and ensure compliance with contract requirements. (*Id.*) Complaints received will be addressed immediately and followed up with the customer and, if necessary, a DMS representative will go to the location. (*Id.*) Customer service requests will be logged and a corrective action plan implemented immediately. (*Id.*) If a service request takes more than 24 hours to complete, the occupant and MSC will be notified, and a follow-up call will be made to ensure satisfaction. (Technical Proposal at 12.)

As key personnel, DMC proposes [xxx] and [xxx] of DMC Management. The Technical Proposal describes [xxx] as having “more than 29 years of progressive experience in the development and execution of business operations with a specialty in sales and management of United States Government housing/lodging contracts.” (Technical Proposal at 10.) The Technical Proposal also includes DMC's statements about the hotel amenities and other matters, and copies of required documents (such as hotel licenses, AAA rating, and health inspection certificates, and proposed bus drivers' CDLs and driving records).

For Past Performance, DMC listed (1) an ongoing prime contract to provide fully furnished apartments and hotel lodging for about 250 Department of Defense (DoD) persons

daily; (2) an ongoing prime contract to provide hotel lodging and breakfast for DoD personnel; and (3) a completed prime contract to provide transportation, lodging, and meals for Army personnel. The key personnel for all three contracts are the same as for the instant contract.

DMC's Price Proposal showed it bid the Contract Line Item Number (CLIN) 0001, CIVMAR Lodging (based on an estimated 23,600 room nights), at $[xxx] for the base year; and CLIN 0002, CIVMAR Transportation (based on an estimated 550 trips), at $[xxx] for the base year. Thus, the total price to the Government for the estimated usage of rooms and trips is $[xxx] for the base year.

E. Area Office File

On November 7, 2013, DMC submitted its completed SBA Form 355, charter document, financial statements, Federal income tax returns, proposal, Letter Agreements with its three proposed hotel subcontractors, and other documents. With its response to the protest, DMC provided [xxx]'s declaration, made under penalties of perjury. On November 12, 2013, after the Area Office had asked DMC about labor costs, DMC submitted additional argument, a second declaration by [[xxx], and the declaration of [xxx], an official of the primary hotel, also made under penalties of perjury.

[xxx]'s first declaration attested to DMC's subcontract costs underlying its proposal. He stated that, for the base year, subcontract cost to DMC for the primary hotel is $[xxx] per room, a figure also reflected in DMC's Letter Agreement with that hotel. He also stated DMC's subcontract cost for transportation is $[xxx] per trip.

Thus, DMC's subcontract cost for the estimated 23,600 room nights during the base year ($[xxx] x 23,600) is $[xxx], and its cost for the estimated 550 bus trips during the base year ($[xxx] x 550) is $[xxx]. DMC's total base year subcontract costs ($[xxx] + $[xxx]) are $[xxx]. Subtracting the subcontract costs from the total base year price to the Government ($[xxx] - $[xxx]) provides $[xxx] for DMC's other costs and profit. These calculations yield the following contract cost and percentage breakdown for the base year:

Hotels	$ [xxx]	74%
Transportation	[xxx]	4%
DMC	[xxx]	2%
Base year price	$ [xxx]	100%

Although the solicitation did not ask for direct labor cost calculations in the proposal, the Area Office asked for them, so DMC provided them in [xxx]'s declaration for the primary hotel, and in [xxx]'s second declaration for the other costs.

Contrary to Appellant's positions, DMC argued that the solicitation does not require the offeror to own a hotel, and that the primary and vital requirements of the contract are not just rooms and bus trips, but an overall package coordinating and managing resources to meet the Government's “dynamic lodging needs”. Further, DMC is not “unusually reliant” upon its subcontractors because DMC lacks lodging experience; to the contrary, DMC has the needed

experience as shown in its past performance volume and in its Area Office submission. DMC also provided extensive discussion of past OHA decisions on similar contracts.

F. Size Determination

On December 5, 2013, the Area Office issued Size Determination No. 1-SD-2014-14, concluding that DMC is an eligible small business for the instant contract. After noting that its authority for determining DMC's size rests on 13 C.F.R. § 121.1001(a)(1)(iv), the Area Office then determined DMC has no affiliates. Examining DMC's Federal income tax returns for 2012, 2011, and 2010, the Area Office next concluded that DMC's annual receipts, by themselves, do not exceed the applicable $30 million size standard.

