Cite as: *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017)

United States Small Business Administration
Office of Hearings and Appeals

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF: Charitar Realty, Appellant, Appealed From Size Determination No. 06-2016-091	SBA No. SIZ-5806 Decided: January 25, 2017

APPEARANCES

Pamela J. Mazza, Esq., Megan C. Connor, Esq., Ambika J. Biggs, Esq., PilieroMazza PLLC, Washington, D.C., for Appellant

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DECISION[1]

I. Introduction and Jurisdiction

On October 19, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2016-091 finding that Charitar Realty (Appellant) is not a small business under the size standard associated with Request for Proposals (RFP) No. GS-09-P-16-KS-D-7011. The Area Office determined that Appellant's relationship with its subcontractor, Zero Waste Solutions, Inc. (ZWS), violated the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4). As a result, Appellant and ZWS are affiliated. Appellant maintains that the size determination contains clear errors of fact and law. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

[1] This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. 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.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Procedural History

On May 27, 2016, the U.S. General Services Administration (GSA) issued RFP No. GS-09-P-16-KS-D-7011 for custodial, landscaping, and grounds maintenance services at two courthouses in California. The Contracting Officer (CO) set aside the procurement entirely for participants in SBA's 8(a) Business Development (BD) Program, and assigned North American Industry Classification System (NAICS) code 561720, Janitorial Services, with a corresponding size standard of $18 million[2] average annual receipts. Proposals were due June 6, 2016. (RFP, Amendment 4.)

On July 24, 2016, the CO informed Melgar Janitorial Solutions (MJS), a disappointed offeror, that Appellant was the apparent awardee. On August 5, 2016, MJS filed a size protest against Appellant with the CO. MJS alleged that Appellant is not eligible for the subject contract because Appellant would be unusually reliant on its subcontractor. The CO forwarded the protest to the Area Office for review.

On September 23, 2016, the Area Office dismissed MJS's protest as untimely. However, after determining that MJS's protest raised valid concerns, the Director of SBA's Fresno District Office initiated his own size protest against Appellant pursuant to 13 C.F.R. § 121.1001(a)(2)(iii).

B. RFP

The RFP contemplated the award of a single performance-based contract for custodial, landscaping, and grounds maintenance services at the Robert E. Coyle U.S. Courthouse in Fresno, California, and the Bakersfield U.S. Courthouse in Bakersfield, California. (RFP § C.2.) The contract would have a base period of one year and four one-year options. The estimated total value of the contract is $4 million. (*Id.* § A.2.3.) ZWS is the incumbent contractor at the Fresno location. (*Id.* § A.2.2.)

The RFP required that supervisory employees have a minimum of three years "of experience with managing and related services in building(s) of similar size and complexity." (*Id.* § H.1.8.) The contractor was required to provide resumes of supervisors 15 days prior to beginning work on the contract. Failure to do so could result in contract termination. (*Id.*)

[2] The RFP incorrectly identified the size standard as $16.5 million. The Area Office noted this mistake and applied the correct $18 million size standard. (Size Determination at 1 n.1, citing 13 C.F.R. § 121.402(e).)

The RFP stated that GSA would award the contract "to the offeror whose offer conforming to the solicitation [is] most advantageous to the Government, price and other factors considered." (*Id.* § M, at 91.) There were four evaluation factors: Experience; Past Performance; Organization and Staffing; and Price. The non-Price factors collectively were approximately equal to Price. (*Id.*) The RFP stated that the Experience and Past Performance factors would be evaluated in light of the "Similar Work" that the offeror had performed. The RFP defined "Similar Work" as "[j]anitorial, grounds maintenance and related services detailed in the [RFP] for a contract involving a minimum of 300,000 gross interior square feet, and 50,000 exterior square feet." (*Id.*)

The RFP stated that the Experience factor "is met when an offeror demonstrates experience on at least three (3) projects that meets the 'Similar Work' definition within the past five (5) years." (*Id.*) The RFP cautioned that "[i]f the Offeror does not meet the standard of this evaluation factor, the Offeror will be eliminated from further consideration." (*Id.*) An offeror could receive a better evaluation by demonstrating experience in Similar Work at U.S. government buildings.

For the Past Performance factor, the RFP stated:

> This factor considers the Offeror's past performance on three (3) projects within the past five (5) years in carrying out Similar Work. The Government reserves the right to check the past performance on any project submitted by the offeror, as well as information it obtains on its own. The Government may also contact an offeror's former customers and business associates; Federal, state, and local government agencies; electronic data bases; and other sources of information. The Government will contact no more than 3 references. Offerors without any past performance on Similar Work or have references that cannot be contacted will be given a neutral score.
>
> The Government will review an offeror[']s past performance by considering how well the offeror complied with the terms of its contracts, including quality of work, timeliness of delivery, cooperation/business relations and overall customer satisfaction. Offerors are advised that they should confirm the accuracy of the contact information of the references submitted for support.

(*Id.* at 91-92.) According to the RFP, the standard for this evaluation factor "is met when the Offeror submits three (3), and no more than three projects within the past three (3) years involving Similar Work and the past performance was rated satisfactory or better." (*Id.* at 92.) An offeror could receive a more favorable rating if it "received a rating greater than satisfactory for overall past performance, demonstrates a substantial level of confidence, or a high expectation that the offeror will successfully perform the required effort." (*Id.*)

The Organization and Staffing factor "considers [the] offeror's corporate or individual company support." (*Id.*) The RFP defined this support as "the relationships, responsibilities and lines of authority between the company headquarters and local offices (physical office of

consideration), as well as the support (e.g. payroll, accounting, legal labor relations, etc.) that the company headquarters will provide to the local office organization(s)." (*Id.*) This factor also assessed "the offeror's organizational structure and resources to adequately perform all requirements of the solicitation" and "the adequacy of the organizational relationships, functional areas of responsibility, span of control and staffing for performance of the work." (*Id.*) According to the RFP, the Organization and Staffing factor "is met when the offeror submits a satisfactory company organizational chart, or narrative, which indicates an understanding of the relationships, responsibilities and lines of authority between the company management and the offices they support," and "identifies and defines how management and control will be provided to the local or onsite offices." (*Id.*) Further, "[t]he chart or narrative must indicate that proposed resources will be sufficient to carry out all the responsibilities under the contract." (*Id.*) An offeror could receive a more favorable rating under this factor if it has an office in the Bakersfield or Fresno service areas. (*Id.*)

C. Appellant's Proposal

Appellant's proposal identified itself as the prime contractor and ZWS as Appellant's principal subcontractor. (Tech. Proposal at 3.) The proposal represented that "[t]he allocation of financial risk, responsibility, and profit sharing will be 51% [Appellant] and 49% [ZWS]." (*Id.*) Throughout the proposal, Appellant referred to itself and ZWS as the "Charitar Team".

In describing how it will meet the Experience factor, Appellant explained that ZWS, a graduate of the 8(a) BD Program, and Appellant are currently working on "custodial/janitorial and similar types of contracts with the federal government", so Appellant and ZWS have "a successful long-term relationship" that has enabled Appellant "to gain experience in the custodial services market." (*Id.* at 4.) Appellant is ZWS's subcontractor on two contracts for custodial services: [xxxx]. (*Id.*) Appellant has also performed three custodial contracts independently: [xxxx]. (*Id.* at 4-5.) The proposal did not describe the size of the areas serviced under these contracts. As for ZWS's experience, ZWS "maintains over [xxxx] square feet on a daily basis." (*Id.* at 5.) ZWS currently performs custodial and housekeeping services at 52 locations nationwide and has accounts with ten federal clients. (*Id.* at 5-7.)

For Past Performance, Appellant provided three references, two of which were for contracts ZWS performed: [xxxx]. The third Past Performance reference was the [xxxx] contract that Appellant performed and referred to in response to the Experience factor. (*Id.* at 8-10.)

On Organization and Staffing, Appellant submitted an organization chart for its corporate support team and a chart for its on-site organization team, explaining the duties attributable to each group. The chart for its corporate support team is:

[xxxx]

(*Id.* at 14.) Appellant explained that the corporate support team would provide support with purchasing, human resources, labor relations, benefits, accounting, safety, quality assurance, payroll, and contracts management. (*Id.*)

The chart for its on-site organization team is:

[xxxx]

(*Id.* at 15.) Appellant explained that the on-site organization team provides on-site decision making authority, span of control designed for effective coordination and direction by supervisors of all levels, minimal layers of supervision, short and clear lines of authority and responsibility, established supervision and responsibility by work areas, staffing authority commensurate with responsibility at each level, and efficient interfaces with management personnel. (*Id.* at 15-16.)

Appellant described the Project Manager, Ms. Rodriguez, as "[xxxx]." (*Id.* at 16.) Appellant submitted Ms. Rodriguez's resume, which indicated that [xxxx]. When ZWS was awarded the predecessor contract in 2011, ZWS became her employer. The record contains a letter of intent from Ms. Rodriguez, stating that, if Appellant is awarded the instant contract, she agrees to be employed by Appellant. The record does not contain a resume for any other proposed personnel.

Appellant did not identify a specific person for Lead Janitor, but described the role as "[xxxx]." (*Id.*) Appellant continued, "[xxxx]." (*Id.*, emphasis in original.)

As for staffing, Appellant proposed to "[xxxx]," stating that it was "[xxxx]." (*Id.* at 17.) Accordingly, Appellant intended "[xxxx]." (*Id.*) Appellant proposed to [xxxx]. (*Id.* at 20.)

In addition, Appellant provided the following chart for its proposed staffing at the courthouses:

[xxxx]

(*Id.* at 18.)

D. Subcontract Agreement

On August 15, 2016, Appellant and ZWS executed a subcontract agreement for the subject procurement. According to this agreement, Appellant "shall provide 51% of the costs of the [contract] incurred for personnel with its own employees," and ZWS "shall provide 49% of the costs of the [contract] incurred for personnel with its own employees". (Subcontract Agreement at § 1.1.) Attached to the subcontract agreement is a document entitled "Subcontractor Scope of Work", which reiterates the cost breakdown and stipulates that ZWS's services shall take place at the Robert E. Coyle Courthouse in Fresno. (*Id.*, Attachment A.) It establishes further that ZWS "shall employ and manage" one day janitor, one night lead, and four night janitors. (*Id.*) At the Fresno courthouse, ZWS will perform pest management, grounds maintenance, refuse and recycling, laundry services, and will "provide all telecommunications needs". (*Id.*) In addition, ZWS will provide equipment and quality control inspections at both the Fresno and Bakersfield courthouses. (*Id.*)

E. Size Investigation

On September 27, 2016, the Area Office notified Appellant of the District Director's protest. The Area Office stated:

> According to [Appellant's] proposal the allocation of financial, risk, responsibility, and profit sharing will be 51% for [Appellant] and [49%] for ZWS. We note that ZWS is the incumbent on this contract and this entity will be the major subcontractor. Based on this information provided, it appears that [Appellant] may be affiliated with ZWS based on ostensible subcontracting.

(Letter from J. Nietes to R. Charitar (Sept. 27, 2016), at 1.) The Area Office then requested a number of documents so that it could perform a size review of Appellant. (*Id.* at 2.)

F. Size Determination

On October 19, 2016, the Area Office issued Size Determination No. 06-2016-091 finding that Appellant is affiliated with ZWS under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Because ZWS is a large business, Appellant is ineligible for the subject contract.

The Area Office found Appellant is unusually reliant on ZWS for each of the evaluation factors in the RFP. As for the first factor, Experience, Appellant is unduly reliant because it "alone does not appear to possess the necessary experience" of having "at least three (3) projects that meet the "Similar Work' definition within the past five (5) years." (Size Determination at 7.) The Area Office investigated Appellant's representation in the proposal that Appellant is ZWS's subcontractor on ZWS's contracts with [xxxx]. The Area Office explained that when it requested copies of these subcontracts, Appellant stated that there were no such subcontracts [xxxx]. (*Id.*) The proposal listed more than 50 contracts performed by ZWS, many for federal agencies and state government entities. In addition, ZWS is the incumbent on the predecessor contract with GSA, maintains over [xxxx] square feet on a daily basis, and has many accounts with federal clients. The Area Office therefore inferred that it was ZWS's experience that caused GSA to determine that Appellant met the minimum Experience requirement. (*Id.*)

In finding that Appellant is unduly reliant on ZWS for Past Performance, the Area Office noted that two of the three references are for relatively large contracts with federal agencies, and were performed by ZWS. By contrast, the one reference performed by Appellant is much smaller in scope and value. The Area Office noted further that, according to Appellant's SBA Form 355, only [xx]% of Appellant's revenues are from janitorial/property management services, and Appellant's financial statements show that Appellant has "minimal experience" providing such services. (*Id.* at 8.) Accordingly, the Area Office reasoned, "it is evident that GSA considered ZWS'[s] past performance record to meet this second factor." (*Id.*)

Turning to Organization and Staffing, the Area Office summarized the charts in Appellant's proposal and observed that Ms. Rodriguez, the proposed Project Manager, is either currently or recently a ZWS employee, and that she will become Appellant's employee should

Appellant win the contract. Appellant did not give the identity of its proposed lead janitor, so the Area Office inferred that this individual is currently a ZWS employee. (*Id.* at 9.)

The Area Office explained that because Appellant's proposal did not separate its own employees from ZWS's, instead referring to itself and ZWS together as a team, the Area Office requested a breakdown of full-time equivalents (FTEs) by company. Appellant responded that it will provide the Project Manager, [xxxx]. (*Id.* at 10.) During the size investigation, Appellant divulged that all [xxxx] of these individuals are current or former ZWS employees. (*Id.*) ZWS, on the other hand, will provide [xxxx] individuals who will work six-hour days and [xxxx] who is on call.[3] Because Appellant's entire workforce would be hired from ZWS, the Area Office concluded that "it is clear that [Appellant] will hire its employees from ZWS *en masse*." (*Id.*)

The Area Office also noted that Appellant's proposal [xxxx]. The Area Office speculated based on this document that "ZWS is performing all of the work." (*Id.* at 11.)

On these facts, the Area Office determined that Appellant is in violation of the ostensible subcontractor rule, commenting that Appellant's "proposal blurs its identity with ZWS." (*Id.* at 12.) The "overbroad use of 'we' and 'our' in its proposal . . . is indicative of a joint venture," the Area Office asserted. (*Id.* at 12, citing *Size Appeal of Smart Data Solutions, LLC T/A SDSE, LLC*, SBA No. SIZ-5071 (2009).)

Further, the instant case is factually similar to *Size Appeal of Wichita Tribal Enterprises, LLC*, SBA No. SIZ-5390 (2012) and *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011). In those cases, the incumbent contractor was ineligible to submit a proposal on the subject procurement, and the challenged firm lacked relevant experience and proposed to hire the incumbent's personnel *en masse*. As in those cases, it is unclear whether Appellant brings anything to the instant procurement beyond its status as an 8(a) concern. Because Appellant is unduly reliant on ZWS for employees and experience, the firms are affiliated based on the ostensible subcontractor rule. (*Id.* at 12-14.)

The Area Office found that Appellant's receipts, when aggregated with those of ZWS, exceed the $18 million size standard. As a result, Appellant is not an eligible small business for the instant procurement. (*Id.* at 14.)

G. The Appeal

On November 3, 2016, Appellant filed its appeal of the size determination with OHA and moved to introduce new evidence. Appellant maintains that the size determination is clearly erroneous and should be reversed.

[3] Based on this information, the Area Office determined that Appellant will provide [xxxx] FTEs, and ZWS will provide [xxxx] FTEs. Because the proposal identifies a total of [xxxx] FTEs, the Area Office observed that there are [xxxx] FTEs unaccounted for, but it did not investigate which firm will employ these remaining FTEs. (*Id.* at 10 n.18.)

Appellant argues that it did not depend on ZWS to meet the Experience and Past Performance evaluation factors. Appellant notes that the RFP did not bar offerors from using the incumbent contract as a reference. Further, because Appellant provided a reference for one of its own contracts, Appellant did not "rely solely" upon ZWS for Past Performance. (Appeal at 6.) Moreover, the fact that the bulk of an offeror's Past Performance references are for contracts performed by its subcontractor does not establish that there is a violation of the ostensible subcontractor rule. (*Id.*, citing *Size Appeal of Logistics & Tech. Servs.*, SBA No. SIZ-5482 (2013) and *Size Appeal of GiaCare and Medtrust JV, LLC*, SBA No. SIZ-5690 (2015).) Appellant stresses that it has performed several janitorial contracts, and argues that Appellant is not unduly reliant simply because they are relatively small. (*Id.* at 7, citing *Size Appeal of Patrick Wolffe Group, Inc.*, SBA No. SIZ-5235 (2011) and *Size Appeal of TCE Inc.*, SBA No. SIZ-5003 (2008).)

Moreover, "the determination of what capabilities are necessary to perform a contract, or whether the awardee has such capabilities, are matters of contract responsibility, which lies solely within the CO's purview." (*Id.* at 8, quoting *Size Appeal of Spiral Solutions and Techs.*, SBA No. SIZ-5279, at 23 (2011) (internal quotations omitted).) Therefore, by concluding that Appellant brings only its 8(a) status, the Area Office usurped the CO's role.

The Area Office's finding that Appellant is unduly reliant on ZWS for Experience and Past Performance is also at odds with the purpose of the 8(a) program, which is to help small, disadvantaged businesses develop. Insisting that they already have experience in order to be awarded a contract puts 8(a) firms in a bind where they cannot gain the experience necessary to compete for and perform contracts. (*Id.* at 8-9.)

Next, Appellant argues, the Area Office erred in finding Appellant unduly reliant on ZWS for Organization and Staffing. The fact that Appellant proposed a ZWS employee for its Project Manager and planned to hire incumbent staff does not, by itself, give rise to affiliation. Under Executive Order 13,495, Nondisplacement of Qualified Workers Under Service Contracts, Appellant is required to give incumbent employees a right of first refusal of employment, and OHA has recognized that hiring incumbent non-managerial personnel cannot be considered strong evidence of unusual reliance. (*Id.* at 10, citing *Size Appeal of Bering Straits Logistics Servs. LLC*, SBA No. SIZ-5277 (2011) and *Size Appeal of Four Winds Servs.*, SBA No. SIZ-5260 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR).)

Although Executive Order 13,495 exempts managerial staff, Appellant's hiring of Ms. Rodriguez does not create undue reliance because she has worked at the courthouse in Fresno since June 2003, eight years before she began work on the incumbent contract. To require her to be unemployed for Appellant to be eligible for the subject contract is inequitable and contravenes OHA's instruction that "although it raises the level of scrutiny, the hiring of key personnel from the incumbent subcontractor, does not create a violation of the ostensible subcontractor rule." (*Id.* at 11, quoting *Size Appeal of Hanks Brandan, LLC*, SBA No. SIZ-5692, at 9 (2015) (emphasis Appellant's).) Rather, it is one of several factors that could lead to a violation of the ostensible subcontractor rule, but "by itself it does not create the violation." (*Id.*, quoting *Hanks Brandan*, SBA No. SIZ-5692, at 9 (emphasis Appellant's).)

Also relevant is whether the key personnel will be under the control of the prime contractor. Such is the case here, as Ms. Rodriguez will report to [xxxx]. (*Id.* at 12.)

Appellant points out that the Area Office made no finding on whether Appellant is performing the contract's primary and vital requirements. Appellant argues these requirements are custodial services, and contends it is performing them. Appellant is also responsible for contract management, as Ms. Rodriguez is ultimately subject to Ms. Charitar's direction and control. (*Id.* at 13-14.)

Appellant contends that the Area Office was wrong to focus on the fact that Appellant did not identify its proposed lead janitor, that Appellant used the terms "we" and "our" in its proposal, and that the Offer Sheet Summary includes ZWS's name. First, Appellant decided to choose its lead janitor after award; if Appellant were unduly reliant on ZWS, it would have named a ZWS employee. Second, OHA's case law states that use of "we" and "our" does not suggest undue reliance. *Size Appeal of Kaiyuh Servs., LLC*, SBA No. SIZ-5581, at 6 (2014), *recons. dismissed*, SBA No. SIZ-5589 (2014) (PFR). Third, [xxxx], and GSA clearly understood that the offer contained Appellant's pricing. (*Id.* at 15-17.)

Finally, Appellant argues that the Area Office approached the ostensible subcontractor inquiry as if it were a rebuttable presumption. SBA regulations, however, do not provide for such an approach. (*Id.* at 17-19.) To support this charge, Appellant observes language from the Area Office's letter notifying Appellant that the District Director had initiated his own size protest.

H. SBA Response

On November 28, 2016, SBA responded to the appeal. SBA contends that the Area Office correctly determined that ZWS is Appellant's ostensible subcontractor, so OHA should deny the appeal.

SBA challenges the notion that Appellant is not unduly reliant on ZWS for Past Performance. SBA emphasizes that when the Area Office requested copies of Appellant's purported subcontracts for work at Monterey Bay and Petaluma, California, Appellant did not submit them and instead indicated that it was [xxxx]. (Response at 3, citing Size Determination at 7.)

[xxxx]

SBA claims that *Patrick Wolffe* and *TCE* are distinguishable, so Appellant's reliance on those cases is misplaced. In *Patrick Wolffe*, labor constituted a relatively small portion of the total value of the contract, as most of the cost was from component parts, and the prime contractor had experience with similar work. Here, though, labor is the larger portion of the contract, "and the NAICS code is unrelated to [Appellant's] primary NAICS code." (*Id.* at 4.) In *TCE*, the challenged firm had relevant experience, and the alleged ostensible subcontractor was not the incumbent.

Appellant's complaint that the Area Office improperly considered matters of contractor responsibility is meritless, SBA argues, because SBA regulations specifically state that a joint venture may not be awarded an 8(a) contract if the 8(a) concern "brings very little to the joint venture relationship in terms of resources and expertise other than its 8(a) status." (*Id.*, quoting 13 C.F.R. § 124.513(a)(2).) Since a violation of the ostensible subcontractor rule means the challenged firm and its subcontractor are treated as a joint venture, "it is wholly appropriate to consider whether [Appellant] brings anything to the relationship besides its small, 8(a) status." (*Id.* at 5.)

Appellant's policy argument that requiring 8(a) firms to have a certain level of experience puts those firms in a bind is also unpersuasive. SBA explains that the same argument could be made whenever SBA attempts to apply the ostensible subcontractor rule. (*Id.* at 5-6.)

SBA then turns to Appellant's arguments that it is not unduly reliant on ZWS for Organization and Staffing. SBA points out that Executive Order 13,495 does not apply to managerial staff. However, in *DoverStaffing*, OHA held that when a prime contractor hires an incumbent's workforce *en masse*, including managerial staff, there may be a finding of unusual reliance. Such is the case here. (*Id.* at 6.)

SBA argues that *Hanks-Brandan* supports finding Appellant and ZWS affiliated. *Hanks-Brandan* instructs that hiring the incumbent's key employees "if combined with other factors, leads to a finding of an ostensible subcontractor rule violation." (*Id.* at 7, quoting *Hanks-Brandan*, at 9.) Here, those additional factors are present.

Appellant's contention that it would be unjust to require Appellant not to retain Ms. Rodriguez misses the point, SBA maintains. She is the incumbent contractor's employee, and hiring her and other ZWS employees *en masse* supports a finding of an ostensible subcontractor relationship. (*Id.* at 7.)

The criticism that the Area Office did not discuss whether Appellant is performing the primary and vital requirements of the contract is also meritless. A finding of an ostensible subcontractor relationship may occur when either the prime contractor is unusually reliant on its subcontractor or when the subcontractor is performing the contract's primary and vital requirements. Because the Area Office found Appellant is unusually reliant upon ZWS, it was unnecessary to decide whether ZWS also is performing the primary and vital requirements. (*Id.* at 8.)

SBA asserts that the size determination is lengthy and thoroughly reviews all relevant facts. Its conclusion is not based on mere presumption, but rather careful analysis of the record, regulations, and OHA precedent. (*Id.*)

I. New Evidence

With its appeal, Appellant moved to introduce a declaration from its president, Ms. Roselin Charitar, discussing the preparation of the proposal and the Offer Sheet Summary referred to in the size determination. Appellant argues that there is good cause to admit the

declaration because this information is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies facts and issues on appeal. (Motion at 2, citing *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041 (2009).) Appellant explains that the Area Office did not offer Appellant the opportunity to address the fact that [xxxx]. Accordingly, Appellant did not become aware of this issue until it received the size determination.

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 Bus. 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. New Evidence

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 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).

In this case, I find there is good cause to admit the declaration. The Area Office cited [xxxx] as one of the reasons for finding undue reliance, so the declaration is relevant and does not enlarge the issues on appeal. Further, Appellant persuasively argues that it did not have an opportunity to address this issue because the Area Office did not ask Appellant to explain [xxxx]. As a result, Appellant could not have offered this declaration to the Area Office at an earlier time. *See, e.g., Size Appeals of Pac. Power, LLC*, SBA No. SIZ-5520, at 4 (2013). For these reasons, Appellant's motion is GRANTED and the new evidence is ADMITTED into the record.

C. 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 *Size Appeal of Wichita Tribal Enterprises, LLC*, SBA No. SIZ-5390 (2012), cases in which 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 proposed subcontractor was the incumbent contractor, and was not itself eligible to compete for the procurement. *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. As a result, 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." *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 concluded 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 Modus Operandi, Inc.*, SBA No. SIZ-5716 (2016); *Size Appeal of Prof'l Sec. Corp.*, SBA No. SIZ-5548 (2014); *Size Appeal of Wichita Tribal Enters., LLC*, SBA No. SIZ-5390 (2012); *Size Appeal of SM Res. Corp., Inc.*, SBA No. SIZ-5338 (2012). Further, subsequent cases have identified "four key factors" that have contributed to the findings of unusual reliance: (1) the proposed subcontractor is the incumbent contractor and is ineligible to compete for the procurement; (2) the prime contractor plans to hire the large majority of its workforce from the subcontractor; (3) the prime contractor's proposed management previously served with the subcontractor on the incumbent contract; and (4) the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract. *Modus Operandi, Inc.*, SBA No. SIZ-5716, at 12; *Prof'l Sec.*, SBA No. SIZ-5548, at 8; *Wichita Tribal Enters.*, SBA No. SIZ-5390, at 9. When these factors are present, violation of the ostensible subcontractor rule is more likely to be found if the proposed subcontractor will perform 40% or more of the contract. *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5785, at 10 (2016).

The instant case fits squarely within the *DoverStaffing* fact pattern. First, Appellant's subcontractor, ZWS, is the incumbent on the predecessor contract for similar services, and as a graduate of the 8(a) program, is ineligible to submit its own proposal for the instant RFP. Sections II.B and II.C, *supra*. Second, Appellant will staff its portion of the contract almost entirely with personnel hired from ZWS. Indeed, Appellant was unable to identify any proposed

employees that were not current or former employees of ZWS, and [xxxx]. Third, Appellant proposed Ms. Rodriguez, a ZWS employee, to manage the contract as Appellant's Project Manager. Although Appellant's proposal indicated that Ms. Rodriguez will report to [xxxx], [that individual] was not ascribed a major role in contract performance [xxxx]. Section II.C, *supra*. Fourth, the Area Office found that Appellant lacks relevant experience, as defined by the RFP, and is reliant on ZWS to win and perform the contract. While Appellant does have some experience performing contracts for custodial work, the RFP required that offerors have experience performing janitorial and grounds maintenance services at locations with at least 300,000 gross interior square feet and 50,000 exterior square feet in order to meet the minimum threshold for "Similar Work". Section II.C, *supra*. Appellant has adduced no evidence that it has ever performed a contract of that size. As a result, Appellant has not demonstrated that the Area Office clearly erred in determining that Appellant was reliant on ZWS to win and to perform the contract. *Cf., Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436, at 15 (2013) (finding no unusual reliance when the challenged firm was "a highly-experienced prime contractor"). Lastly, Appellant proposed to subcontract 49% of the procurement to ZWS, a larger proportion than the 40% seen in *DoverStaffing*. Section II.D, *supra*. In sum, I find no error in the determination that the instant case is highly analogous to the *DoverStaffing* line of cases.

I agree with Appellant, however, that the Area Office exaggerated the significance of Appellant's use of the terms "we", "our", and "team" throughout its proposal. OHA has repeatedly explained that "the use of 'team' language, particularly if it does not imply that the proposed subcontractor is the dominant partner, is not indicative of unusual reliance or that any subcontractor will be performing the primary and vital functions of the contract." *InGenesis*, SBA No. SIZ-5436, at 17 (quoting *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 10 (2011)). Nevertheless, this error is ultimately harmless, as the record otherwise supports the Area Office's determination. *Size Appeal of Veterans Tech., LLC*, SBA No. SIZ-5763, at 5 (2016).

Appellant's remaining arguments are unpersuasive. As SBA observes, the ostensible subcontractor test is disjunctive. *See* 13 C.F.R. § 121.103(h)(4). In other words, a prime contractor may be unusually reliant upon a subcontractor even if the prime contractor will perform a majority of the primary and vital requirements. *Wichita Tribal Enters.*, SBA No. SIZ-5390, at 9. In the instant case, then, it is immaterial that the Area Office did not discuss which firm will perform the primary and vital requirements, because the Area Office based its decision solely on unusual reliance.

The notion that the Area Office applied the ostensible subcontractor rule as a presumption is belied by the size determination and the record. Appellant points to the Area Office's letter notifying Appellant of the size protest. Section II.E, *supra*. SBA regulations require, however, that a valid size protest, including a protest initiated by SBA itself, must provide sufficient notice so as to permit the challenged firm a meaningful opportunity to respond. 13 C.F.R. § 121.1007(b). Accordingly, the mere fact that the protest made specific allegations does not establish that the Area Office presumed, or predetermined, that Appellant was in violation of the ostensible subcontractor rule.

IV. Conclusion

Appellant has not proven clear error in the size determination. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge