

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

SIZE APPEAL OF:

Modus Operandi, Inc.,

Appellant,

Appealed From
Size Determination No. 3-2016-020

SBA No. SIZ-5716

Decided: February 19, 2016

APPEARANCES

Lori Ann Lange, Esq., Peckar & Abramson, P.C., Washington, D.C., for Appellant

Edward J. Kinberg, Esq., Scott D. Widerman, Esq., Widerman Malek, PL, Melbourne, Florida, for Kegman, Inc.

Charlotte G. Nelson, Contracting Officer, Patrick Air Force Base, Florida

DECISION¹

I. Introduction

On November 23, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2016-020 concluding that Modus Operandi, Inc. (Appellant) exceeds the size standard associated with the subject procurement due to affiliation with BAE Systems Technology Solutions & Services, Inc. (BAE) under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Appellant contends that the size determination is clearly erroneous, and requests that the SBA Office of Hearings and Appeals (OHA) reverse. 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 This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

fifteen days after 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. The Procurement

On October 28, 2014, the U.S. Department of the Air Force (Air Force) issued Request for Proposals (RFP) No. FA7022-14-R-0012 for the Management, Engineering & Research Concepts — Geophysical (MERC-G) Program.² The RFP's Performance Work Statement (PWS) provided that the contractor would support the Air Force Technical Applications Center Directorate of Nuclear Treaty Monitoring by providing: (1) research, studies and analyses in geophysics and seismology; (2) research, studies, analyses, and support to the National Data Center (NDC); (3) engineering services related to acquisition, maintenance, and sustainment of existing and new systems and equipment; (4) program/project management and acquisition support; (5) key research and operational support to missions related to geophysics; and (6) limited procurement support for the purchase of mission related equipment. (RFP, Attachment 1, § 1.1.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541690, Other Scientific and Technical Consulting Services, with a corresponding size standard of \$15 million average annual receipts.

MERC-G is the successor to a procurement for similar services known as Sustainment Systems Engineering & Acquisition Management Services (SSEAMS). BAE is the incumbent SSEAMS prime contractor. Appellant became a subcontractor to BAE on the SSEAMS contract during 2014. (Appeal at 2.)

According to the RFP, the Air Force would evaluate proposals using three evaluation factors: Technical Acceptability; Price; and Past Performance. (RFP § M-I.) The Air Force would first “evaluate the technical proposals on a pass/fail basis.” (*Id.*) Next, the Air Force would “rank all technically Acceptable offers (those that pass) by total evaluated price from lowest to highest.” (*Id.*) Then, “all technically acceptable offers (those that pass) shall have their past performance evaluated.” (*Id.*) Lastly, the Air Force would conduct a tradeoff analysis, with Past Performance significantly more important than Price. (*Id.*)

The first evaluation factor, Technical Acceptability, consisted of three subfactors: Security; Technical; and Management. The Technical subfactor considered the offeror's “technical capability for providing the necessary mission support and for meeting the technical requirements of the PWS,” including expertise in the technical disciplines of Geophysics and Research, Engineering, and Software Engineering, and addressed the offeror's methodology and approach in responding to three sample “problem scenarios.” (*Id.*) For each problem scenario,

² On December 2, 2014, the CO issued Amendment 0001 and a conformed version of the RFP incorporating various changes. Unless otherwise noted, citations to the RFP are to the conformed version.

the offeror was to provide an executable solution with a technical narrative demonstrating a clear understanding of the requirement. The problem scenarios involved “seismic array installation,” “software change process,” and “seismic event classification.” (*Id.*)

Appellant submitted its final proposal revisions on August 14, 2015. On October 30, 2015, the CO awarded the MERC-G contract to Appellant. (CO's Response at 1.) On November 5, 2015, Kegman, Inc. (Kegman), a disappointed offeror, filed a size protest challenging Appellant's size. Kegman alleged that Appellant is affiliated with BAE under the ostensible subcontractor rule, the newly organized concern rule, and the totality of the circumstances. (Protest at 6-7.) To support these claims, Kegman asserted that Appellant “has no history of performing research and analysis of geophysical and seismic projects and no history of acquiring, installing or maintaining the equipment required to conduct such projects.” (*Id.* at 7.) The CO forwarded the protest to the Area Office for review.

B. Proposal and Teaming Agreement

Appellant's proposal identified itself as the prime contractor for the MERC-G procurement, and BAE, the incumbent contractor, as Appellant's sole subcontractor. Appellant proposed that Appellant will perform 51.1% of contract services and BAE will perform the remaining 48.9%. (Proposal, Vol. III, at 20.)

Appellant proposed that, of a total workforce of 20 personnel, 10 would be employees of Appellant and 10 would be employees of BAE. (*Id.*, Vol. II, at 5.) All 20 employees would be incumbent SSEAMS personnel, and the 18 non-managerial employees would continue to perform the “same role” on the MERC-G contract as on SSEAMS. (*Id.*, Vol. IV, at 26.) The proposal included commitment letters signed by each of the 20 proposed employees. The letters affirm that the employee “authorize[s] BAE Systems to submit [the employee's] resume” with the proposal. (*Id.*, Vol. I, at 72-91.) The employees further agreed that, if Appellant were awarded the MERC-G contract, “I will accept assignment to the position for which I have been proposed.” (*Id.*)

One of the 10 employees proposed as Appellant's personnel was [XXXX] as MERC-G Program Manager. (*Id.*, Vol. II, at 36.) At the time the proposal was submitted, [XXXX] was employed by BAE as Deputy Program Manager on the incumbent SSEAMS contract. (*Id.*) For MERC-G Deputy Program Manager, Appellant proposed a BAE employee, [XXXX], who “will lead the BAE Systems contingent.” (*Id.* at 2.) [XXXX] will provide “administrative management for BAE Systems personnel.” (*Id.* at 37.)

Appellant proposed as its own employee [XXXX] as Senior Systems Engineer. The proposal stated that “[XXXX] will provide software engineering and support services on the MERC-G contract.” (*Id.* at 37.) [XXXX] also works on the current SSEAMS project. The proposal explained that “BAE Systems added [Appellant's] software engineer [on SSEAMS] to respond to the Government's request for assistance in the integration of two different databases.” (*Id.*, Vol. IV, at 4.) Like the other proposed employees, [XXXX] signed a commitment letter to “authorize BAE Systems to submit [his] resume” with the proposal. (*Id.*, Vol. I, at 85.)

In its proposal, Appellant listed three executive personnel who would have “[a]uthority to obligate [Appellant] contractually,” and provided the name and contact information of Appellant’s contract administrator. (*Id.*, at 39, 66.) Appellant also identified an employee responsible for “managing all of [Appellant’s] facility and personnel security requirements.” (*Id.*, Vol. II, at 4.) None of these individuals was assigned to work directly on the MERC-G contract. (*Id.* at 5.)

For the Past Performance factor, Appellant identified two prior contracts for itself, and two for BAE, one of which was the SSEAMS contract. The proposal contained a table indicating that, of the four contracts, only BAE’s SSEAMS contract was relevant to the “Geophysics and Research” technical discipline. (*Id.*, Vol. IV, at 6.)

The record includes a teaming agreement between Appellant and BAE, executed on July 30, 2014. There, Appellant and BAE agreed that BAE would be Appellant’s exclusive teaming partner and that BAE would provide bid and proposal support to Appellant on this RFP. (Teaming Agreement, Ex. A ¶ 1.0.) BAE’s work share would be “49% of the value of the raw labor cost of the prospective prime contract,” as practicable. (*Id.* ¶ 2.2.) The teaming agreement specified that Appellant and BAE would remain independent contractors, and would not share profits or losses arising from the efforts of either or both the parties. (Teaming Agreement ¶¶ 7.1 and 7.2.) The agreement would automatically terminate upon certain conditions, including: “[i]n the event that the acquisition strategy for the subject solicitation is released as a Full and Open Competition”; “[i]n the event that the Prime no longer meets the classification of the NAICS code”; and “[i]n the event that the Prime’s rate structure changes to make them uncompetitive based on the competitive landscape.” (*Id.* ¶¶ 4.1.10 — 4.1.12.)

C. Protest Response

Appellant responded to Kegman’s protest on November 16, 2015. Appellant stated it became interested in the NDC portion of the existing SSEAMS contract, cultivated a relationship with BAE, and was “able to secure work” on that contract. (Protest Response at 2.) Appellant noted that its interest in bidding as a prime contractor on the instant MERC-G opportunity dates from “Spring of 2014”. (*Id.*)

Appellant offered a table listing the task areas identified in the MERC-G PWS and the Full Time Equivalents (FTEs) to be assigned to each:

Activity	# of [Appellant] personnel	# of BAE personnel
1. Program Management	1.0	0.0
2. Performing research studies and analyses in the disciplines of geophysics and seismology	2.4	0.0
3. Performing research studies and analyses and support to the [NDC]	3.6	3.0
4. Providing engineering services related to all aspects of the acquisition, maintenance, and sustainment for existing fielded and new sensor equipment	2.0	6.9

5. Providing key research and operational support to [offices] related to the discipline of geophysics as required	1.0	0.0
6. Limited procurement support for the purchase of mission related equipment	0.0	0.1
Totals	10.0	10.0

(*Id.* at 6.) Appellant claimed that all task areas, except the last, are “primary and vital” requirements of MERC-G. Therefore, Appellant reasoned, “[a] s clearly demonstrated in the table, [Appellant] will be performing a[t] least a portion of each and every one of the primary and vital activities, and in fact is performing a majority of the work in all but one of such activities.” (*Id.*) Appellant also stated its participation in MERC-G is not limited to direct charge personnel but also includes its executive management and financial/administration personnel, none of whom are former BAE employees. (*Id.* at 7.)

Appellant's submission to the Area Office included its SBA Form 355. Appellant stated in response to Question 16 that it “is a subcontractor to BAE under [SSEAMS]. This is an independent contractor relationship.” Appellant also referred to “the SSEAMS subcontract” in response to Question 19. Appellant did not submit a copy of its SSEAMS subcontract.

As for BAE's support in preparation of the MERC-G proposal, Appellant stated in response to Question 18, “BAE provided normal and customary support to the bid.” In response to Question 26, Appellant added “As part of the bid preparation, since BAE is a proposed subcontractor, [Appellant] and BAE had normal and customary discussions regarding the contents of the solicitation, which contained all the terms and conditions the Air Force intended to include in the contract.”

D. The Size Determination

On November 23, 2015, the Area Office issued Size Determination No. 3-2016-020 sustaining Kegman's protest. The Area Office found no merit to Kegman's allegation that Appellant is affiliated with BAE under the newly organized concern rule, reasoning that Appellant “has been in business for over 31 years, so it is not newly organized.” (Size Determination at 5.) The Area Office did, however, find Appellant affiliated with BAE under the ostensible subcontractor rule. As a result, Appellant is not a small business for the MERC-G procurement. (*Id.* at 7.)

The Area Office determined that Appellant will be unusually reliant upon BAE to perform the contract, in contravention of the ostensible subcontractor rule. Specifically, BAE is the incumbent SSEAMS prime contractor, and all of the personnel involved in performing the contract will be current or former employees of BAE. The Area Office found that Appellant proposed a workforce of 20 FTEs to staff the MERC-G contract. Although 10 of the FTEs would be employees of Appellant and 10 FTEs would be BAE employees, “*all 10* of [Appellant's] employees are incumbent personnel moving from BAE.” (Size Determination at 6, emphasis in original.) Thus, except for personnel newly hired from BAE, “[Appellant] is not providing any of its own personnel” to perform the contract. (*Id.* at 5.)

The Area Office determined that BAE also would be heavily involved in managing the contract. The incumbent Deputy Program Manager, [XXXX], would join Appellant to serve as Program Manager for the MERC-G contract. (*Id.*) Meanwhile, the incumbent Program Manager, [XXXX], would remain with BAE and become Deputy Program Manager under the MERC-G contract. (*Id.*) As a result, “half of the management team, the Deputy PM, will be employed by BAE.” (*Id.* at 6.) Further, when contacted by the Area Office, the CO opined that “it is vital that the management team is strong enough to effectively manage the functions across all disciplines.” (*Id.*)

The Area Office asserted that “when the alleged ostensible subcontractor is the incumbent, and the prime contractor proposes to hire *en masse* both the workforce and managerial personnel of the alleged ostensible subcontractor, this may be grounds to conclude that the prime contractor is unusually reliant upon the alleged ostensible subcontractor.” (*Id.*, citing *Size Appeal of Wichita Tribal Enterprises, LLC*, SBA No. SIZ-5390 (2012), *Size Appeal of SM Resources Corp., Inc.*, SBA No. SIZ-5338 (2012), and *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011).) In the instant case, “[s]ince *all* of the staff for this contract, including the management team, is being provided by BAE, the large incumbent contractor, [Appellant] is unduly reliant on BAE for the performance of this procurement.” (*Id.*, emphasis in original.) Further, in the Area Office's view, Appellant would contribute nothing more than its small business status to this procurement. (*Id.*)

Appellant conceded that BAE is a large business. (*Id.* at 7.) As a result, Appellant and BAE together exceed the size standard, and Appellant is not an eligible small business for this procurement.

E. Appeal

On December 7, 2015, Appellant filed the instant appeal. Appellant maintains that the size determination is erroneous and should be reversed.

Appellant disputes the Area Office's factual findings that Appellant did not propose any of its own personnel for the MERC-G contract, and that all of Appellant's personnel would be incumbent workers moving from BAE. Appellant allows that it “did propose to use a number of incumbent non-management personnel currently performing work under the SSEAMS contract.” (Appeal at 6.) However, Appellant itself is an incumbent SSEAMS subcontractor, so “the reference to incumbent personnel referred to both [Appellant] and BAE.” (*Id.* at 7.) Appellant highlights in particular that Appellant proposed [XXXX], who has been employed by Appellant since 2004 and has never been employed by BAE, to work directly on the MERC-G contract. (*Id.* at 4.) Further, Appellant identified in the proposal other current employees of Appellant to perform executive management, contract administration, security, and support functions for MERC-G. (*Id.* at 5.)

Appellant complains that the Area Office ignored the fact that Appellant is an incumbent subcontractor on the SSEAMS contract. In this role, Appellant “obtained experience with the contract requirements, which substantially weakens BAE's incumbent status as a factor upon

which to find unusual reliance.” (*Id.* at 7, citing *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279, at 28 (2011).)

Appellant argues that the Area Office erred in concluding that Appellant would bring nothing to the procurement but its small business status. Appellant emphasizes that, as the prime contractor, Appellant would perform a majority of the MERC-G contract. (*Id.* at 9-10.) In addition, Appellant has a proven past performance record of its own. Appellant states that “[w]hile [Appellant] had the least experience in the technical discipline of Geophysics and Research, [Appellant] planned to perform this requirement by hiring non-management incumbent employees with direct experience.” (*Id.* at 11.)

Appellant observes that OHA has recognized in recent cases that hiring key personnel, such as the Program Manager, from a subcontractor will not violate the ostensible subcontractor rule if those personnel remain under the supervision and control of the prime contractor. (*Id.* at 12-13, citing *Size Appeal of Hanks-Brandan, LLC*, SBA No. SIZ-5692 (2015), *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436 (2013) and *Size Appeal of J.W. Mills Management, LLC*, SBA No. SIZ-5416 (2012).) Here, Appellant's proposed Program Manager would report to, and would be subordinate to, Appellant's management, so the Area Office erred in finding unusual reliance. (*Id.* at 14.) Appellant further contends that, although the Deputy Program Manager would be employed by BAE, the Deputy Program Manager is not responsible for managing the overall contract. Rather, Appellant argues, “the proposal makes it clear that the Deputy PM's role is limited to managing the BAE subcontract effort — not the MERC-G contract itself.” (*Id.* at 8.)

Appellant distinguishes *Wichita Tribal Enterprises*, *SM Resources*, and *DoverStaffing*, the three cases cited in the size determination. “In each of those cases, OHA concluded that the concerns were affiliated in significant part because the small business prime contractor lacked experience or past performance in the type of work being procured.” (*Id.* at 14-15.) By contrast, Appellant “has been in business for 31 years, has considerable corporate experience, and has performed contracts similar in size and complexity to the MERC-G contract.” (*Id.* at 16.) Therefore, Appellant reasons, Appellant is not dependent upon a subcontractor to perform the contract. Additionally, in *Wichita Tribal Enterprises*, *SM Resources*, and *DoverStaffing*, the prime contractor planned to hire its entire workforce from the alleged ostensible subcontractor. Conversely, Appellant “proposed to use some of its current employees to perform management and non-management services.” (*Id.* at 14.)

F. CO's Response

On December 28, 2015, the CO responded to the appeal. The CO likens the instant appeal to OHA's decision in *Size Appeal of HX5, LLC*, SBA No. SIZ-5331 (2012), where OHA overturned a size determination concluding that a prime contractor had violated the ostensible subcontractor rule. The CO observes that, in *HX5*, OHA found no unusual reliance when the prime contractor proposed to hire its program manager from the alleged ostensible subcontractor. (CO's Response at 1.) The CO urges the same outcome here.

The CO asserts that the Air Force “has identified everything in the MERC-G PWS as primary and vital.” (*Id.* at 2.) Further, “[n]ot one area of the PWS is considered more important than the other.” (*Id.*)

The CO states that Appellant submitted two past performance references for itself, both of which were deemed relevant by Air Force evaluators, although less relevant than the two references provided for BAE. (*Id.*) While Appellant did not demonstrate experience in geophysical research support, “[i]t would be inaccurate to conclude that because [Appellant] does not have Geophysical Research Support experience, they cannot fulfill the primary and vital requirements of the PWS when they have experience in all other areas.” (*Id.*, emphasis in original.)

The CO contends that Appellant reasonably proposed to utilize the incumbent workforce from the SSEAMS contract. Indeed, the CO asserts, given the “highly specialized professional services personnel” needed for the MERC-G contract, any offeror selected for award would be expected to retain much of the incumbent staff. (*Id.*) In the CO's view, “it would be difficult and a high risk for any contractor to successfully perform without incumbent capture.” (*Id.*, emphasis in original.)

On December 28, 2015, Kegman moved to supplement and clarify the CO's response. Appellant opposed the motion. Because Kegman incorporated the substance of its motion to supplement and clarify into its December 31, 2015 response to the appeal, OHA need not rule on the motion.

G. Kegman's Response

On December 31, 2015, Kegman responded to the appeal. Kegman maintains that the size determination is correct and should be affirmed.

Kegman reviews the requirements of the RFP, and concludes that “the principal purpose of the acquisition is to obtain scientists and engineers that can maintain, monitor and manage seismic devices throughout the world.” (Kegman's Response at 17.) As such, “the primary and vital requirements of the contract involve geophysics and in particular the areas of seismic, hydroacoustic and infrasonic technologies.” (*Id.* at 8.) Understanding the nature of the MERC-G procurement is crucial because Appellant has no experience performing such work whereas BAE does. Therefore, Kegman reasons, Appellant must depend upon BAE both to win and to perform the MERC-G contract. Kegman emphasizes that “the only member of [Appellant's] team that had experience in these areas was BAE and [Appellant] could not perform the contract with its own staff unless that staff was augmented by former employees of BAE.” (*Id.*) According to Kegman, “[Appellant's] hiring of some of the BAE employees is simply a sham to create the appearance that [Appellant] will be performing more than 50% of the work even though it has no experience performing the work and will be entirely reliant upon BAE staff to perform the work.” (*Id.* at 11.)

Kegman observes that Appellant's own appeal concedes that only one of the 20 employees that will work directly on the MERC-G contract was employed by Appellant at the

time Appellant submitted its proposal. (*Id.* at 19.) Further, that one employee, [XXXX], “is basically a computer engineer with no experience in geophysical or seismic work which is the core mission of the contract.” (*Id.* at 29.) Because Appellant only became a SSEAMS subcontractor in 2014, “the record is clear that [XXXX] could not have worked on the project prior to an unknown date in 2014 when BAE issued a subcontract to [Appellant] to provide [XXXX] to support BAE's contract.” (*Id.* at 21.) Kegman maintains that “all of the individuals performing the primary and vital requirements of the contract will either be direct BAE employees on the incumbent contract or employees shifted from BAE's payroll to [Appellant's] on the first day of the new contract.” (*Id.* at 30.)

Kegman argues that the OHA decisions cited by Appellant (such as *J.W. Mills and InGenesis*) are distinguishable because they did not involve situations where a prime contractor proposed to hire its entire workforce, including both managerial and non-managerial employees, from a subcontractor that was also the incumbent contractor. (*Id.* at 16-18.) The instant case therefore is far more analogous to the cases referenced in the size determination: *Wichita Tribal Enterprises*, *SM Resources*, and *DoverStaffing*. Kegman maintains that, in each of those cases, “the prime contractor lacked experience in the particular type of work to be performed under the contract,” and OHA found that employees would be transferred or hired *en masse* from the ostensible subcontractor. (*Id.* at 27.) Likewise, Appellant here lacks relevant experience, and there is no evidence to show that Appellant would assess employees individually rather than transferring them *en masse* from BAE. (*Id.* at 18.)

Kegman notes that Appellant's proposal frequently refers to Appellant and BAE as a “team” and describes BAE's experience, expertise, and personnel as if they were Appellant's own. (*Id.* at 12-16.) Thus, “reading the proposal gives the clear impression that BAE drafted the proposal and that [Appellant's] role was limited to providing information to BAE.” (*Id.* at 30.)

Kegman attacks Appellant's contention that the Area Office should have attached greater significance to Appellant's SSEAMS subcontract. (*Id.* at 21.) The subcontract is not in the record, Kegman observes, so the nature and extent of Appellant's work on SSEAMS is unclear. (*Id.* at 19.) Moreover, the Air Force announced in December 2013 that it intended to conduct the MERC-G procurement as a small business set aside, and Appellant entered into the SSEAMS subcontract with BAE only after that date. (*Id.* at 11.) Given this chronology, Kegman posits that “it is reasonable to assume that the subcontract was awarded after [December 2013] to enhance the appearance that [Appellant] was a subcontractor on BAE's existing contract.” (*Id.* at 19.)

Kegman questions whether Appellant will actually self-perform at least 51% of the MERC-G contract. Kegman claims that, based on Kegman's reading of the teaming agreement between Appellant and BAE, “11 of the 20 positions are included in BAE's scope of work and nine remaining positions will be filled by BAE employees shifting to [Appellant's] payroll on the date the contract starts.” (*Id.* at 9.)

Kegman also addresses the CO's response to the appeal. In Kegman's view, the CO's response essentially “admits that [Appellant] has no experience in geophysical research.” (*Id.* at 31.) In addition, because the CO “obviously believes the only contractor that can perform the

work is one that relies on the incumbent workforce,” the CO's response confirms that Appellant will be heavily dependent upon BAE. (*Id.* at 34.)

H. Appellant's Reply

On January 5, 2016, five days after the close of record, Appellant moved to reply to Kegman's response. Appellant subsequently submitted its proposed reply on January 19, 2016. Appellant argues that there is good cause to admit the reply because Kegman's response “raises issues unrelated to the size appeal.” (Motion at 1.) Appellant objects in particular to Kegman's comments on the CO's response, and to Kegman's contention that Appellant lacks experience performing similar work. (*Id.* at 1-2.) Kegman opposes the motion. According to Kegman, Appellant “simply seeks an additional opportunity to offer[] its own interpretation of the record.” (Opposition at 1.) Kegman complains that reopening proceedings would delay the outcome of the case, to the benefit of BAE, the incumbent contractor. (*Id.* at 2.) In the event that OHA nevertheless grants Appellant's motion, Kegman requests leave to sur-reply. (*Id.*)

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, Appellant's reply was not requested by OHA and was filed well after the close of record. In addition, while Appellant disagrees with Kegman's response, Appellant has not established that Kegman's response raised issues outside the scope of a proper size appeal. Accordingly, Appellant's motion to reply is DENIED, and the reply is EXCLUDED from the record. *E.g., Size Appeal of Mali, Inc.*, SBA No. SIZ-5506, at 3-4 (2013). Because I am excluding Appellant's reply, Kegman's request to sur-reply is moot and is DENIED.

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).

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 is intended to “prevent other than small firms from forming relationships with small firms to evade SBA's size requirements.” *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). To ascertain whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, an area office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Size Appeal of C&C Int'l*

Computers and Consultants Inc., SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). Ostensible subcontractor inquiries are “intensely fact-specific given that they are based upon the specific solicitation and specific proposal at issue.” *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 12 (2010).

B. Analysis

Having reviewed the record, OHA case precedent, and the arguments of the parties, I find that Appellant has not shown clear error in the size determination. As a result, this appeal must be denied.

The Area Office based its decision on *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011) and the line of cases following it, where OHA found violation of the ostensible subcontractor rule due to the prime contractor's unusual reliance upon a subcontractor. In *DoverStaffing*, the prime contractor was to perform 51% of the contract, and the alleged ostensible subcontractor was responsible for 40%. *DoverStaffing*, SBA No. SIZ-5300, at 3. Several factors, though, demonstrated that the prime contractor was unusually reliant upon the subcontractor. The subcontractor was the incumbent contractor and was ineligible to submit a proposal in its own name. *Id.* at 10. None of the prime contractor's proposed personnel — including both managerial and non-managerial personnel — was employed by the prime contractor at the time of proposal submission. Rather, the prime contractor planned to staff the contract by “hiring the [subcontractor]'s incumbent employees *en masse* to perform [the prime contractor's] 51% of the work.” *Id.* at 8. Although the prime contractor's President was mentioned in the proposal, she was not assigned a major role in contract performance. *Id.* Further, the prime contractor lacked an established performance record, and relied upon the subcontractor's experience and past performance to win the contract. *Id.* at 10-11. On these facts, OHA determined that the prime contractor was “bringing nothing to the contract but its small business status,” in contravention of the ostensible subcontractor rule. *Id.* at 9.

OHA has affirmed the reasoning of *DoverStaffing* in several subsequent cases. *Size Appeal of Professional Security Corp.*, SBA No. SIZ-5548 (2014); *Size Appeal of Wichita Tribal Enterprises, LLC*, SBA No. SIZ-5390 (2012); *Size Appeal of SM Resources Corp., Inc.*, SBA No. SIZ-5338 (2012). Further, subsequent cases have identified “four key factors” that have contributed to the findings of unusual reliance. *Professional Security*, SBA No. SIZ-5548, at 8; *Wichita Tribal Enterprises*, SBA No. SIZ-5390, at 9. First, the proposed subcontractor was the incumbent contractor, and was not itself eligible to compete for the procurement. Second, the prime contractor planned to hire the large majority of its workforce from the subcontractor. Third, the prime contractor's proposed management previously served with the subcontractor on the incumbent contract. And fourth, the prime contractor lacked relevant experience, and was obliged to rely upon its more experienced subcontractor to win the contract. OHA has explained that “when a prime contractor proposes the incumbent contractor as its subcontractor, relies heavily upon its subcontractor for both managerial and non-managerial personnel, and has little or no corporate experience, the prime contractor is [] at risk of violating the ostensible subcontractor rule.” *Wichita Tribal Enterprises*, SBA No. SIZ-5390 at 11 (citing *DoverStaffing* and *SM Resources*).

The instant case fits squarely within the *DoverStaffing* fact pattern. Appellant's subcontractor, BAE, is the incumbent on the predecessor SSEAMS contract for similar services, and is a large business ineligible to submit its own proposal for the MERC-G procurement. Section II.A, *supra*. Appellant proposed to staff Appellant's portion of the project almost entirely with personnel hired from BAE, and all non-managerial personnel would continue in the "same role" that they performed on SSEAMS. Section II.B, *supra*. In effect, then, Appellant proposed to adopt BAE's incumbent non-managerial workforce *en masse*. To manage the contract, Appellant proposed to retain BAE's incumbent Deputy Project Manager, [XXXX], to serve as Appellant's MERC-G Program Manager. *Id.* Lastly, according to Appellant's own proposal, BAE is the only member of Appellant's team with experience in the "Geophysics and Research" technical discipline, and the CO likewise acknowledged that Appellant "does not have Geophysical Research Support experience." Sections II.B and II.F, *supra*. Appellant submitted data to the Area Office indicating that nearly all personnel on MERC-G would be involved in some manner with geophysics and research. Section II.C, *supra*. For instance, the single largest group of employees (8.9 of the 20 FTEs) that Appellant proposed for MERC-G would be engaged in the acquisition, maintenance, and sustainment of seismic sensor equipment, tasks pertaining largely to geophysics. *Id.* Thus, Appellant lacks experience in the principal subject matter of this procurement. In sum, as the Area Office determined, the instant case is highly analogous to the *DoverStaffing* line of cases.

Arguably, the facts of the instant case may suggest greater reliance than was seen in *DoverStaffing*, because the RFP here required offerors to provide detailed solutions to three sample technical problems — including scenarios involving "seismic array installation" and "seismic event classification" — which had to be rated acceptable by the Air Force in order for the offeror to proceed in the competition. Section II.A, *supra*. Appellant acknowledges, however, that at the time of proposal submission, Appellant did not have personnel with experience in these areas. Section II.E, *supra*. It therefore appears questionable whether Appellant could have participated in this competition without assistance from BAE in addressing the technical scenarios.

Appellant attempts to distinguish this case from *DoverStaffing* on various grounds, but none of Appellant's arguments is persuasive. Appellant first disputes the Area Office's factual finding that Appellant planned to hire its entire workforce from BAE. The Area Office was mistaken, Appellant claims, because one of the personnel Appellant proposed to work on MERC-G was [XXXX], who has long been employed by Appellant. Appellant's argument fails for two reasons. First, Appellant's proposal included a signed commitment letter from [XXXX] in which he "authorize[d] BAE Systems to submit [his] resume" with the proposal. Section II.B, *supra*. Nor did the proposal elsewhere state that [XXXX] was employed by Appellant as opposed to BAE. The Area Office therefore did not clearly err in concluding that [XXXX] was employed by BAE. Second, even accepting Appellant's contention that [XXXX] is Appellant's employee, Appellant still planned to acquire the large majority of its workforce (9 of 10 employees) from BAE, and 19 of the 20 personnel that would work on the MERC-G contract were to be current or former employees of BAE. Thus, Appellant is still reliant upon BAE to staff this contract. *SM Resources*, SBA No. SIZ-5338, at 11 (applying *DoverStaffing* and finding violation of ostensible subcontractor rule when "[o]nly 14% of the proposed contract personnel are currently [the prime contractor's] employees"). Accordingly, the fact that Appellant may have

proposed one of its own employees for this procurement does not invalidate the Area Office's analysis, given that Appellant planned to hire its remaining workforce from BAE.

Appellant also argues that it proposed its own personnel to perform executive management, contract administration, security, and support functions for MERC-G. As Kegman points out in its response to the appeal, however, these personnel will not work directly on the MERC-G contract, and were only briefly mentioned in Appellant's proposal. Because there is no indication that these personnel would have a major role on the MERC-G contract, their involvement does not lessen Appellant's reliance upon BAE to perform the contract. *DoverStaffing*, SBA No. SIZ-5300, at 8 (rejecting the notion that the prime contractor's President would control the project because "the proposal does not assign a major role to the [prime contractor's] President beyond interface with the [procuring agency], and it is the Project Manager who will be providing oversight over the project.").

Appellant further contends that the Area Office should have considered that Appellant is an incumbent subcontractor to BAE on the SSEAMS contract. Under 13 C.F.R. § 121.1009(c), though, it was Appellant's responsibility to persuade the Area Office that Appellant is a small business, yet Appellant failed to provide the SSEAMS subcontract to the Area Office. As a result, the Area Office was unable to assess the nature and extent of Appellant's work on the subcontract, and did not err in giving little attention to this issue. Moreover, based on Appellant's proposal, the subcontract apparently consisted only of a single software engineer who was assigned "to respond to the Government's request for assistance in the integration of two different databases." Section II.B, *supra*. Appellant does not explain how such an arrangement would substantially enhance Appellant's credentials to perform the much broader MERC-G contract. Accordingly, Appellant has not demonstrated that the Area Office committed any material error by neglecting to discuss Appellant's role on the SSEAMS subcontract.

Appellant also argues, citing OHA decisions such as *J.W. Mills* and *HX5*, that the hiring of key personnel from a subcontractor does not violate the ostensible subcontractor rule when those personnel remain under the supervision of the prime contractor. OHA has previously discussed such decisions in the context of the *DoverStaffing* line of cases, though, and has explained that, although hiring key personnel from the subcontractor is not, by itself, sufficient to constitute unusual reliance, an area office nevertheless may consider this factor among others in determining whether unusual reliance exists. *Professional Security*, SBA No. SIZ-5548, at 10; *Wichita Tribal Enterprises*, SBA No. SIZ-5390, at 10-11. The instant case involves multiple indicia of reliance comparable to *DoverStaffing*, and Appellant has not demonstrated that the Area Office improperly followed the *DoverStaffing* line of cases.

Appellant also maintains that the Area Office incorrectly found that Appellant would bring nothing to the procurement but its small business status. Appellant insists that it will perform "a[t] least a portion of each and every one of the primary and vital activities, and in fact is performing a majority of the work in all but one of such activities." Section II.C, *supra*. This argument misses the point of the Area Office's analysis. The Area Office did not find that BAE alone would perform the primary and vital contract requirements, but rather determined that Appellant would be unusually reliant upon BAE to perform the contract. In *DoverStaffing* itself, for example, OHA found violation of the ostensible subcontractor rule although the prime

contractor would perform 51% of services and would subcontract only 40% to the alleged ostensible subcontractor. OHA reasoned that the prime contractor was “reliant upon [its subcontractor] not only for the 40% of the contract work assigned to it by the proposal, but for nearly all of [the prime contractor's] own staff for this contract and for all of the key employees performing the contract management.” *DoverStaffing*, SBA No. SIZ-5300, at 8. Accordingly, the fact that Appellant would perform a majority of MERC-G contract services, and a majority of the work in several task areas, does not preclude a finding that Appellant is unusually reliant upon BAE to accomplish such work.

Appellant lastly argues that the instant case is distinguishable from *DoverStaffing* because Appellant is not a newly-created or unproven firm. Rather, Appellant emphasizes, in addition to its work on the SSEAMS subcontract, Appellant submitted two past performance references for itself for MERC-G, and both references were considered relevant to the MERC-G procurement. As Kegman correctly counters, though, the problem here is not that Appellant lacks any corporate experience at all, but rather that Appellant has no experience in the specific subject matter of this procurement. In *SM Resources*, a case that adhered closely to *DoverStaffing*, OHA found that the prime contractor was experienced in information technology, but lacked experience in environmental consulting services, the subject of the procurement. OHA affirmed the finding of unusual reliance, explaining that “the Area Office was correct in concluding [that the prime contractor] had limited experience in contracts of this nature.” *SM Resources*, SBA No. SIZ-5338, at 13. Similarly, in the instant case, the record supports the conclusion that the MERC-G procurement calls for expertise in geophysics and seismology, and Appellant acknowledges that it has no experience in this area. Accordingly, there is no basis to distinguish this appeal from *SM Resources* and *DoverStaffing*.

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).

KENNETH M. HYDE
Administrative Judge