The Area Office next reviewed the solicitation requirements, DMC's proposal, Appellant's protest allegations, and DMC's response to those allegations. The Area Office found that DMC will perform and manage the contract daily, is the sole point of contact with MSC, and is solely responsible for performance. (Size Determination at 9.) None of the subcontractors has any control over decisions made in daily performance of the contract. (*Id.*) Further, none of the subcontractors is an incumbent, none had contact with MSC on the contract, and none is sharing profits with DMC. (*Id.*) DMC, and not the subcontractors, pursued the contract and prepared the proposal. (*Id.*)

The Area Office determined that the primary and vital elements of the contract are "the coordination of lodging transportation and services to MSC." (Size Determination at 9.) Further, "The contract is for more than just rooms and transportation, but is for an overall package of rooms, transportation and services". (*Id.*) This is because Government's needs for lodging and transportation vary and the contractor must monitor, control, record, and report them. (*Id.*)

The Area Office calculated the percentage of contract "cost" that DMC will receive as 11.75%, that the hotels will receive as 80.5% (with most going to the primary hotel), and that the bus company will receive as 7.25%. As for the labor costs, based on DMC's November 12th submission, DMC's cost of labor is over 50% of the overall cost of the labor to perform the contract. The Area Office noted that the bulk of the cost of lodging is in the cost of the room and not the labor, and that the bulk of the cost of transportation is in the cost of the equipment, not the labor. (Size Determination at 9.)

Although the largest portion of the contract will go to the hotels, the Area Office found this cost breakdown in line with past OHA decisions, including *Size Appeal of EconoLodge*, SBA No. SIZ-2698 (1987), *Size Appeal of Dacotah Lodging*, SBA No. SIZ-3305 (1990), *Size Appeal of Canaveral Maritime, Inc.*, SBA No. SIZ-3108 (1989), and *Size Appeal of TLC Catering*, SBA No. SIZ-5172 (2010). In those cases, OHA concluded there was no ostensible subcontractor rule violation despite subcontracting of large portions of the contract. The Area Office contrasted the instant proposal to that in *Size Appeal of Best Western InnTowne Hotel*, SBA No. 2574 (1986), where OHA had found the ostensible subcontractor rule violated because the single subcontractor was performing 100% of the work. (Size Determination at 9-13.)

After discussing the OHA precedent, the Area Office concluded that DMC was making "sufficient contributions itself to the performance of the contract" as required by that precedent. (Size Determination at 9-14 (quoting *Canaveral Maritime*).) The Area Office continued:

> No one hotel or company has the ability to control the contract. DMC has the ability, with approval of MSC, to substitute any of its subcontractors. No one subcontractor has the leverage to control DMC or the contract. DMC is performing a primary and vital requirement of the contract to arrange for lodging and transportation meeting MSC's requirements. DMC is providing a package of services that MSC contracted. The Contracting Officer indicated that many hotels do not want to bid on its contracts because of the extensive administrative requirements and because they don't have the ability to individually meet the contract requirements.

(Size Determination at 14.) Thus, DMC's proposal does not violate the ostensible subcontractor rule and DMC, therefore, is not affiliated with its subcontractors. The Area Office concluded DMC is an eligible small business for the instant procurement.

G. The Appeal

1. Appeal Petition

On December 19, 2013, Appellant filed the instant appeal. Appellant asserts the Area Office clearly erred in concluding that DMC's proposal was in compliance with the ostensible subcontractor rule. Appellant contends that the Area Office (1) incorrectly determined the primary and vital requirements of the contract, (3) erred in finding DMC will perform the primary and vital requirements, (3) failed to find a violation because it erroneously required a single dominant subcontractor, and (4) failed to reasonably evaluate "unusual reliance".

Appellant's first argument is that the Area Office incorrectly determined that the primary and vital requirements of the contract are the "coordination of lodging, transportation and services to MSC". (Appeal Petition at 8.) Rather, based on a full reading of the solicitation, "lodging services" is the primary and vital requirement as it is the "principal purpose of the acquisition". (*Id.*) The Contracting Officer (CO) assigned NAICS code 721110, Hotels (Except Casino Hotels) and Motels, to the acquisition indicating she considered lodging services to be the principal purpose of the acquisition. (Appeal Petition at 9.) Although the CO's opinion of what the primary and vital requirements are is "not decisive", had she thought coordination was primary and vital, she would have chosen a different NAICS code. (*Id.*) Further, hotel services are the vast majority of contract value, some eight times the value of DMS's management and administrative services, and the solicitation did not focus on the managerial tasks, so they could not be the most important. (*Id.* at 10-11.) The solicitation did not require a management or coordination plan, and of the four technical evaluation subfactors, three address the hotels, one addresses transportation, and none addresses management. (*Id.* at 11-12.) Thus, management is clearly ancillary to the solicitation's primary purpose, lodging. (*Id.*) Appellant also asserts the size determination does not explain why coordination or management is more complex or important than the hotel services. (Appeal Petition at 11.)

Appellant's second argument is that the Area Office erred in its finding that DMC will perform the primary and vital requirements of the contract, which are hotel services. (Appeal Petition at 13.) Appellant also notes OHA has held that 12% of the total work not to be a "significant portion" of a contract, citing *Size Appeal of John R. Bermingham Co., Inc.*, SBA No. SIZ-1889 (1984), and DMC will perform less than that here. (*Id.*) Further, OHA has held that a prime contractor must do more than merely manage subcontractor performance and interact with the Government, citing *Size Appeal of Bell Pottinger Communications USA, LLC*, SBA No. SIZ-5495 (2013), and DMC is only managing subcontractors and doing administrative work. (*Id.* at 14.) Appellant also asserts that the two "older" OHA decisions, *EconoLodge* and *Canaveral Maritime*, on which the Area Office relied are distinguishable from the instant case and are inconsistent with subsequent OHA decisions and "current understanding" of the ostensible subcontractor rule as exemplified by *Bell Pottinger*. (*Id.* at 14-17.) *EconoLodge* is distinguishable because the contractor there, who was to provide lodging, meals, and transportation, subcontracted only lodging and meals, keeping transportation, as well as managerial and administrative functions, for itself. Here, only lodging and transportation are to be provided, and DMC is subcontracting both. (*Id.* at 15-16.) In *Canaveral Maritime*, the contractor leased the facility at which it performed the required services, while in the instant case, the purpose of the procurement is the acquisition of the facility itself. (*Id.* at 14-15.) Moreover, *Size Appeal of Sunrise International Group, Inc.*, SBA No. SIZ-3385 (1990), where OHA found ostensible subcontractor rule violation in a proposal for lodging, meals, and transportation, has limited the reach of *EconoLodge*. (Appeal Petition at 16.)

Appellant's third argument is that the Area Office erred in not finding the ostensible subcontractor rule violated just because DMC had divided the work among four subcontractors rather than one. In support, Appellant notes the Area Office stated: "[n]o one hotel or company has the ability to control the contract ... [n]o one subcontractor has the leverage to control DMC or the contract." (Appeal Petition at 18 (quoting Size Determination at 14).) Appellant cites two OHA decisions where OHA found violations of the ostensible subcontractor rule despite the use of three and four subcontractors. (Appeal Petition at 18.)

Appellant's fourth argument is that the Area Office failed to reasonably evaluate the second of Appellant's two protest allegations, "unusual reliance", asserting the Area Office's analysis was "conclusory and/or vague". (Appeal Petition at 19.) Appellant had alleged DMC is unusually reliant on its hotel subcontractors because it lacks hotel facilities, and "because DMC is a broker, not a lodging provider in its own right, DMC lacks the requisite past performance and could not have been awarded the contract without the critical experience of its subcontractors." (Appeal Petition at 19-20 (quoting Size Protest at 9).)

2. Appellant's Supplement

On January 22, 2014, after Appellant's counsel had reviewed the Area Office file and DMC's Proposal under the terms of a protective order, Appellant filed a supplement to its appeal petition. There Appellant further argues, based on the record, that lodging services, and not the coordination of lodging, transportation and services, are the primary and vital requirements of

the contract. Appellant also further argues that the subcontractors, and not DMC, are performing the primary and vital requirements, and that DMC is "unusually reliant" on its subcontractors.

Appellant asserts, because DMC's role on this contract consists of two individuals who also manage DMC's other ongoing contracts and its apartments business, that DMC cannot devote more than part-time effort to this contract which is valued at nearly $2 million annually. (Supplement at 2-5.) Thus, Appellant contends, management and administrative tasks could not be the primary and vital requirements of the instant contract, citing to *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466 (2013), where the prime contributed only three management personnel to the effort and OHA found the ostensible subcontractor rule violated. (*Id.*)

Further, Appellant asserts that DMC's Technical Proposal focuses almost entirely on the hotel services to be performed by the hotel subcontractors, and includes in the narrative portion few tasks DMC will actually perform. (*Id.* at 5-8.) Of the 91 pages of exhibits, 82 relate to the hotels (including health inspection certificates) and the remaining nine relate to the bus drivers. None relates to DMC. There are no key employee resumes or "addendums" dealing with DMC's managerial and administrative tasks. (*Id.* at 7.) Appellant contends that if DMC's managerial and administrative tasks were the primary and vital portions of the contract, the Proposal would have focused on them. (*Id.* at 7-8.)

Appellant also asserts that the record confirms that the subcontractors are contractually responsible for and will perform the entire SOW, pointing to the Letter Agreements under which the hotels agree to provide all rooms, services, and amenities as outlined in the SOW. (*Id.* at 8.) Appellant also iterates various hotel amenities and services required by the SOW, such as the lodging facility itself, dining facilities, front desk services, and protection for CIVMARs' small valuables; points to the hotels' role in providing the amenities or services; and asserts DMC has no role in providing them. (*Id.* at 9-13.) Thus, subcontractors are performing almost every substantive requirement of the SOW. (*Id.* at 13.)

Moreover, Appellant asserts the Letter Agreements expressly state DMC is ""relying on" the subcontractors to perform the entire SOW, thus showing DMC is ""unusually reliant" on its subcontractors. (*Id.* at 14.)

Appellant requests OHA to reverse the size determination and find DMC's proposal violates the ostensible subcontractor rule, making DMC ineligible for the contract.

3. DMC's Response to the Appeal and Supplement

On January 30, 2014, DMC filed its response to Appellant's appeal and supplement. DMC asserts the Area Office size determination is correct and requests OHA to deny the appeal. The Area Office (1) made no clear error in determining the solicitation's primary and vital requirements, (2) correctly determined that DMC will perform those primary and vital requirements, and (3) correctly determined that DMC is not "unusually reliant" on its subcontractors.

First, DMC asserts the Area Office correctly found the solicitation requires more than just rooms and buses; it requires an overall coordinated package of rooms, transportation, and services. (Response at 4-5.) MSC will issue its task orders to a single point of contract, DMC, which is available 24 hours a day. From that single point, DMC will manage and supervise performance of MSC's orders, and the subcontractors will never be in contact with the Government. (*Id.* at 5.) DMC points to the critical need for management and coordination in the evaluation criteria for Past Performance, where DMC's experience was measured against the size, magnitude, and complexity of contract requirements. (*Id.*) Further, with MSC approval, DMC may substitute contractors. (*Id.* at 6.)

Second, DMC asserts that, after having correctly identified the primary and vital requirement of the contract as a coordinated package of rooms, transportation, and services, the Area Office then correctly found that DMC, and not its subcontractors, will perform that primary and vital requirement. (Response at 8.) In support, DMC lists eight Area Office findings regarding contract work done by DMC's own personnel. DMC will:

> . make hotel reservations, collect and verify room occupancy information for MSC;
> · handle billing of room and transportation charges for each CIVMAR;
> · arrange transportation to and from the Center and collect daily logs;
> · be sole point of contact between MSC and the subcontractors;
> · monitor subcontractors for performance and compliance and train hotel staff as to specific contract requirements;
> · supply police report to MSC for any gambling, drug use or sales, or illicit acts at a hotel;
> · arrange for any needed transfers of CIVMARs to overflow or replacement hotels in case of disaster or substandard performance; and
> · provide quality assurance through surveys and inspections of subcontractors.

(Response at 8-9 (citing Size Determination at 12-13).) Further, the Letter Agreements make it clear the arrangements are discretionary on DMC's part but binding on the hotels' parts. Thus, the subcontractors cannot manage or perform the contract in DMC's stead, and DMC, not the hotel subcontractors, are in control of the contract. (Response at 10.)

As for Appellant's allegations that DMC has only two part-time staff and two other ongoing contracts as well as its apartments business, DMC asserts that its two staff work full time, one of the two "ongoing" contracts has since ended, and other allegations are based on outdated information. Further, DMC contends that this line of argument relates to proposal responsiveness and contractor responsibility and, thus, is irrelevant to size issues. (Response at 11.) DMC also contends that the 91 pages of exhibits in its Proposal do not relate to contract performance but are merely supporting documents. (*Id.*)

Third, DMC asserts the Area Office did make a finding, in response to Appellant's second protest allegation, that DMC is not unusually reliant on its subcontractors. The Area Office did so in its discussion of DMC's proposal in light of OHA's past decisions. DMC asserts that in *Dacotah Lodging* and *EconoLodge*, both of which involve lodging services, OHA

concluded that there was no ostensible subcontractor violation despite the subcontracting of 75% and 73% of contract value. (Response at 13.) DMC disagrees with Appellant's contention that OHA limited the reach of *EconoLodge* in *Size Appeal of Sunrise International Group, Inc.*, SBA No. SIZ-3385 (1990). Further, one week after issuing *Sunrise International*, OHA issued *Size Appeal of Wei Chen dba Bogie's Restaurant*, SBA No. 3389 (1990), another lodging case in which OHA held there was no ostensible subcontractor violation despite heavy subcontracting. (Response at 14-15.)

4. Appellant's Reply

On February 4, 2014, Appellant filed its reply, in which it elaborates on its earlier arguments and responds to DMC's arguments. First, Appellant maintains that hotel services are the primary and vital requirement and that the SOW contains few if any managerial tasks. (Reply at 1-2.) Appellant asserts DMC "struggles" to identify portions of the solicitation supporting its position that management and coordination are primary and vital requirements. (*Id.* at 2.) For example, Appellant cites DMC's mistaken reference to Paragraph 1 of """Special Contract Requirements" where it states the Government shall not supervise contractor employees and then Appellant proceeds to discuss various authorities underlying that requirement, rather than to note and reply to DMC's point, that Paragraph 5 requires the contractor to provide MSC with a single point of contact available on a 24-hour basis for task order issuance, a contract requirement that DMC was arguing enhances its position. (Reply at 2-3 (citing Response at 8).)

Appellant also asserts DMC's Past Performance is "of little importance" on this point because the emphasis on management and coordination of efforts in the evaluation factor is just standard language. (Reply at 3, 4.) There are no management and coordination "deliverables" in the SOW, and the fact management and coordination factor into Past Performance evaluation does not establish they are primary and vital requirements (*Id.*)

Further, even if the SOW includes coordination, Appellant asserts that coordinating between the primary and overflow hotels is not a complex task given that the Letter Agreement requires the Primary hotel "to provide the first 90 rooms" and DMC has no discretion to use the Overflow hotels unless the Primary is at capacity. (*Id.* at 5-6.) Appellant questions how the transfer of CIVMARs to other facilities in the unlikely event of an emergency could be considered "primary and vital." (*Id.* at 6.) As for coordinating "all travel needs" of CIVMARs, the requirement is only to transport them to the Training Center on time and then back to the hotel, and to identify a public transit stop near the hotels. DMC's role is only to oversee the bus company, work which is not "primary and vital" under *Bell Pottinger*. (*Id.* at 7.)

In response to DMC's argument that the solicitation does not require the offeror to own a hotel, Appellant retorts that the solicitation also does not authorize the offeror to violate the ostensible subcontractor rule. (*Id.* at 8.) Appellant also contends *TLC Catering* is not analogous to the instant case because the prime contractor there was "intimately involved" in all aspects of contract performance except sandwich preparation, which was subcontracted. Here, in contrast, DMC's functions are only ancillary to the primary and vital tasks performed by its subcontractors. (*Id.* at 8-9.)

After recapping its previous arguments supporting its position that the hotel subcontractors, and not DMC, will perform the primary and vital requirements, hotel services, Appellant moves to the undue reliance issue. (Reply at 16-21.) Appellant asserts that none of DMC's cited OHA decisions stands for the proposition that a prime contractor can avoid ostensible subcontractor rule violation by providing only management and administrative services. (*Id.* at 17.) Specifically, in each case, the prime contractor retained for itself a "major" service of the contract, and OHA determined there was no ostensible subcontractor violation. (*Id.*) In *Dacotah Lodging*, the prime contractor retained transportation, security, and administrative services and subcontracted lodging and meals. In *EconoLodge*, the prime contractor retained transportation and subcontracted lodging. In *Wei Chen*, the prime contractor retained meals and subcontracted lodging and transportation. (*Id.*) Of the "older" lodging cases, Appellant also asserts the instant case is most similar to *Best Western*. (*Id.* at 18-19.) There, the solicitation called for lodging and meals, all of which were to be subcontracted. Despite the prime contractor's assertion that it had "power to control the contract" and would have to locate another source if the subcontractor failed to deliver appropriate services, OHA concluded the ostensible subcontractor rule was violated in *Best Western*. (*Id.*)

Further, the line of older OHA decisions that DMC claims support its position that DMC is not unusually reliant on subcontractors has been superseded by the 1996 regulatory revision of the ostensible subcontractor rule. (Reply at 19-21.) Appellant argues that the 1996 revision permits but does not require a finding of affiliation if the subcontractor is performing the primary and vital requirements of the contract, taking into account whether the prime contractor is unusually reliant upon the subcontractor. Appellant argues that 1996 rule is substantively different from the pre-1996 rule and that the Area Office should not have relied on ostensible subcontractor rule decisions under the old rule. Under the current rule, even if DMC was not unusually reliant upon its subcontractors, it is still not performing the primary and vital functions of the contract and so violates the ostensible subcontractor rule. (Reply at 20-21.)

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. Threshold Findings

In reviewing the Area Office's calculations of the percentages of contract value that DMC and its subcontractors will receive, I find the Area Office made some mathematical errors. The Area Office had calculated that the hotels will receive 80.5% of contract value, the bus company will receive 7.25%, and DMC will receive 11.75%. Contract Value for the Base Year is DMC's total bid of $[xxx]. DMC's subcontract costs for the hotels and bus company are stated in the

Letter Agreements and in [xxx]'s first declaration. As detailed, *supra* at Section II.E., the percentage of Base Year Contract Value that the hotels will receive is 74%. The percentage that the bus company will receive is 4%, and the percentage that will be left to DMC is 22%. The Area Office's mathematical errors do not affect its size determination; to the contrary, the correct percentages actually strengthen the Area Office's conclusions.

Appellant asserts in its Reply that SBA substantively changed the ostensible subcontractor rule in 1996, and that OHA decisions issued under the earlier version of the rule have been superseded. I disagree. A review of the preambles to the proposed and the final rules for the 1996 revisions shows SBA intended no substantive changes to the ostensible subcontractor rule. *See* 60 Fed. Reg. 57982 (Nov. 24, 1995), 61 Fed. Reg. 3280 (Jan. 31, 1996). Further, I know of no OHA decision discussing any substantive changes made to the ostensible subcontractor rule in 1996, and Appellant has failed to cited any to support its assertion.

Appellant does not dispute the Area Office's conclusions that DMC, by itself, is a small business, and that DMC has no affiliated entities. The only issue in this appeal, thus, is whether DMC's proposal violates the ostensible subcontractor rule.

C. Ostensible Subcontractor Issue

Under the "ostensible subcontractor" rule, if a subcontractor is actually performing the primary and vital requirements of the contract, or the prime contractor is unusually reliant upon the subcontractor, then 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 International 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).

Appellant advanced four arguments in its appeal petition, and elaborated on three of them in its subsequent pleadings. I consider each one in turn.

1. The Primary and Vital Requirements of the Contract

OHA has explained that the "primary and vital" contract requirements are those associated with the principal purpose of the acquisition. *Size Appeal of Santa Fe Protective Services, Inc.*, SBA No. SIZ-5312, at 10 (2012); *Size Appeal of Onopa Management 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.* In evaluating claims of an ostensible subcontractor rule violation, OHA will base its analysis on the solicitation and proposal before it. *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 6 (2011).

Appellant asserts that “lodging services” is the primary and vital requirement because it represents most of the contract's value and is reflected in the solicitation's NAICS code designation (indicating the CO believes that lodging services is the principal purpose of the acquisition). Also, most of the solicitation and the Proposal (including 82 out of the 91 pages of exhibits) focus on the hotels, and not on the management and administrative services which DMC will provide using just two employees who also have other duties. Further, management and “coordination” of the contract are not complex tasks given that the solicitation requires the primary hotel to be at capacity before CIVMARs may be sent to an overflow hotel and the travel requirements also are fairly simple.

DMC asserts the Area Office correctly identified the primary and vital requirement of the contract as a coordinated package of rooms, transportation, and services. MSC will issue its task orders to a single point of contract that is available 24 hours a day, and from that single point, DMC will manage and supervise performance of MSC's orders. The subcontractors will never be in contact with MSC and, with MSC approval, DMC may substitute subcontractors. Thus DMC, and not any subcontractor, is in control of the contract.

The Area Office found this proposal similar to those in several OHA decisions where OHA concluded the proposal in question did not violate the ostensible subcontractor rule. These decisions included *Size Appeal of EconoLodge*, SBA No. SIZ-2698 (1987), where subcontractors would provide lodging and food, for 73% of the total value, while the prime would provide transportation, accounting, training of subcontractors in performance requirements, and profit, for 27% of the value; and *Size Appeal of Dacotah Lodging*, SBA No. SIZ-3305 (1990), where the subcontractor would provide lodging and meals, about 75% of the total contract, and the prime would provide transportation, security, administration and recordkeeping, and quality control. In both these decisions, the prime contractor was found to make a “sufficient contribution” to the effort.

The Area Office also relied on two OHA decisions that did not involve lodging. The first was *Size Appeal of Canaveral Maritime, Inc.*, SBA No. SIZ-3108 (1989), where the solicitation called for operating layberth facilities for five years to perform services on ships. The prime contractor, experienced in this type of work, would lease the layberth facility (not unlike leasing the hotel rooms). The solicitation contained extensive criteria for the port and pier, but did not require that the prime contractor own it. The subcontractor who owned the facility also was to perform construction work to bring its facilities into compliance with the solicitation criteria. Citing to *EconoLodge*, OHA affirmed the Area Office's finding of no ostensible subcontractor violation. The subcontractor there did much more extensive work to comply with the solicitation than one hotel here is doing: installing a generator and a third washer and dryer.

Another, more recent decision the Area Office relied on was *Size Appeal of TLC Catering*, SBA No. SIZ-5172 (2010), which involved a prime contractor who would provide box lunches consisting of a sandwich prepared by the subcontractor, and other items. The prime contractor would also provide equipment and furniture as well as the labor involved in serving and cleaning up after the lunch. The Area Office found the proposal in violation of the ostensible subcontractor rule, but on appeal OHA reversed. OHA found the primary purpose of the contract was the provision of a meal, and the coordination and management necessary to deliver and

serve the meal, and clean up afterwards. That management and coordination were the primary purpose of the contract.

The Area Office contrasted the instant proposal to that in *Size Appeal of Best Western InnTowne Hotel*, SBA No. 2574 (1986) (*Best Western*), where the subcontractor was to provide 100% of the required meals and lodging and OHA determined the proposal violated the ostensible subcontractor rule. Here, Appellant is not reliant upon one subcontractor, but is coordinating the work of a number of subcontractors.

`The critical issue here is: what the primary and vital purpose of the contract. I agree with DMC and the Area Office that the primary and vital requirement of this contract is a coordinated package of rooms, transportation, and services. Although I also agree with Appellant that the management and administrative services which DMC will provide are not very complex tasks, the basic, inescapable fact of the matter is that none of the tasks in this contract are very complex. The provision of hotel rooms is a simple task, as is short distance bus transportation. This is not a complicated contract for Information Technology or construction. Rather, it is simply the provision of lodging and transportation for the CIVMARs attending training, along with the necessary administrative tasks necessary to perform the contract. These tasks, which include: making reservations, verifying occupancy information for MSC; billing; arranging transportation and collecting daily logs; monitoring subcontractor performance and training hotel staff; monitoring performance, supplying police reports; arranging for transfers of CIVMARs to overflow or replacement hotels, providing quality assurance through surveys and inspections of subcontractors and being the primary point of contact between MSC and the subcontractors.

Here, it is coordination of hotel rooms and transportation to meet MSC's needs that is the more complex task. The contract is for a package of hotel and transportation services, all managed by the contractor and provided to MSC. To characterize this as merely a hotel contract is a gross oversimplification. For that reason, I conclude that that the coordination and management task that DMS will perform is the primary and vital requirement of this contract.[3]

The subcontracted lodging services and bus transportation, together, represent 78% of contract value, a substantial percentage, but that percentage is not far from the 75% of contract value that was subcontracted to a single subcontractor in *Size Appeal of Dacotah Lodging*, SBA No. SIZ-3305 (1990), or the 73% that was subcontracted to two subcontractors in *Size Appeal of EconoLodge*, SBA No. SIZ-2698 (1987). Therefore, DMC's subcontracting out of this much work does not mandate a finding of an ostensible subcontractor violation.

Appellant contends that OHA limited the reach of *EconoLodge* in *Size Appeal of Sunrise International Group, Inc.*, SBA No. SIZ-3385 (1990), where OHA affirmed the Regional Office's conclusion that the proposal violated the ostensible subcontractor rule. I disagree with

[3] I would note that Appellant's contention that this is merely a hotel contract would limit the field of offerors to hotels in the area which can meet the size standard, whereas this finding opens the field to any concern which can provide the package of required services, which could include any hotel, and still meet the size standard.

Appellant and distinguish *Sunrise International* from the other lodging cases for two reasons: first, the subcontracting agreement there did not clearly divide the tasks between the prime and subcontractor (a strong signal for ostensible subcontractor rule violation), and second, the Regional Office found the prime contractor's statement that his employees would be performing most contract requirements lacked credibility.

As for the number of pages of exhibits the hotel documentation takes up in DMC's Proposal, I find that irrelevant to the issue because the solicitation required those documents of each hotel regardless of whether it was the primary or an overflow hotel. The number of pages of exhibits, thus, has no relation to the amount of work a particular hotel would receive.

Appellant asserts the CO's designation of the hotel services NAICS code indicates her opinion of the primary and vital requirements, and that her opinion is entitled to weight. While I do not disagree with the usefulness of the contracting officer's opinion on what constitutes primary and vital requirements of a particular contract, the CO here has not provided her opinion to the Area Office. While a NAICS code also can provide some guidance, it is certainly not conclusive, and OHA recognizes NAICS codes are not perfect. *E.g., NAICS Appeal of Appledore Marine Engineering, Inc.*, SBA No. NAICS-5240, at 3 (2011).

2. Who is Performing the Primary and Vital Requirements of the Contract?

Appellant's second argument is that the Area Office erred in its finding that DMC will perform the primary and vital requirement of the contract. Appellant bases this argument on its presumption that OHA would conclude that hotel services is the primary and vital requirement of the contract and the hotels will perform the hotel services. Appellant's presumption not being the case, I find that DMC is performing the primary and vital requirement which, as discussed *supra*, is the coordination and management task.

3. Four Subcontractors

Appellant's third argument is that the Area Office erred in not finding the ostensible subcontractor rule violated merely because DMC had divided the work among four subcontractors rather than one, noting the size determination stated, “[n]o one hotel or company has the ability to control the contract ... [n]o one subcontractor has the leverage to control DMC or the contract.” I disagree with Appellant that the Area Office based its determination on the number of subcontractors, as opposed to its conclusion that the primary and vital requirement of the contract is the coordination and management of the CIVMAR lodging and that that requirement is to be performed by DMC without unusual reliance upon its subcontractors. It is clear from the Letter Agreements that no single subcontractor, and not all three hotel subcontractors acting together, can control DMC or the contract.

4. Unusual Reliance

Appellant's fourth argument is that the Area Office failed to reasonably evaluate the second of Appellant's two protest allegations, “unusual reliance”. Appellant had alleged DMC is unusually reliant on its subcontractors because it lacks hotel facilities and the requisite past

performance and could not have been awarded the contract without its subcontractors' "critical experience." Further, the Letter Agreements expressly state DMC is "relying on" the hotels to perform certain tasks, thus showing DMC is "unusually reliant" on its subcontractors.

I disagree with Appellant. The Area Office did reasonably evaluate the unusual reliance issue in its discussion of DMC's proposal in light of OHA's past decisions. As for Appellant's related contentions, as noted *supra*, the solicitation does not require the offeror to own a hotel. Further, DMC has worked similar contracts at least three times, as it stated in its Past Performance submission. This situation is in contrast to that in *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466 (2013), where there was no evidence the prime contractor had any experience in similar contracts for trash collection and disposal services. As for the Letter Agreements, the "relying on" language is just contract language clearly intended to bind the other party to the agreement, and I find it bit of a stretch to interpret it to mean anything else.

I find Appellant has not met its burden of proving clear error. For the reasons discussed *supra*, I deny the appeal and affirm the size determination.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge