

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

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

Social Solutions International, Inc.,

Appellant,

RE: IT Shows, Inc.

Appealed From
Size Determination No. 2-2015-120

SBA No. SIZ-5741

Decided: May 17, 2016

APPEARANCES

David S. Black, Esq., Gregory R. Hallmark, Esq., Elizabeth N. Jochum, Esq., Holland & Knight, LLP, Tysons, Virginia, Bryan T. Bunting, Esq., Vinson & Elkins, LLP, Washington, D.C., for Appellant

J. Patrick McMahon, Esq., William T. Welch, Esq., Peter A. Fish, Esq., McMahon, Welch and Learned, PLLC, Reston, Virginia, for IT Shows, Inc.

DECISION¹

I. Introduction

On January 22, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2015-120 concluding that IT Shows, Inc. (IT Shows) is not affiliated with its subcontractor, Public Health Institute (PHI), under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Social Solutions International, Inc. (Appellant), which had previously protested IT Shows' size, contends that the size determination is clearly erroneous, and requests that the SBA Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

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.

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 received the size determination on January 28, 2016 and filed the instant appeal within fifteen days thereafter, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On March 7, 2014, the U.S. Agency for International Development (USAID) issued Request for Proposals (RFP) No. SOL-OAA-14-000024 for the Global Health Support Initiatives III (GHSI-III) procurement. GHSI-III is the successor to a procurement for similar services known as GHSI-II. The Contracting Officer (CO) set aside the GHSI-III procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541990, All Other Professional, Scientific and Technical Services, with a corresponding size standard of \$15 million average annual receipts. Offers were due October 3, 2014.

According to the Statement of Work (SOW), the contractor will provide “non-direct hire global health support services” for USAID's Bureau for Global Health (GH) at its offices in Washington, D.C. and overseas. (RFP § C.1.1.) More specifically, “[t]he contractor will recruit, hire and maintain a contracted technical, professional, operational, and support staff that supply support services to USAID's health programs worldwide.” (*Id.*) The SOW explained that USAID has used predecessor contracts, including GHSI-II, to supplement GH's direct-hire staff of federal civilian employees. At the time the RFP was issued, there were 259 contractor personnel providing technical, professional, operations, and administrative support for GH. (*Id.* § C.2 and Attachment J.6.) The staff provided by the contractor support seven health program areas: (1) HIV/AIDS; (2) Tuberculosis; (3) Malaria; (4) Avian Influenza; (5) Other Public Health Threats; (6) Maternal and Child Health; and (7) Family Planning and Reproductive Health. (*Id.* § C.3.2.)

The SOW stated that “[t]he Contractor will provide *support services* to USAID's health programs worldwide.” (*Id.* § C.4 (emphasis in original).) The contractor will be responsible for transitioning and maintaining approximately 259 positions worldwide that were being performed under the GHSI-II contract. The recruitment, hiring, and maintaining of this staff will be for non-direct-hire positions, categorized as technical, professional, operational, and support in nature. (*Id.*) The SOW emphasized that contractor personnel “**WILL NOT perform 'inherently governmental functions', nor supervise any employees other than the contractor's own staff, nor make final decisions or sign documents that commit the U.S. Government.**” (*Id.*, emphasis in original.) The SOW indicated that “[d]uring the life of the contract, new position descriptions are expected to be established”, and some existing positions may be discontinued. (*Id.* §§ C.5.1 and C.5.2.) USAID anticipated that contractor employees will be “be a mix of entry to junior-level support staff with an interest in public health and mid to senior-level professionals in the public health sectors” as specified by USAID. (*Id.* § C.5.3.) The contractor will provide a plan for transitioning incumbent contractor employees that are offered employment under GHSI-III. (*Id.* § C.6.) The contractor will provide three key personnel: (1) Program Director; (2) Program Manager; and (3) Financial/Budget Specialist. (*Id.* § C.7.1.) The SOW specified

minimum qualifications for five categories of support staff: Administrative Assistants; Program Assistants; Program Analysts; Program Specialists; and Travel Coordinators. (*Id.* § C.7.3.)

The RFP required that “[t]he contractor must be able to manage, and report on, budgets and pipelines in a timely and efficient manner”, to include tracking, analyzing and forecasting of funding and expenses. (*Id.* § F.6.)

The evaluation criteria for GHSI-III stipulated that proposals will be evaluated based on five factors: Technical Approach; Corporate/Institutional Capability; Past Performance; Personnel; and Cost/Price. (*Id.* §§ M.2 and M.3.) The Technical Approach factor will evaluate (i) the offeror's approach for developing and overseeing the administration and logistics of contractor employees, focusing on salaries and benefits packages; and (ii) the offeror's approach for recruiting and transitioning up to 259 incumbent contractor employees from GHSI-II with minimal disruption. (*Id.* § M.2.) The Corporate/Institutional Capability factor will evaluate the offeror's experience in recruiting and fielding qualified personnel with experience in international development and/or humanitarian assistance, its financial reporting operation systems, and its ability to provide personnel in emergency situations. (*Id.*) Past Performance will evaluate 3-5 references provided for the prime contractor and any proposed major subcontractors. The Personnel factor will evaluate the proposed key personnel and their ability to meet the SOW requirements. (*Id.*)

On August 10, 2015, the CO announced that IT Shows was the apparent awardee. On August 17, 2015, Appellant, a disappointed offeror, filed a size protest challenging IT Shows' size. Appellant alleged that IT Shows has only 3 or 4 employees and that it must rely on its subcontractor, PHI, a large nonprofit organization, to perform the primary and vital contract requirements.

In response to the protest, IT Shows stated that it has more than 14 years of experience including “perform[ing] as a subcontractor on the work in the past.” (Protest Response at 3-4.) IT Shows highlighted that PHI is not the incumbent contractor; that PHI will provide no financing to IT Shows; that IT Shows prepared the proposal; and that IT Shows “does not intend to hire any of PHI's employees and will perform the work with only [IT Shows'] employees it currently has or will be hired from other companies.” (*Id.*)

B. Proposal and Teaming Agreement

IT Shows' proposal identified itself as the prime contractor for the GHSI-III procurement, and PHI as [a] subcontractor. The proposal stated that IT Shows and PHI together have years of experience recruiting, retaining, and transitioning global health personnel. (Proposal, Vol. I, at 1.) The proposal indicated that “the majority of support staff will be hired by IT Shows, while more of technical staff will be hired by PHI.” (*Id.*) However, “either organization will be able to hire any labor category.” (*Id.*)

The proposal stated that IT Shows would utilize [XXXX] to track funding, while also installing a web-based [XXXX] to track all placements. The proposal explained that IT Shows' “accounting system is structured and already set up to track and report expenses by GH program

element and office.” (*Id.* at 20.) [XXXX] will be adapted from [XXXXXXXXXXXXXXXXXXXX] and will allow USAID and contractor management to obtain “easy access on each position and funding status in real time.” (*Id.* at 11-12 and Annex D.) Data from [XXXX] will be “linked directly with [XXXX].” (*Id.* at 20.)

Of the three proposed key personnel, all are or will be employed by IT Shows, the prime contractor. (*Id.* at 23-24.) The Program Director is IT Shows' [employee]; both the Program Manager and the Financial/Budget Specialist will become IT Shows employees upon award, and neither is employed by PHI. (*Id.*; *see also* Annex I, at 62 and 67.) In its cost proposal, IT Shows stated that IT Shows will be responsible for staffing [the majority of] positions, while PHI will staff [XXX]. (Proposal, Vol. II, at 2.) All of PHI's personnel are identified as [XXXXXX], and IT Shows will provide [XXX] of the personnel in this group. (*Id.*; Annex D, at 1.) IT Shows will also provide [XXX] personnel in the [XXXX] category [XXXXXXXXXXXXXXXXXXXX]. (*Id.*) According to a table entitled “Total Cost for GHSI-III”, IT Shows would be responsible for [the majority] of total cost, whereas PHI will be responsible for [XX]%. Later, in response to discussion questions, IT Shows estimated that IT Shows would be responsible for [the majority] of total cost, whereas PHI will be responsible for [XX]%.

IT Shows submitted three past performance references for itself, and two past performance references for PHI. (Proposal, Vol. I, Annex G.) All five references were for procurements in support of USAID. (*Id.*) The largest of IT Shows' three references was for [XXXXXXXXXX]. The proposal stated that, in performing [XXXXXXXXXX], IT Shows “recruited, hired and maintained program operations and administrative staff that provided support to numerous USAID offices.” (*Id.* at 45.)

The record includes a teaming agreement between IT Shows and PHI for the GHSI-III procurement. There, IT Shows and PHI agreed that PHI would be IT Shows' subcontractor and that PHI would “assist in developing a proposal and [] serve as a subcontractor because PHI has relevant experience with human resources support services [XXXXXXXXXXXXXXXXXXXX].” (Teaming Agreement, at 1.) The Teaming Agreement adds that “IT Shows will be responsible for the preparation, content, and submission of the proposal to USAID.” (*Id.* ¶ 1.2.) PHI's responsibility for the proposal will be related to its delegated work. Additionally, the use of the phrase “IT Shows Team” in the proposal “shall not be deemed to create or provide evidence of any relationship between the parties except prime contractor and subcontractor.” (*Id.* ¶ 3.3.) The Teaming Agreement specified that IT Shows and PHI will be independently responsible for costs that may arise during the period before the award of the instant contract. (*Id.* ¶ 4.0.)

In an attachment to the Teaming Agreement, IT Shows and PHI agreed that:

The primary purpose of the solicitation is to recruit, hire a contracted technical, professional, operational, and support staff that will supply support services to USAID's health programs worldwide. IT Shows has selected PHI to recruit, hire and maintain a subgroup of the workforce consisting of domestic technical staff. PHI's seven-year experience and capabilities as [XXXXXXXXXXXXXXXXXXXX] is directly relevant to the discrete set of tasks associated with this labor category and location. The projection based on the

GHSI-II positions transitioning to GHSI-III is that this group will represent approximately [XX]% of the GHSI-III workforce, including encumbered and pending hires. The parties expect to maintain an allocation in this range throughout the contract.

(*Id.*, Exhibit A ¶ 2.a.) The attachment further stated that “[a]t the time of the preparation of this Exhibit A, the reasonable estimate of the parties is that the work assigned to PHI is [XX] percent of the total contract. This figure cannot be fixed in advance for the entire term of the contract because GHSI-III is a staffing vehicle and the specific staffing levels fluctuate depending on the needs of USAID.” (*Id.*)

C. The Size Determination

On January 22, 2016, the Area Office issued Size Determination No. 2-2015-120 finding that IT Shows is a small business for the GHSI-III procurement.

The Area Office determined that IT Shows will manage the contract, provide the three key personnel, and perform a majority of the contract's primary and vital requirements. (Size Determination at 4.) The primary and vital requirements, according to the Area Office, are “to recruit, hire, [and] maintain contracted technical, professional, operational, and support staff that supply support services to USAID's health programs worldwide.” (*Id.*) The Area Office found that the Teaming Agreement between IT Shows and PHI is typical of a prime/subcontractor relationship, and makes clear that IT Shows will manage the contract. (*Id.*)

The Area Office rejected Appellant's claim that IT Shows lacks sufficient experience to perform the GHSI-III contract. The Area Office determined that IT Shows has past experience “related to the requirements of the instant procurement”, as well as experience “performing work for the USAID.” (*Id.* at 5.)

Based on these findings, the Area Office concluded that IT Shows will perform the contract's primary and vital requirements and will not be unduly reliant upon PHI to perform the contract. (*Id.*) IT Shows has no affiliates and its receipts do not exceed the \$15 million size standard. (*Id.* at 6.) Therefore, IT Shows is a small business for the GHSI-III procurement.

D. Appeal and Supplemental Appeal

On February 12, 2016, Appellant filed the instant appeal. Appellant disputes the Area Office's findings that IT Shows will perform the contract's primary and vital requirements and that IT Shows is not unusually reliant upon PHI.

Appellant complains that the Area Office should have found that “the Solicitation's 'primary and vital' work is to provide professional technical personnel with public health expertise.” (Appeal at 8, emphasis in original.) Support personnel, such as administrative assistants, are ancillary to the primary and vital public health professionals and experts. Appellant cites to *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466 (2013) in arguing that a requirement is not necessarily “primary and vital” merely because that requirement is a

substantial part of the solicitation. Appellant further points to the NAICS code selected by the CO, which focuses on professional, scientific and technical personnel, instead of administrative support. (*Id.* at 9.) In Appellant's view, “[t]he Area Office's finding that the primary and vital requirements include recruiting, hiring, and maintaining of support staff is clearly erroneous.” (*Id.* at 11.)

Appellant alleges that the Area Office ignored the record when it failed to conclude that PHI is primarily responsible for providing the public health personnel. According to Appellant, IT Shows has no experience in recruiting, hiring, and maintaining public health experts and professionals, and certainly not on the scale required by the GHSI-III contract. (*Id.*) IT Shows' past experience did not involve this type of work, instead it focused on “hiring non-exempt, non-technical staff such as administrative assistants.” (*Id.*, emphasis in original.) Appellant suggests that a review of IT Shows' proposal will confirm that IT Shows lacks experience with a workforce of public health experts and professionals, the major requirement in this procurement. PHI, on the other hand, does have experience in recruiting, hiring and maintaining a staff of public health professionals and experts. (*Id.* at 12.) “Because the record shows that PHI has experience in the primary and vital requirements and IT Shows does not, it is clear that PHI will perform the primary and vital requirements.” (*Id.*)

Appellant contends that the Area Office erred in concluding that IT Shows' employment of the three key personnel indicates that IT Shows will perform the contract's primary and vital requirements. The fact that the three key personnel will be employed by IT Shows is immaterial “given that IT Shows is providing none or virtually none of the primary and vital public health experts and professionals.” (*Id.*) Appellant highlights that a prime contractor cannot comply with the ostensible subcontractor rule merely overseeing its subcontractor while the subcontractor performs the primary and vital requirements. (*Id.* at 12-13; citing *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5369 (2012), *recons. denied*, SBA No. SIZ- 5392 (2012) (PFR).) In Appellant's view, “IT Shows cannot be said to perform the primary and vital requirements if it will not provide the technical and professional staff simply because it will purportedly manage the contract and perform the majority of the overall work.” (*Id.* at 13.)

Next, Appellant observes that the Area Office failed to cite any specific evidence to support the conclusion that IT Shows has the necessary experience to perform the RFP's requirements. Any reliance by the Area Office on IT Shows' work on the predecessor [XXXXXX] contracts is misplaced as those contracts did not pertain to the primary and vital requirements of GHSI-III. Appellant asserts that IT Shows' past experience is “limited to administrative support staff and did not include any public health professionals and experts.” (*Id.* at 14.)

Appellant maintains that IT Shows will also likely rely on PHI's accounting systems. Appellant comes to this conclusion based on USAID's debriefing stating that it preferred an accounting tool that is not Excel-based. (*Id.* at 15.) Appellant assumes that this accounting tool was developed by PHI, based on PHI's use of such a system [XXXXXX]. Appellant adds that, of late, PHI is searching for a financial analyst to operate PHI's in-house financial module. According to Appellant, this accounting tool relates to the RFP's requirement that the contractor track, analyze, and forecast the funding and expense necessary to maintain the staff. (*Id.* at 15-

16.) Therefore, without PHI, IT Shows would not have the necessary resources to perform the contract. (*Id.* at 16.)

On March 18, 2016, after reviewing the record under an OHA protective order, Appellant filed a supplement to its appeal. Appellant renews its argument that the primary and vital requirements do not include the recruiting, hiring, and maintaining of administrative support staff because the RFP repeatedly emphasizes that the procurement is in support of USAID's "health programs." (Supplemental Appeal, at 3.) The staffing and maintaining of administrative support positions therefore is ancillary to the primary and vital requirements.

Appellant contends that IT Shows' SBA Form 355 contained inaccurate statements that were overlooked or disregarded by the Area Office. Appellant claims that IT Shows stated on its Form 355 that there was no proposed subcontract between IT Shows and PHI, and that PHI did not assist in preparing the proposal. The existence of the Teaming Agreement between IT Shows and PHI contradicts the first claim, and the Teaming Agreement itself states that PHI will assist in preparing the proposal. (*Id.* at 5.) The SBA Form 355 further stated that PHI will be responsible for no more than [XX]% of the contract, yet the proposed subcontract indicates that PHI will provide a minimum of [XX]% of the personnel and incur [XX]% of total costs, while also receiving up to [XX]% of the total revenue. (*Id.*) Appellant observes that the Teaming Agreement stated that PHI will recruit, hire and maintain the domestic technical staff required by the contract, which, Appellant asserts, "constitute the vast majority of the primary and vital requirements" for GHSI-III. (*Id.*)

Next, Appellant argues that IT Shows' proposal reveals that PHI will be in charge of the recruiting, hiring, and maintaining of technical, professional, and operations staff, with IT Shows responsible for the administrative support staff. (*Id.* at 7; citing Proposal, Vol. I, at 1.) IT Shows' claim that PHI will employ about [XX]% of the workforce is misleading because it is based on a headcount of the number of personnel without regard to the complexity of the work, and because the proposal does not distinguish between future hires and incumbent personnel. This inconsistency, according to Appellant, "results in a misleading estimate of the estimated cost that PHI will incur." (*Id.* at 8.) PHI will be responsible for [the majority] of the highly-experienced and highly-paid incumbent positions — [XXXXXXXXXXXX] — therefore demonstrating IT Shows will be unduly reliant upon PHI for performance of the contract. In addition, Appellant contends that the Teaming Agreement states that PHI would employ the domestic technical staff, whether an incumbent or pending position. However, the proposal states that IT Shows will employ [XXXXXXXX], and thus "IT Shows' representations that it will be able to employ all of the highly skilled technical employees in [XXXXXXXX] category is contradicted by its other statements", as newly-hired positions will not have access to PHI's capabilities as incumbent personnel will. (*Id.* at 10.)

Appellant cites to *Size Appeal of Greenleaf Construction Company*, SBA No. SIZ-4663 (2004) in arguing that when the Area Office performs a limited review of the record and evidence available to it, OHA will grant the appeal and remand the matter to the Area Office in order to perform a more thorough analysis. (*Id.* at 10-11.) Appellant maintains that the same should occur here because the Area Office erroneously found that IT Shows will perform the majority of the recruitment, hiring, and maintenance of the professional, operational, and

technical workforce. Inconsistency between IT Shows' proposal and the Teaming Agreement demonstrates the Area Office's lack of thorough analysis. This includes IT Shows' claim that it will employ all of the non-technical support staff, yet the proposal indicates that PHI will employ some of this same staff. (*Id.* at 11.)

Next, Appellant argues that the Area Office erred in regards to IT Shows' past experience. The Area Office's conclusion that IT Shows had relevant past experience is incorrect as IT Shows "had no experience of similar size, scope, and complexity (the test of relevancy) and that the only relevant experience of similar scale to this procurement was provided by PHI." (*Id.* at 12.) IT Shows' proposal relied on PHI's experience in staffing public health professionals, as IT Shows' own experience is confined to administrative and program support staff. Additionally, the past experience submitted by IT Shows was for contracts of a much smaller scale, while PHI's past performance involved a contract of similar magnitude as found here. (*Id.* at 13.) IT Shows' proposal also fails to detail what tasks it completed in supporting the predecessor GHSI-II contract, and there is no information that IT Shows' role pertained to work similar to the primary and vital requirements of GHSI-III.

According to Appellant, a review of IT Shows' financial statement for 2013 suggests that IT Shows finds itself in a perilous financial situation, thereby lending credence to the notion that PHI will provide financing assistance, despite the Area Office's determination to the contrary. (*Id.* at 15.) Appellant estimates that, [XXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX]. (*Id.* at 16.) IT Shows' proposal reflects that large costs will be incurred in the contract's first year, an amount far exceeding these modest projected reserves. Appellant posits that "IT Shows must find some way to finance the project other than through its own reserves" and "[t]he simplest way for IT Shows to avoid exhausting its cash reserves is to rely on PHI." (*Id.*)

The Area Office further failed to consider IT Shows' possible reliance on PHI's accounting system technology. The proposal states that IT Shows will utilize [XXXX], which IT Shows admits has been either adopted or adapted from [XXXXXXXXXXXX]. Appellant argues that [XXXX] was developed by PHI, and IT Shows relies on this system in order to perform the primary and vital contract requirements. (*Id.* 17-18.) Because the RFP requires the contractor to have an existing system for financial reporting, including keeping track of funding and expenses, the record indicates that IT Shows is unduly reliant on PHI to accomplish these tasks. Lastly, the fact that IT Shows is providing the key personnel is irrelevant here as almost none of the public health professionals will be provided by IT Shows. Managing the contract does not equate to performing the primary and vital requirements, so the Area Office erred in finding no violation of the ostensible subcontractor rule. (*Id.* at 19.)

E. IT Shows' Response and Supplemental Response

On March 18, 2016, IT Shows responded to the appeal. IT Shows maintains that its cost and technical proposals make clear that IT Shows will perform the majority of the contract's primary and vital requirements. IT Shows states that GHSI-III "is not intended to provide direct health service delivery, but instead to provide the administration and personnel necessary to act under the direction of the USAID offices." (Response, at 3.) IT Shows observes that the Area

Office, after reviewing the Teaming Agreement between IT Shows and PHI, determined that they have a typical prime-subcontractor relationship.

IT Shows contends that, contrary to premise of the appeal, the GHSI-III contract requires support services, not professional services. IT Shows' cost proposal indicates that IT Shows will provide a majority of the existing personnel as well as [XXXXXXXXXX]. (*Id.* at 6.) IT Shows adds that it will manage the contract, and provide the key personnel, who are not PHI employees. Regarding its past experience, IT Shows notes that it has “recruited, hired, and maintained program and administrative staff” in support of USAID. (*Id.* at 7.) “[IT Shows] brings far more to the table than its small size. It brings significant experience and comparable past performance.” (*Id.* at 6.)

Lastly, IT Shows disputes Appellant's claim that IT Shows must rely on PHI's systems and resources in order to perform the contract. IT Shows states that it will utilize its own [XXXX] financial system in performing the contract, while ensuring that its accounting and financial software is DCAA compliant. (*Id.* at 7-8.) Additionally, IT Shows will [XXXXXXXXXX]. The [XXXXXXXXXX] is not proprietary to PHI, and will be owned and operated by IT Shows; no system proprietary to PHI will be utilized by IT Shows in performance of the contract. (*Id.* at 8.)

On March 31, 2016, IT Shows requested leave to supplement its response, in order to address new issues raised in the supplemental appeal. For good cause shown, IT Shows' request is GRANTED. 13 C.F.R. § 134.207(b); *Size Appeal of NMC/Wollard, Inc.*, SBA No. SIZ-5668, at 12 (2015) (admitting response to appeal supplement).

IT Shows again disputes Appellant's claim that the primary and vital requirements are to provide professional health experts, stating that the RFP requires staffing services, and as the Teaming Agreement stipulates, PHI will supply “a subgroup of the workforce consisting of domestic technical staff.” (Supplemental Response at 3 (emphasis in original).)

With regard to Appellant's contention that IT Shows made inaccurate statements in its SBA Form 355, IT Shows states that it did not have a proposed subcontract with PHI, and its Teaming Agreement is different than a proposed subcontract. Further, the SBA Form 355 correctly stated that PHI did not assist in preparing the proposal, as PHI merely provided input into the proposal, per the Teaming Agreement. (*Id.* at 4.)

According to IT Shows, Appellant's claims that PHI will receive up to [XX]% of the revenues, perform [XX]% of the contracted work, and incur [XX]% of the total costs are inaccurate. IT Shows maintains that Appellant misconstrued the proposed subcontracting figures. (*Id.* at 5.) Although the Teaming Agreement originally estimated that PHI would perform approximately [XX]% of the work in dollar value, IT Shows' cost proposal projected that PHI's portion of labor will be approximately [XX]%, and in any event would not exceed [XX]% of the dollar amount received by IT Shows. The different percentages are the result of possible fluctuations in staffing over the term of the contract. (*Id.*) IT Shows adds that these percentages are within the range of “Limitations on Subcontracting” requirements.

Next, IT Shows contends that its proposal accounts for fluctuation regarding any additional positions which may need to be staffed, and the Teaming Agreement caps PHI's percentages, even accounting for the fluctuations. IT Shows' proposal further states that PHI will be in charge of staffing [XX] positions, while IT Shows will staff [the majority]. (*Id.* at 6-7 citing Proposal, Vol. I, Annex M.) Therefore, IT Shows will supply approximately [the majority]% of the initial proposed labor, with PHI responsible for [XX]%. IT Shows' past performance, contrary to Appellant's claims, establishes that it has past experience in providing administrative and program staffing to various offices within USAID. IT Shows concludes that this past experience unequivocally confirms its capacity to provide the RFP's requirements. (*Id.* at 7.)

Lastly, IT Shows argues that its financial capability is a matter of responsibility for the CO to decide, and OHA lacks jurisdiction to review this issue. (*Id.* at 8, citing *Size Appeal of Spiral Technologies, Inc.*, SBA No. SIZ-5279 (2011).) IT Shows insists that it has the monetary capability, and access to the necessary credit, to perform this contract. (*Id.* at 8.) Further, the Teaming Agreement and the proposal indicate that IT Shows is not relying on PHI for financing of the instant contract.

F. Appellant's Reply to IT Shows' Response

On April 8, 2016, Appellant moved to reply to IT Shows' supplemental response. Appellant maintains that IT Shows “fails to refute, and in several instances declines to address, [Appellant's] points in [the] Supplemental Appeal.” (Reply at 1.) IT Shows opposes the motion, but in the event that OHA nevertheless grants Appellant's motion, IT Shows requests leave to sur-reply. (IT Shows Opp. at 1-2.)

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, was filed after the close of record, and expounds upon arguments raised in the appeal and supplemental appeal. Accordingly, Appellant's motion is DENIED, and the reply is excluded from the record. *E.g.*, *Size Appeal of Modus Operandi, Inc.* SBA No. SIZ-5716, at 10 (2016).

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 “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).

B. Analysis

Appellant's principal argument here is that the Area Office incorrectly determined that IT Shows will perform the “primary and vital” aspects of the procurement. Appellant does not dispute the Area Office's findings that IT Shows will manage the GHSI-III contract, and that IT Shows will perform a majority of contract measured both in dollar value and in quantity of personnel. Appellant highlights, however, that IT Shows' proposal and the Teaming Agreement between IT Shows and PHI make clear that PHI will supply the large majority of the highly-experienced and highly-paid incumbent positions — *i.e.*, those identified in the proposal as [XXXXXXXXXXXX]. Appellant reasons that only the tasks performed by the [XXXXXXXXXX] personnel should be considered primary and vital, so IT Shows is dependent upon PHI to perform the contract.

OHA has explained that “the primary and vital requirements are those associated with the principal purpose of the acquisition.” *Size Appeal of Onopa Mgm't Corp.*, SBA No. SIZ-5302, at 17 (2011). As a result, “identifying the primary and vital requirements of a contract requires a comprehensive assessment of the entire solicitation in order to ascertain the principal purpose.” *Size Appeal of Santa Fe Protective Services, Inc.*, SBA No. SIZ-5312, at 10 (2012). Frequently, the primary and vital requirements are those which account for the bulk of the effort, or of the contract dollar value. It is, however, also appropriate to consider qualitative factors, such as the relative complexity and importance of requirements. OHA has, in some instances, found that a prime contractor will not perform the primary and vital requirements even though the prime would perform the majority of the total contract. *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192 (2011); *Size Appeal of A1 Procurement, LLC*, SBA No. SIZ-5121 (2010). OHA has reached such decisions after concluding, based upon a close review of the solicitation and the proposal, that the subcontractor would perform the crucial tasks at the heart of the procurement. In *Alutiiq*, for example, OHA found that “[t]he contract requires the operation of a job corps center”, and that the subcontractor would provide the “academic and career training”, leaving the prime contractor to perform “many ancillary tasks, such as maintaining a safe setting and providing health care”. *Alutiiq*, SBA No. SIZ-5192, at 12. Although the jobs corps center represented less than 25% of total contract value, OHA found that these tasks were the “primary and vital” portion of the contract based on their preeminent position in the solicitation, including the evaluation criteria. *Id.* at 12-13. In addition, “the fact

that [the prime contractor's] technical proposal dedicates 69 of 97 pages to describing the career development period and career preparation period in detail supports the notion that these are the most important contract tasks.” *Id.* at 12.

Appellant here has not pointed to circumstances similar to *Alutiiq* demonstrating that only the tasks performed by the more senior [XXXXXXXXXX] personnel should be considered primary and vital. The RFP stated that the GHSI-III contractor will perform “support services to USAID's health programs worldwide” and provide a “mix” of personnel comprised of different skill sets and levels of experience. Section II.A, *supra* (emphasis in original). Notably, all contractor personnel are barred from performing inherently governmental functions, that therefore are necessarily in a supporting role to USAID decision-makers. *Id.* The RFP's evaluation criteria did not attach particular weight to more senior or more technical personnel proposed for the project. Likewise, the Teaming Agreement between IT Shows and PHI characterized the [XXXXXXXXXX] personnel as merely a “subgroup” of the total workforce that the contractor would provide. Section II.B, *supra*. Accordingly, while the more senior [XXXXXXXXXXXXXX] staff are a significant part of the “mix” of personnel to be provided, Appellant has not established that such personnel constitute the “primary and vital” aspects of the procurement. As a result, it was not improper for IT Shows to delegate these functions to a subcontractor. *E.g.*, *Size Appeal of BCS, Inc.*, SBA No. SIZ-5654, at 13 (2015) (finding no violation of the ostensible subcontractor rule because the engineering services subcontracted, although “important”, were “only a part of the overall planning, analysis and evaluation services” to be provided by the contractor); *Size Appeal of J.W. Mills Mgm't, LLC*, SBA No. SIZ-5416, at 8 (2012) (“it is permissible for a small business prime contractor to subcontract discrete tasks to a large business without violating the ostensible subcontractor rule.”); *Size Appeal of iGov Technologies, Inc.*, SBA No. SIZ-5359, at 13-14 (2012); *Size Appeal of CymSTAR Services, LLC*, SBA No. SIZ-5329, at 13-14 (2012).

The conclusion that PHI will not perform the primary and vital contract requirements also disposes of two of Appellant's other arguments. Appellant contends that a small business prime contractor cannot comply with the ostensible subcontractor rule merely by supervising subcontractors in their performance of work. *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466 (2013); *Size Appeal of Competitive Innovations LLC*, SBA No. SIZ-5369 (2012), *recons. denied*, SBA No. SIZ- 5392 (2012) (PFR). Although Appellant correctly summarizes the law, such cases are inapposite here because PHI will not perform the primary and vital requirements. Rather, IT Shows will perform a large majority of the GHSI-III contract, and therefore is performing the primary and vital requirements. Similarly, Appellant maintains that IT Shows lacks experience relevant to the primary and vital requirements because IT Shows' past experience is “limited to administrative support staff and did not include any public health professionals and experts”. Section II.D, *supra*. Again, then, Appellant's argument is premised on the notion that only the public health professionals and experts are associated with the primary and vital requirements. If the primary and vital requirements are defined more broadly to include the supplying of all manner of support staff, IT Shows does have relevant past performance, as the Area Office determined. *BCS*, SBA No. SIZ-5654, at 14 (prime contractor's lack of engineering experience was immaterial, because engineering was not the primary purpose of the contract).

Appellant also argues that the Area Office should have questioned the accuracy of IT Shows' claims in its SBA Form 355 that IT Shows had no actual or proposed subcontracts with PHI; that PHI did not assist in preparing the proposal; that PHI would not perform more than [XX]% of the contract; that IT Shows and PHI did not engage in discussions relating to specific terms or conditions; and that PHI would not be financially impacted if the GHSI-III contract were terminated for default. IT Shows counters that IT and PHI merely prepared draft subcontract language; that PHI provided input into the proposal but did not assist in drafting it; and that the [XX]% estimate was accurate at the time based on IT Shows' proposal. I agree with IT Shows that these representations were not clearly false or misleading. The claim that PHI would perform less than [XX]% of the contract is inconsistent with statements in the Teaming Agreement that PHI would provide [XX]% of the staff and incur [XX]% of the costs. Section II.B, *supra*. Nevertheless, the Teaming Agreement also made clear that these numbers were intended as a "reasonable estimate" at that time, and that a precise distribution could not be determined "because GHSI-III is a staffing vehicle and the specific staffing levels fluctuate depending on the needs of USAID." *Id.* Moreover, the proposal stated that PHI would provide [XX] out of a total of [XX] staff, or approximately [XX]%. *Id.* Accordingly, there is no evidence in the record that clearly contradicts the representations on IT Shows' SBA 355. Further, OHA has held that, in assessing compliance with the ostensible subcontractor rule, "[a]n area office must give 'great if not controlling weight' to statements in the proposal and other contemporaneous documentation, as opposed to any subsequent representations." *Size Appeal of Iron Sword Enterprises, LLC*, SBA No. SIZ-5503, at 7 (2013) (quoting *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071, at 20 (2009)). Thus, even assuming there were minor inaccuracies in IT Shows' SBA Form 355, it is not clear that this would have materially affected the Area Office's analysis, given that the Area Office still would have been required to base its decision on primarily on the solicitation, proposal, and Teaming Agreement.

Lastly, I find no merit to Appellant's arguments concerning IT Shows' financial resources and accounting systems. Appellant alleges that IT Shows may be dependent on PHI for financial assistance because IT Shows is purportedly in a weak financial position. This argument, though, amounts to mere speculation as it is based on Appellant's extrapolations from IT Shows' 2013 financial statement. Section II.D, *supra*. Lacking any more recent data or reliable corroborating information, Appellant cannot meet its burden of proving error in the size determination. *Size Appeal of GiaCare and MedTrust JV, LLC*, SBA No. SIZ-5690, at 13 (2015). Appellant's contention that IT Shows must rely upon PHI's accounting system is equally unpersuasive. While it is true that the RFP did require the contractor to have the capability of tracking, analyzing, and forecasting funding and expenses, IT Shows' proposal made clear that it would use its own [XXXXXXX] accounting system to meet these requirements. Section II.B, *supra*. IT Shows also proposed a separate [XXXX] to track placements, but Appellant has not demonstrated that such a system was required by the RFP, and if so, that IT Shows would be dependent upon PHI to obtain or operate such a system.

IV. Conclusion

Appellant has not proven 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