

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

SIZE APPEAL OF:

GiaCare and MedTrust JV, LLC,

Appellant,

RE: Global Dynamics, LLC

Appealed From
Size Determination No. 2-2015-50

SBA No. SIZ-5690

Decided: October 29, 2015

APPEARANCES

Antonio R. Franco, Esq., Patrick T. Rothwell, Esq., Alexander O. Levine, Esq.,
PiliroMazza PLLC, Washington, D.C., for Appellant

Craig A. Holman, Esq., Lauren J. Schlanger, Esq., Elizabeth T.M. Fitzpatrick, Esq.,
Arnold & Porter LLP, Washington, D.C., for Global Dynamics, LLC

DECISION¹

I. Introduction

This appeal arises from a size determination concluding that Global Dynamics, LLC (GDL) is not affiliated with its subcontractor, OMV Medical, Inc. (OMV), under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). GiaCare and MedTrust JV, LLC (Appellant), which had previously protested GDL's size, maintains that the size determination is clearly erroneous and should be reversed. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

The U.S. Small Business Administration (SBA) 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. The record reflects that Appellant received the size determination on August 3, 2015, and filed the instant appeal within fifteen days thereafter, so

¹ This decision was originally issued under a protective order. OHA received one or more requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Solicitation

On September 14, 2012, the U.S. Army Medical Command (Army) issued Request for Proposals (RFP) No. W81K04-12-R-0025 for registered nursing services in the San Antonio Military Health System (SAMHS). (RFP at 4-14, 36). The RFP's Performance Work Statement (PWS) indicated that the nursing services would include "Critical Care, Medical/Surgical, Ambulatory, Peri-Operative, Burn Unit, Mother/Baby Units, Psychiatric Units, and In and Out Patient areas of the [military treatment facilities]." (PWS § 1.3.2.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 621399, Offices of All Other Miscellaneous Health Practitioners, with a corresponding size standard of \$7 million in average annual receipts. Initial proposals were due October 16, 2012. Final proposal revisions were submitted August 28, 2014.

The RFP stated that the Army planned to award a single indefinite delivery/indefinite quantity (ID/IQ) contract with a five-year ordering period. (RFP at 92.) The contract would have a guaranteed minimum of \$20,000 and a maximum of \$200 million over the life of the contract. (*Id.* at 5, 23.) The contractor would not be required to perform an order exceeding \$30 million for a single item or \$50 million for a combination of items. (*Id.*)

The RFP indicated that the Army would award the contract to the offeror whose proposal represented the best value to the Army. There were five evaluation factors: Personnel Methodology, Management Capability, Staffing Approach, Past Performance, and Price. (*Id.* at 97-100). The Past Performance evaluation would be "subjective" and would consider the recency and relevance of the past performance information provided by the offeror as well as the quality of the past performance. (*Id.* at 98.) The RFP stated that the Army would first evaluate the offeror's past performance based on the degree of relevance to the instant procurement, which was determined according to the number of full-time equivalent healthcare providers required for previous contracts. (*Id.* at 99.) To be considered "somewhat relevant," as opposed to "not relevant," the past performance reference must have involved "providing healthcare providers (e.g. registered nurses, licensed vocational nurses, physicians, ancillary support, etc.) equivalent to less than 100 but more than 20 full-time equivalent healthcare providers annually." (*Id.*) The Army would then assign a confidence rating based on how well the offeror had previously performed on recent and relevant projects. (*Id.*)

The RFP stated that offerors could submit past performance pertaining to subcontractors or other entities within a teaming arrangement. (*Id.* at 84.) Each offeror was limited to no more than five past performance references. (*Id.*)

The RFP required that each offeror "demonstrate financial capability sufficient to cover the proposed price for 60 days of contract performance." (*Id.* at 86.) To determine this dollar

amount, the Army would utilize 1/30th of the contractor's price for Contract Line Item Numbers (CLINs) 0001 through 0011. (*Id.*)

B. GDL's Proposal and Teaming Agreement

On August 28, 2014, GDL submitted its final proposal revision. In the proposal, GDL stated that GDL will “perform 51% of the effort and OMV will perform 49%.” (GDL Proposal, Vol. II, at 72.) GDL will also supply the full-time Senior Project Manager, [Senior Project Manager], who will be located in San Antonio and will be responsible for day-to-day contract management and communication with the Government. (*Id.* at 61-62, 69.) [OMV Project Manager], an OMV employee, will be the OMV Project Manager. Both [Senior Project Manager] and [OMV Project Manager] will be supervised by GDL's CEO and contract manager, Ms. Ledell Weaver. (*Id.* at 60.)

GDL submitted five past performance references, one for itself and four for OMV. The GDL reference had a value of \$1.2 million. (*Id.*, Vol. III, at 4.) The OMV references were valued between \$[XXXX] and \$[XXXX]. (*Id.*, at 8, 19.)

The Teaming Agreement between GDL and OMV identified GDL as the prime contractor and OMV as the subcontractor. (Teaming Agreement, at 1.) According to the agreement, “the actual work share assignment will be determined upon award with the prime receiving [at] least 51% and OMV up to 49%.” (*Id.* at 5.) The agreement also contained a provision stating that GDL's subcontract with OMV will contain a provision stating that the division of work will comply with the “Limitation on Subcontracting — 52.219-14 (that at least 50% of the cost of contract performance incurred for personnel shall be expended for employees of the Prime.” (*Id.* at 4.) The agreement noted that GDL and OMV are independent entities and that they did not intend to create a joint venture. (*Id.* at 5-6.)

C. Protest and Response

On January 29, 2015, the CO announced that GDL was the apparent awardee. On February 5, 2015, Appellant protested GDL's small business status. Appellant alleged that GDL is not an eligible small business because GDL is in violation of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).² GDL, Appellant alleged, is a young company that began conducting business in 2010. GDL has modest revenues, fewer than 10 employees, and little experience with contracts as large as the subject ID/IQ contract. As a result, Appellant maintained, GDL cannot perform the contract's primary and vital requirements and will be heavily reliant upon OMV to perform the contract.

² Appellant also alleged that GDL is affiliated with Absolute Staffers, Inc. through identity of interest. The Area Office found no such affiliation, and Appellant does not challenge this determination on appeal. Accordingly, further discussion of this issue is unnecessary. *Size Appeal of Env't'l Restoration, LLC*, SBA No. SIZ-5395, at 6-7 (2012) (when issue is not appealed, the area office's determination “remains the final decision of the SBA.”).

On February 17, 2015, GDL responded to the protest. GDL argued that it is not affiliated with OMV because GDL will perform the contract's primary and vital requirements and GDL is not unduly reliant on OMV. The primary and vital requirements, GDL argued, are to provide nursing services to SAMHS, and GDL will perform the majority of this work. (Response at 9-10.) Furthermore, GDL will manage the contract. Ms. Weaver—the wife of Mr. Lewis Weaver, GDL's founder and president—will serve as senior management leader for the project. (*Id.* at 10.) The Weavers have experience in the health care industry. GDL will also provide the Senior Project Manager who will be responsible for day-to-day management of the contract and communication with the Government. (*Id.* at 15-16.) GDL will not be unduly reliant on OMV to perform the contract, moreover, because GDL has several lines of credit and is therefore financially capable of performing the contract.

Accompanying its protest response, GDL submitted a declaration from Ms. Weaver. She averred that GDL and OMV have no common shareholders, officers, or directors, and do not share facilities, resources, or profits. (Weaver Decl. ¶¶ 9-11.) In addition, GDL and OMV have not previously collaborated on any other projects. (*Id.* ¶ 8.) Ms. Weaver declared further that she will oversee GDL's program management office and provide overall contract management. (*Id.* ¶ 18.) GDL will also assign a Senior Project Manager, who will be a GDL employee, to oversee contract performance. (*Id.* ¶ 19.) All OMV key personnel will report to and be supervised by the Senior Project Manager and Ms. Weaver. (*Id.* ¶ 20.)

D. Size Determination

On July 30, 2015, the Area Office issued Size Determination No. 2-2015-50 concluding that GDL is not affiliated with OMV under the ostensible subcontractor rule.

The Area Office agreed with GDL that nursing services are the contract's primary and vital requirements. GDL will perform the majority of the primary and vital requirements, the Area Office reasoned, because GDL employees will provide the majority of the nursing services. (Size Determination at 8.) GDL will also manage the contract through Ms. Weaver and the Senior Project Manager. (*Id.*)

The Area Office determined that GDL is not unusually reliant on OMV either, and cited three considerations for this conclusion. First, although OMV employees will hold some managerial positions, such as facilities manager, these employees will be under GDL's supervision. (*Id.* at 9, citing *Size Appeal of J.W. Mills Mgmt. LLC*, SBA No. SIZ-5416, at 8 (2012).) Next, GDL is not dependent on OMV for financial resources because GDL has two lines of credit allowing it to perform the contract for 60 days. Third, GDL has experience in the healthcare industry. According to GDL's past performance reference, GDL was awarded a contract valued at \$1.2 million, which GDL is currently performing. Under that contract, GDL provides “pre-screened health care workers to help train and provide medical care at the U.S. Army School of Aviation.” (*Id.*) The Weavers also have relevant experience and education. Ms. Weaver holds an MBA with an emphasis in acquisition and contract management, and she served as Chief Operating Officer for Absolute Staffers, a company that she transformed from a commercial nursing agency to a premier government contracting firm. (*Id.*)

E. Appeal

On August 18, 2015, Appellant filed its appeal of the size determination with OHA. Appellant contends that the Area Office clearly erred in finding no violation of the ostensible subcontractor rule.

Appellant argues that GDL will be reliant upon OMV to perform the contract. GDL lacks experience performing contracts as large as the subject ID/IQ contract. Its largest contract awards prior to submitting its proposal were for \$2.03 million, which was for four years' of physician services, and \$1.3 million, which was for optometry services. (Appeal at 12.) The largest order GDL has received for nursing services was for approximately \$466,000. These awards are small compared to the subject ID/IQ contract, which has a ceiling of \$200 million and task orders potentially reaching \$50 million. Further, “[t]he maximum size of the instant procurement is 400 times larger than GDL's reported annual revenue stream.” (*Id.* at 13.)

Appellant argues that the Past Performance reference cited by the Area Office, GDL's contract with the Army School of Aviation, does not support the Area Office's finding that there is not undue reliance. This contract cannot even be rated “somewhat relevant” under the RFP, because the revenue it generated was not enough to support at least 20 healthcare providers. (*Id.* at 13.) It is also inapposite to the subject ID/IQ contract, which calls for the contractor to complete background checks and licensing and credentialing reviews, because the healthcare workers GDL provided under the Army School of Aviation contract were pre-screened. (*Id.* at 14 n.8.) The only relevant past performance references GDL offered were those from OMV. GDL, therefore, was dependent upon OMV's past performance to win the contract, and must likewise rely upon OMV to perform the contract.

Next, Appellant scrutinizes the factors the Area Office cited in determining that GDL is not unduly reliant on OMV to manage the contract. Appellant argues that just because Ms. Weaver has past experience in project management, it does not follow that GDL will self-perform management independently of OMV, or that GDL itself has the experience to win and perform the contract independently of OMV. The Area Office did not articulate what substantive role Ms. Weaver would play in the project. Moreover, Appellant argues, the RFP states that the Army will consider past performance from entities within a teaming arrangement, not specific individuals, such as Ms. Weaver. (*Id.* at 15, citing RFP at 85.)

The next factor Appellant challenges is that GDL will provide the Senior Project Manager who will be responsible for the day-to-day management of the contract. If this is correct, Appellant argues, it is unclear what role, if any, Ms. Weaver will have. (*Id.* at 16.) Appellant argues further that the Area Office did not articulate whether the Senior Project Manager is already a GDL employee. The issue is significant because undue reliance may arise where the prime contractor hires key personnel from a subcontractor. (*Id.*, citing *Size Appeal of NVE, Inc.*, SBA No. SIZ-5638 (2015).)

Appellant argues that GDL is unusually reliant on OMV for financing, and that the Area Office's contrary conclusion lacks support. Although the Area Office observed that GDL has two letters of credit, the Area Office failed to consider the amounts of those letters of credit, and

whether those letters of credit were sufficient to meet the minimum threshold set by the RFP. (*Id.* at 17-18.)

Lastly, Appellant argues that the size determination does not support the Area Office's determination that GDL is performing the contract's primary and vital requirements. The teaming agreement contemplates the possibility that work might be split equally between GDL and OMV. (*Id.* at 19.) Further, the size determination contains no indication as to whether the employees and managers who will work on the contract are currently employed by GDL. In Appellant's view, the Area Office's analysis "was superficial and did not get to the heart of whether GDL is actually providing its own management of the contract or whether this effort is really being managed by OMV." (*Id.* at 20.)

F. GDL's Response

On September 2, 2015, GDL responded to the appeal. GDL argues that Appellant can point to no error of fact or law, so OHA should affirm the size determination.

GDL contends that Appellant misconstrues OHA case law in arguing that GDL is unduly reliant upon OMV. GDL was not dependent on OMV's past performance, GDL argues, because the RFP permitted offerors to utilize the past performance of their subcontractors. In such a situation, OHA has determined that "such past performance information 'should not be counted as indicia of unusual reliance.'" (Response at 10, quoting *Size Appeal of Bering Straits Logistics Servs., LLC*, SBA No. SIZ-5277, at 7 (2011).) The fact that OMV's past performance made GDL's proposal more competitive does not show undue reliance because GDL "is still capable, qualified, and will perform the primary and vital requirements of the contract and manage the contract (including the work of the subcontractor)." (*Id.* at 11.)

Further, the record supports the Area Office's finding that GDL is not unduly reliant on OMV. The proposal is clear that Ms. Weaver will oversee the Program Management Office and provide overall contract and acquisition management. (GDL Proposal, Vol. II, at 62.) Further, the Senior Project Manager, a GDL employee, will oversee contract performance and serve as the primary point of contact for the Government. (*Id.* at 61-62, 69-70.) All other personnel are subordinate to Ms. Weaver and the Senior Project Manager. (*Id.* at 60.) Neither the RFP nor the law requires the Senior Project Manager to be a current GDL employee. In any event, the Area Office did not need to consider whether all future contract employees are currently GDL employees, because the record was clear that experienced personnel would manage the contract and GDL employees would perform the primary and vital requirements. (Response at 13-14.)

GDL argues it is not dependent on OMV for financing. GDL provided evidence of two letters of credit in its initial proposal for \$[XXXX] and \$[XXXX]. A third, for OMV, is for \$[XXXX]. GDL subsequently received another letter of credit, which will support payroll for the first 90 days of performance. (*Id.* at 14.)

GDL argues it is performing the majority of the contract's primary and vital requirements, which GDL argues are nursing services. Although the teaming agreement states that GDL will perform "at least 50%" of the nursing services, the proposal confirms that GDL "will perform

51% of the effort.” (*Id.* at 16, citing GDL Proposal, Vol. II, at 72.) As for Appellant's argument that there is no indication whether the proposed managers and employees are currently employed by GDL, GDL reiterates that there is no such requirement. (*Id.* at 16-17.)

G. Motion to Supplement Appeal

On September 9, 2015, after reviewing the Area Office file under an OHA protective order, Appellant moved to supplement its appeal. OHA should grant the motion, Appellant argues, because Appellant sought permission from the U.S. Government Accountability Office (GAO) to supplement the record in this appeal with information Appellant obtained during a parallel bid protest proceeding. Appellant states there will be no prejudice to other parties because the Army is taking corrective action in response to the protest. (Motion, at 2.)

On September 24, 2015, GDL opposed Appellant's motion. OHA should deny the motion, GDL argues, because Appellant's stated reasons for supplementing its appeal are dubious. GDL argues that Appellant is intentionally delaying these proceedings. Should OHA nevertheless grant Appellant's motion, however, GDL requests leave to respond to the merits of the supplemental appeal.

It is OHA's practice to permit parties to supplement their pleadings after reviewing the Area Office files for the first time under a protective order. *E.g.*, *Size Appeal of Harbor Servs., Inc.*, SBA No. SIZ-5576 (2014). This is particularly true when, as here, the matters in dispute are contract-specific and therefore cannot be thoroughly litigated without considering the specific terms of the challenged firm's proposal. Accordingly, Appellant's motion is GRANTED, and the supplemental appeal is ADMITTED. GDL's supplemental response is also ADMITTED.

H. Supplemental Appeal

Appellant points out that, although OMV is not the immediate incumbent contractor, OMV was the incumbent on an earlier contract. GDL, Appellant repeats, is unduly reliant on OMV for past performance, financing, and personnel.

Appellant repeats that GDL is “completely reliant” upon OMV for Past Performance. (Supp. Appeal at 8.) As OHA has explained, “[i]t is appropriate to consider a prime contractor's experience as part of an ostensible subcontractor analysis because this experience is relevant to whether the prime contractor can perform independently from the subcontractor.” *Size Appeal of Dover Staffing, Inc.*, SBA No. SIZ-5300, at 9 (2011). Appellant then cites *Size Appeal of CWU, Inc.*, SBA No. SIZ-5118 (2010). In that case, Appellant argues, OHA affirmed a finding of undue reliance “where the prime contractor's experience was primarily in an unrelated field and where its relevant experience was limited and was dwarfed in comparison to its ostensible subcontractor.” (Supp. Appeal at 8.)

Next, Appellant criticizes GDL's arguments with respect to the letters of credit. The letter for \$[XXXX] stated that the bank was “in the process of underwriting [GDL]” but did not state that GDL has access to that line of credit. (*Id.* at 10.) The letter for \$[XXXX] stated that the bank did “not anticipate issues increasing [the limit] to the \$[XXXX] level requested,” but did not

state what the limit was before any such increase. (*Id.*) The letter that provides 90 days of credit for payroll was issued after GDL's final proposal, the date for determining compliance with the ostensible subcontractor rule, so this letter of credit is irrelevant to the size determination. (*Id.* at 11.) The other two letters were nearly two years old as of the date of GDL's final proposal. Appellant concludes:

[T]he only amount of available credit to GDL that was established by these letters, as of the time it submitted its final proposal revision, was OMV's available credit of \$[XXXXXXXXXXXX], which is well short of the \$5,587,888³ needed to meet the Solicitation's financing requirement. . . . Unable to meaningfully establish that it can rely on its own lines of credit or, for that matter, its own paltry revenues, to perform the contract independently, GDL is entirely dependent on OMV for financing or, at the very least, unable to show that it is able to finance performance of the contract without assistance of OMV.

(*Id.* at 11-12.)

Third, Appellant argues—and offers evidence to support—that [Senior Project Manager], who will be the Senior Project Manager, is the Executive Director at OMV. (*Id.* at 13.) As Senior Project Manager, she will manage the contract. Moreover, GDL's proposal suggests that she managed the prior incumbent contract for ten years. The Area Office, then, should have investigated [Senior Project Manager]'s relationship with OMV and whether she was an employee of GDL at the time of proposal submission. Appellant points out that hiring of a subcontractor's key employees, when combined with other factors, can lead to a violation of the ostensible subcontractor rule. (*Id.* at 14, citing *Size Appeal of NVE, Inc.*, SBA No. SIZ-5638 (2015).)

Appellant highlights that three key individuals identified in GDL's proposal are associated with OMV, and two others have unidentified corporate associations. The only individual that is clearly currently associated with GDL is Ms. Weaver, who, Appellant argues, “lacks substantial authority and responsibility over contract management.” (*Id.*) Although her title, job description, and the organization chart indicate that she is at the top of the organization, her authority and responsibilities are vague when compared to [Senior Project Manager]'s. Ms. Weaver, then, is acting only in an “ancillary, advisory, and subordinate” capacity. (*Id.* at 15.) As a result, the Area Office erred in concluding that GDL will manage the contract.

Appellant contends that GDL is not performing the contract's primary and vital requirements, which, Appellant argues, are the “provision” of nursing personnel rather than the “performance” of nursing services. (*Id.* at 17, citing PWS § 1.3.) Providing nursing personnel necessarily requires management and administration, and OMV, through [Senior Project Manager] and [OMV Project Manager], is managing the contract.

³ Appellant explains that it computed this dollar amount by dividing GDL's price for CLINs 0001 through 0011 by 30, in accordance with the RFP's instructions. (Supp. Appeal at 11 n.9.)

I. Supplemental Response

On September 24, 2015, GDL responded to the supplemental appeal. In GDL's view, Appellant's arguments that GDL is unduly reliant on OMV are actually critiques of the RFP itself and the Army's decision to restrict the procurement to small businesses. By setting aside the procurement for small businesses, the Army essentially determined that the procurement could be performed by a company with annual revenues of less than \$7 million. Appellant's focus on the value of the subject contract as compared to GDL's annual revenue stream is therefore misplaced. Further, the Army permitted offerors to use subcontractors and stated that it would consider subcontractors' experience when evaluating offers. GDL's use of OMV, then, is consistent with the RFP. (Supp. Response, at 8-9.)

GDL argues it is not unduly reliant on OMV's past performance because, although reliance on a subcontractor's past performance may be a factor in an ostensible subcontractor analysis, such past performance "should not be counted as indicia of undue reliance" where the solicitation at issue permits an offeror to submit past performance for its subcontractors. (*Id.* at 11, quoting *Size Appeal of Bering Straits Logistics Servs.*, SBA No. SIZ-5277, at 8 (2011).) GDL then argues that *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011) and *Size Appeal of CWU, Inc.*, SBA No. SIZ-5118 (2010) are distinguishable from the facts of this case because, unlike the challenged firms in those cases, GDL has extensive relevant industry experience. (*Id.* at 12.)

Next, GDL denies that it is unduly reliant on OMV for financing. In selecting GDL for award, the CO determined GDL has sufficient financial capacity, and it was reasonable for the Area Office to conclude Appellant is not unduly reliant on OMV for financing. Appellant's "mere (self-serving) disagreement does not overcome the reasonableness of the Area Office's determination." (*Id.* at 14.)

GDL then turns to Appellant's contention that OMV personnel will manage the contract. GDL argues that a prime contractor may propose to hire a subcontractor's employees as management or key personnel if those employees will be subordinate to the prime contractor's own employees. (*Id.* at 15, citing *Size Appeal of Maywood Closure Co., LLC & TPMC-EnergySolutions Env't'l Servs. 2009, LLC*, SBA No. SIZ-5499 (2013).) Ms. Weaver, who is a GDL employee, is responsible for overall contract management. Her role, then, is not "ancillary, advisory, and subordinate," as Appellant contends. Rather, she will oversee all contract performance. Further, Ms. Weaver's experience is in fact relevant because it is germane to the ostensible subcontractor inquiry of whether GDL is managing the contract. (*Id.* at 18.)

GDL asserts that the contract's primary and vital requirements are nursing services, of which GDL will perform at least 51%. GDL is also managing the provision of these services. The Area Office therefore correctly concluded GDL will perform the contract's primary and vital requirements. *Size Appeal of Combat Readiness Health Servs., Inc.*, SBA No. SIZ-5498 (2013).

J. New Evidence

Accompanying the supplemental appeal, Appellant moved to introduce two pieces of new evidence into the record. The first consists of the Army's past performance evaluation of GDL's proposal, which found that GDL's past performance reference [XXXXXXXX], whereas OMV's four references [XXXXXXXX]. Appellant explains that this information was under a GAO protective order and therefore was unavailable to Appellant at the time it submitted the protest and the initial appeal. (Motion at 1.) The second piece of evidence is information from online directories showing that GDL's proposed Senior Project Manager, [Senior Project Manager], holds the position of Executive Director at OMV. Appellant states that it did not know the identity of GDL's proposed Senior Project Manager until it reviewed the Area Office record under OHA's protective order, so Appellant could not have introduced this evidence earlier in the proceedings. (*Id.* at 2.)

On September 24, 2015, GDL opposed the motion. GDL contends that the motion is untimely, and that supplementation of the record “is neither justified nor appropriate.” (Opp. at 1.) GDL asserts that Appellant has had access to the evidence it proffers since July 30, 2015, weeks before Appellant filed its appeal. (*Id.* at 2-3.)

Another reason OHA should not admit the Army's past performance evaluation, GDL argues, is that the evidence is incomplete and irrelevant. It is irrelevant because a procuring agency's evaluation of a proposal is for the purpose of making a competitive award and does not attempt to assess whether the prime contractor is unduly reliant on its subcontractors. Moreover, because it is undisputed that GDL submitted past performance references for OMV, the evaluation does not actually introduce new facts. (*Id.* at 3-4.) Further, GDL argues, Appellant offers only a portion of the past performance evaluation. Should OHA find this proffered evidence admissible, GDL requests that OHA admit it in its entirety, and attaches the full past performance evaluation. (*Id.* at 5-6.)

GDL contends that the information regarding [Senior Project Manager], the proposed Senior Project Manager, was publicly available when Appellant filed the appeal, and this evidence does not reflect error in the size determination. GDL emphasizes that it will employ [Senior Project Manager], and [Senior Project Manager] will report to Ms. Weaver. (*Id.* at 7.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that 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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). OHA “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

In this case, Appellant seeks to admit the Army's evaluation of GDL's past performance and information showing that [Senior Project Manager] is OMV's Executive Director. Because proposing a subcontractor's employees in managerial roles is probative of an ostensible subcontractor violation, and because a prime contractor's reliance upon a subcontractor's past performance has been a significant issue in other ostensible subcontractor cases, I find this information relevant to the issues on appeal. Moreover, Appellant has established that it could not have submitted this evidence to the Area Office during the size review. Even if Appellant had access to the Army's evaluation as of July 30, 2015, as GDL suggests, this was the date the Area Office issued the size determination. Section II.D, *supra*. Likewise, Appellant represents that it first learned that [Senior Project Manager] was the proposed Senior Project Manager when it reviewed GDL's proposal under OHA's protective order, so Appellant would not have known earlier that it should research [Senior Project Manager]'s involvement with OMV. Appellant's motion is therefore GRANTED, and the evidence is ADMITTED. The Army's past performance evaluation is admitted in its entirety, as GDL requests.

C. Analysis

The “ostensible subcontractor” rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or when the prime contractor is unusually reliant upon the subcontractor, the two firms are affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). The 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 ascertain whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, an area office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). Generally, “[w]here 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 tasks of the contract and there is no violation of the

ostensible subcontractor rule.” *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 13 (2011).

In the instant case, Appellant argues that GDL is dependent upon OMV because: (1) [Senior Project Manager], a current OMV employee, will manage the contract; (2) GDL has not previously performed a contract of comparable size, and without OMV's past performance references, GDL would not have won the contract; and (3) GDL lacks the financial capability to perform the contract without OMV. I agree with GDL and the Area Office that none of the issues raised by Appellant is compelling to show that GDL is unusually reliant upon OMV. Therefore, the appeal must be denied.

Appellant's contention that OMV will control management of the contract through [Senior Project Manager] amounts to no more than unsupported speculation. OHA has recognized on several occasions that “when key personnel, even if hired from the subcontractor, remain under the supervision and control of the prime contractor, there is no violation of the ostensible subcontractor rule.” *Size Appeal of NVE, Inc.*, SBA No. SIZ-5638, at 10 (2015); *see also Size Appeal of Maywood Closure Co., LLC & TPMC-EnergySolutions Env'tl. Servs. 2009, LLC*, SBA No. SIZ-5499, at 9 (2013); *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436, at 15-16 (2013); *Size Appeal of J.W. Mills, Mgmt., LLC*, SBA No. SIZ-5416, at 8 (2012). Here, although [Senior Project Manager] was employed by OMV at the time GDL submitted its proposal, she will be a GDL employee during contract performance, and will operate under GDL's supervision and control. According to the proposal, GDL's CEO, Ms. Weaver, will oversee the program management office and supervise [Senior Project Manager] and other managers. Section II.B, *supra*. [Senior Project Manager] thus will be subordinate to and report to Ms. Weaver, and ultimate control and decision-making rests with GDL. Because all contract performance will occur under Ms. Weaver's supervision and direction, GDL is not dependent on OMV for contract management.

Appellant also argues that GDL relied heavily upon OMV's past performance to win the contract. It is true, as Appellant observes, that OHA has held that “[w]hen a prime contractor relies almost totally upon the experience of other firms to establish its relevant experience, that is probative evidence it is unusually reliant upon its subcontractor to perform the contract in question.” *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300, at 10-11 (2011). More recently, though, OHA reversed a finding that the ostensible subcontractor rule had been violated notwithstanding that the challenged firm “relied almost entirely on [the alleged ostensible subcontractor] for its past performance for this contract.” *Size Appeal of Logistics & Tech. Servs., Inc.*, SBA No. SIZ-5482, at 8 (2013). In *Logistics & Technology*, OHA noted that three of four past performance references were from the subcontractor, and the remaining reference was for a joint venture between the challenged firm and the subcontractor. (*Id.*) Further, the evaluation criteria heavily weighted past performance. (*Id.* at 4.) OHA distinguished *DoverStaffing*, explaining that past performance “has always been only one among other factors in the ostensible subcontractor analysis.” (*Id.* at 8.)

The instant case is more similar to *Logistics & Technology* than *DoverStaffing*. While four of the five past performance references that GDL submitted pertained to the subcontractor, OMV, this fact pattern is quite analogous to that seen in *Logistics & Technology*. Moreover,

in *DoverStaffing*, there were a number of issues beyond past performance which signaled that the challenged firm would be dependent upon its subcontractor. For instance, the challenged firm in *DoverStaffing* proposed to hire its workforce *en masse* from the subcontractor, and the challenged firm could present no evidence that it had experience relevant to the solicitation's primary and vital requirements. *DoverStaffing*, SBA No. SIZ-5300, at 9-10. Here, by contrast, there has been no suggestion that GDL will hire large portions of OMV's workforce, and GDL clearly has experience providing healthcare workers, as it is currently performing such a contract for the U.S. Army School of Aviation.⁴ Accordingly, Appellant has not demonstrated that GDL is unusually reliant upon OMV.

Nor do Appellant's arguments with respect to GDL's credit line show clear error. Appellant asserts that the RFP required GDL to have available credit of at least \$5,587,888, and GDL cannot meet this requirement without OMV. The Area Office found, however, that GDL has letters of credit for \$[XXXX] and \$[XXXX], or more than half of the credit that Appellant asserts GDL must bring to the contract. Appellant complains that the Area Office should have investigated these letters of credit further because the letters do not specifically state that GDL has credit for \$[XXXX] and \$[XXXX]; they only indicate that the credit limits would be increased to these amounts. Significantly, though, Appellant does not argue—much less prove—that GDL lacks such credit. In addition, Appellant offers no authority for the proposition that, in order to avoid a finding of unusual reliance, the prime contractor must be able to meet all financing requirements entirely with its own resources. Because Appellant has the burden of proving clear error on appeal, Appellant's arguments are unpersuasive.

Appellant's contention that GDL is not performing the contract's primary and vital requirements is likewise unconvincing. GDL's proposal and teaming agreement are clear that GDL will perform at least 51% of the work. Section II.B, *supra*. Appellant's argument that GDL is not managing the contract is meritless for the reasons stated *supra*.

IV. Conclusion

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

KENNETH M. HYDE
Administrative Judge

⁴ Although Appellant emphasizes that the Army found [XXXX], it appears that this finding was [XXXX]. The Army's evaluation report stated that this contract [XXXX]. (Evaluation Report, at 13.)