

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

REDACTED VERSION FOR PUBLIC RELEASE

SIZE APPEAL OF:

Automation Precision Technology, LLC,

Appellant,

Appealed From
Size Determination No. 2-2017-075

SBA No. SIZ-5850

Decided: September 6, 2017

APPEARANCES

William W. Goodrich, Esq., Judith B. Kassel, Esq., Richard J. Webber, Esq., Arent Fox, LLP, Washington, D.C., for Appellant

Michael J. Gardner, Esq., Erik C. Porcaro, Esq., Troutman Sanders, LLP, Virginia Beach, Virginia, for Alliance Technical Services, Inc.

DECISION¹

I. Introduction and Jurisdiction

On May 31, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2017-075, finding Automation Precision Technology, LLC (Appellant) is not small for the subject procurement. Appellant received the Area Office's determination on June 1, 2017, via e-mail.

On June 16, 2017, Appellant filed the above-captioned appeal with the SBA Office of Hearings and Appeals (OHA). On appeal, Appellant asserts the Area Office clearly erred in

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded Appellant an opportunity to propose redactions to the published decision. Appellant proposed redactions, which OHA considered in redacting the decision. OHA now publishes a redacted version of the decision for public release.

finding Appellant was unusually reliant on the incumbent contractor for the subject procurement under the ostensible subcontractor rule.

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 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. Solicitation

On June 16, 2016, the Department of Navy's Space and Naval Warfare Systems Command (SPAWAR) issued Solicitation No. N00039-16-R-0030 seeking services for the Integrated Undersea Surveillance System (IUSS) Logistics Support Facility in Virginia Beach, Virginia and Sasebo, Japan. The Contracting Officer (CO) set aside the procurement for small businesses, and assigned North American Industry Classification System (NAICS) code 541614, Process, Physical Distribution, and Logistics Consulting Services, with a corresponding \$15 million average annual receipts size standard. The final due date for all offers was March 6, 2017.

The Performance Work Statement (PWS) states the contractor shall provide services in four areas: (1) Logistics Support Facility (LSF) Operation and Navy Life Cycle Logistics Support; (2) Software, Network and Facility Management; (3) Foreign Military Sales (FMS) Support; and (4) Program Management. (PWS, § 1.0.)

For LSF Operation and Navy Life Cycle Support, the contractor shall “provide logistics support for all IUSS fielded and in-service systems afloat and ashore, for facilities, activities, and units which support the worldwide IUSS mission, and for International Programs and related other project tasks.” (PWS, § 3.1.1.) The contractor shall also perform various services in: supply support management; inventory control functions; packaging, handling, storage, and transportation (PHS&T), including emergency transportation services; marking equipment; tracking equipment; outfitting IUSS sites; installing and de-installing various IUSS systems; deactivation, reactivation, and remoting IUSS ships and sites; and procuring necessary materials for these services. (PWS, §§ 3.1.1-3.1.4.1.)

For Software, Network and Facility Management, the contractor shall provide technical support to IUSS, including “implementation and [restoration of] network functioning of IUSS IPT users networked computers.” (PWS, § 3.2.1.) The contractor is responsible for operating, maintaining, and managing the Web-Enabled IUSS Logistics Database (WILD), IUSS' automated system for managing logistics, configuration, and data for support of IUSS. (PWS, § 3.2.2.) This includes configuration and control of WILD software, coordinating implementation of control board actions, establishing software quality assurance measures, performing software development and maintenance, and maintaining a software data repository. (PWS, §§ 3.2.2.1-3.2.2.7.) In addition, the contractor shall also manage and maintain IUSS' Local Area Network (LAN) systems, including arranging for repair of failed hardware and performing preventative

maintenance on network terminals and peripherals. (PWS, § 3.2.1.1.) Collaterally, the contractor shall provide “physical and administrative security services for LSF,” including security briefs and classified control and handling of document and hardware. (PWS, § 3.2.1.2.)

For Foreign Military Sales, the contractor shall provide “Tailored Repairable Items List (TRIL) support to the Japan Maritime Self Defense Force (JMSDF), including logistics, engineering support, and related technical services” required for the Japanese Auxiliary Oceanographic Surveillance (J-AOS) TRIL. (PWS, § 3.3.1.) The contractor shall “[c]ontinuously review existing J-AOS engineering and configuration data to determine TRIL candidates,” “provide logistics, technical and engineering support services to maintain [Japan's] TRIL,” and “act as the Navy's agent for the shipping and receiving of TRIL related items.” (PWS, § 3.3.1.)

For Program Management, the contractor “shall perform Program Management covering the planning, execution, and control of efforts necessary to accomplish the tasks” and “shall appoint a Program Manager charged with the responsibility of accomplishing the overall efforts of the contract.” (PWS, § 3.4.1.) The Program Manager shall report monthly on work progress, status, deliverables, assigned tasks, costs, and information on problem areas. (*Id.*) The contractor shall also “ensure that the PWS logistics support requirements are met” and implement a quality program “to ensure these services satisfy the customer expectation for technical performance and schedule.” (PWS, § 3.4.2.) In addition, the contractor shall “conduct Quarterly Program Reviews (QPRs) with the Government for the purpose of providing a forum for the formal exchange of information relating to the contract/project.” (PWS, § 3.4.3.)

The PWS identifies seven key employees for the instant procurement: Program Manager; Operations Manager; Supply Support Manager; Inventory PHS&T Manager; Network LAN Administrator; Software Engineer/WILD Database Manager; and OCONUS Warehouse Manager. (PWS, at Attachment 7, Labor Category Descriptions.)

According to the PWS, the Program Manager “[p]rovides programmatic oversight to include tasking, budgeting, monitoring & reporting of tasks . . . , management of contract deliverables . . . , and participating in semiannual program reviews.” (*Id.*) The Program Manager also “[i]nterfaces with . . . Logistics personnel, Contracting Officer and Contracting Officer Representative (COR) as required.” (*Id.*) The Operations Manager “[m]anages the planning, execution, and control of the efforts required to operate the [IUSS LSF],” including inventory management, PHS&T, marking, tracking, installation, and software development. (*Id.*) The Supply Support Manager manages services to maintain stock levels, procure when required, track requisitions, track consumption, and maintain support and test equipment. (*Id.*) The Inventory PHS&T Manager is responsible for “warehouse functions associated with shipping & receiving, packing, and handling” and operates handling equipment and transportation equipment. (*Id.*) The Network LAN Administrator “[o]perate[s], manage[s], and maintain[s] the [LAN], [c]oordinate[s] with SPAWAR network personnel to ensure connectivity and compliance with Navy and [Department of Defense] Information Assurance (IA) requirements.” (*Id.*) The Network LAN Administrator also operates the Operations Support Center LAN helpdesk. (*Id.*) The Software Engineer/WILD Database Manager “[m]anage[s] the development and maintenance of [WILD] for both Fleet and LSF functionality.” (*Id.*) The OCONUS Warehouse Manager “[e]xecute[s] the warehousing functions associated with shipping [and] receiving,

packing, and handling” and operates handling equipment and transportation assets. (*Id.*) The OCONUS Warehouse Manager also “[p]rovide[s] services to maintain automated stock records, [and] replenish stock levels via government [and] commercial procurements as applicable.” (*Id.*)

The solicitation states proposals will be evaluated based on four factors: (1) Technical Approach; (2) Corporate Experience; (3) Management Approach; and (4) Past Performance. (Solicitation, at 95.) The solicitation further delineates Management Approach into two sub-factors: (1) Management Plan/Staffing and Transition Plan; and (2) Experience and Qualifications Proposed Personnel. (*Id.*, at 95-96.) Under Management Approach, the solicitation states:

The Government will evaluate the extent to which the Offeror describes a sound management, staffing, and transition approach that demonstrates a high probability (low risk) of success, clear understanding of management requirements, and capability to successfully manage and perform the proposed effort, through the below sub-factors . . .

Sub-factor 1: Management Plan/Staffing and Transition Plan: . . . [T]he Government will assess the degree to which the proposed staffing plan is based on current named employees, new-hires with letters of intent, or [To-Be-Determined (TBDs)]. Proposals with a higher proportion of current named employees will be evaluated as lower performance risk than those proposals with a higher proportion of new-hires with letters of intent or TBDs.

(*Id.*, at 95.)

B. Teaming Agreement & Proposal

On June 21, 2017, Appellant and Serco, Inc. (Serco) entered into a Teaming Agreement for the instant procurement. (Teaming Agreement, at 1.) The Teaming Agreement states “[Appellant] shall have the primary responsibility of integrating and coordinating the development of technical support services, preparing and submitting the proposal and negotiating the prime contract,” while Serco will assist with the integration, drafting, and editing the proposal. (*Id.*, at 2.) “This Agreement is not intended by the parties to constitute or create a joint venture, pooling agreement, partnership, or formal business organization of any kind.” (*Id.*) According to the Teaming Agreement's Statement of Work, Serco “will be considered for providing technical support across the full-range of functional [PWS] task areas.” (*Id.*, at 10.) The Teaming Agreement also states Serco will provide the Program Manager and “ensure compliance with all RFP / PWS requirements, as well as achieving all Quality Assurance metrics.” (*Id.*) Serco also “shall provide technical subject matter expertise, lead these efforts, and make recommendations to [Appellant] on direction and content” when collaborating on “the technical/management strategy, solution, and proposal documents.” (*Id.*) Regarding price strategy, the Teaming Agreement states Appellant “shall minimize its own price and its pass-through on [Serco] price to remain within the price to win target.” (*Id.*, at 11.)

Appellant's proposal states it “offers a superior solution that combines the incumbent experience of Serco; the expertise of [XXX], the current contract Program Manager (PM) with over 12 years of experience; with the time-proven management processes of [Appellant].” (Proposal, Volume I: Technical, at I-1-1.) The proposal continues, stating “[t]o ensure a seamless transition, we *selected Serco as a partner. . .*” (*Id.*, emphasis in original.) In an adjoining graphic, Appellant's proposal states “[o]ur solution leverages Serco's incumbency and superior performance over 14 years . . . [and] [o]ur team represents the lowest possible performance risk.” (*Id.*) In another adjoining graphic, Appellant's proposal suggests that Appellant and Serco have technical capabilities in LSF operations, Program Management, Safety, Travel, and Government Furnished Information, but suggests only Serco has capabilities in [XXX] and in [XXX], [XXX], and [XXX]. (*Id.*)

Appellant's proposal also states “[Appellant] offers a Management Approach that will ensure IUSS is supported by an exceptionally well-managed contractor team, which includes the incumbent.” (*Id.*, at I-3-1.) The proposal further states “[Appellant] offers a proven management structure . . . [which] provides direct lines of communication within Team [Appellant], and between [Appellant] and IUSS, with *APT as the absolute lead for the contract team.* (*Id.*, emphasis in original.) “[Appellant], through its Contract Manager (CM), will empower and oversee the PM to manage operations at the operational level to ensure timely response to customer requirements.” (*Id.*) In Exhibit 3-1, the proposal breaks down the hierarchical management structure as follows: CM, at the top; the Program Manager; the Task/Team Leaders; and Employees, at the bottom. (*Id.*) According to Exhibit 3-1, the CM “provides leadership, guidance, and resources to support the PM in management and execution of the contract” and “is responsible for [Appellant's] corporate support to IUSS and reports to [Appellant's CEO].” (*Id.*) Exhibit 3-1 also states, “[t]he PM reports directly to the CM” and “is responsible for day-to-day contract management with the authority to obligate Team [Appellant] within contract terms.” (*Id.*)

In its proposal, Appellant provides a Staffing Chart delineating fifteen positions required for the procurement, comprising the seven management positions and totaling 21.5 Full-Time Equivalents (FTEs). (Proposal, Volume II, at II-2.) According to the Staffing Chart, Appellant will provide 12.5 FTEs and Serco will provide 9 FTEs. (*Id.*) The Staffing Chart indicates Appellant will provide the Supply Support Manager, Inventory PHS&T Manager, and Security Manager, while Serco will provide the Program Manager, Operations Manager, Network LAN Administrator, WILD Database Manager, and OCONUS Warehouse Manager. (*Id.*) Notably, the Staffing Chart also indicates that, with the exception of a to-be-determined Security Manager, all management positions will be filled by incumbent employees. (*Id.*) In fact, of the 21.5 FTEs listed on the Staffing Chart, 19 FTEs will be incumbent employees, or approximately 90% of the FTEs required. (*Id.*) The Staffing Chart does not list a Contract Manager.

Appellant also describes several past and on-going relationships with its intended subcontractor, Serco. (Proposal, at APT_000521.) According to Appellant's proposal, Appellant currently serves as Serco's subcontractor on the [XXX] contract, and has a proposal submission for the re-compete of that contract as the prime contractor and Serco as the subcontractor. (*Id.*) Appellant is also listed as a subcontractor on another proposal submission of Serco's, and “has

on-going subcontract opportunities with Serco for the [XXX] contract. (*Id.*) In addition, Appellant and Serco are teaming partners on another multiple award contract for the Navy. (*Id.*)

Appellant's proposal provides three past performance references. (Proposal, Volume I: Technical, at I-4-1.) First, Appellant's proposal cites to Serco's performance on the incumbent contract, stating "this work is virtually identical to that as listed in the solicitation. Serco provides critical technical support, distribution services, warehouse operations, inventory management operations, and comprehensive logistics services." Appellant's proposal further describes the incumbent contract, stating "[t]here have never been any subcontractors on this contract. We expect all employees currently on this contract will perform on this solicitation either as employees of [Appellant], or employees of Serco." (*Id.*)

Second, Appellant's proposal cites to Appellant's ongoing performance of "[XXX]" ("[XXX]"). (*Id.*, at I-4-4.) On this contract, Appellant provides "non-personal technical, data and material management, maintenance, supply, administrative supervision and reports" services. (*Id.*) According to Appellant's proposal, "[t]he work on this contract is relevant in size, scope and complexity as the RFP in the following areas: Program Management Support Services [(PWS 3.4) . . . [and] Supply Management (PWS 3.1)." (*Id.*) In Block 13 of Appellant's Past Performance Form for [XXX], the proposal indicates Appellant has partnered with one subcontractor, [XXX], a large business "provid[ing] 2.5 FTEs supporting the contract as described." (*Id.*) Appellant's entry in Block 13 also suggests that [XXX] provides 4 FTEs to this contract. (*Id.*)

Last, Appellant's proposal references Appellant's ongoing performance of "[XXX]" ("[XXX]"). (*Id.*, at I-4-6.) On this contract, Appellant "is the prime contractor providing ... services logistic, administrative, maintenance and repair support", including "program management; equipment, facilities and services assistance; safety and quality assurance; heavy equipment mobile mechanic ashore and afloat; supply technicians; warehouse; ordnance equipment mechanics; and MHE/SMSE vehicle mechanics." (*Id.*) In Block 13 of Appellant's Past Performance Form for [XXX], the proposal indicates Appellant has partnered with one subcontractor, [XXX], a small business concern "provide[ing] 2.5 FTEs supporting this contract." (*Id.*) Appellant's entry in Block 13 also suggests [XXX] provides 4 FTEs to this contract. (*Id.*)

On April 13, 2017, the CO notified Alliance Technical Services, Inc. (ATS), an unsuccessful bidder, that Appellant is the apparent successful offeror for the instant procurement. (Letter from K. Staron-Barabasz to L. Wade (Apr. 13, 2017).)

C. Protest

On April 17, 2017, ATS filed a size protest with the CO, asserting Appellant was not a small business under the applicable size standard. According to ATS, Appellant had misrepresented itself when certifying as small, as Appellant has an estimated annual revenue of \$38 million according to Dun & Bradstreet. (Protest, at 2.)

ATS also asserted Appellant is other than small because of its affiliation with Serco, a “large, multinational corporation” having \$1.2 billion in North American revenue. (*Id.*, at 3.) ATS contends Appellant is affiliated with Serco, the incumbent contractor, under the ostensible subcontractor rule and, alternatively, based on the totality of the circumstances. (*Id.*, at 3.) According to ATS, Appellant has “very limited logistics services experience and virtually no [information technology] experience” and primarily offers “hardware manufacturing/sales . . . , personnel and baggage screening, alarm monitoring, maintenance of weapons, and ... administrative personnel services.” (*Id.*, at 3.) ATS asserts Appellant must be unusually reliant upon its subcontractor to perform the critical and essential aspects of the instant procurement as Appellant lacks the experience and capacity to substantially perform such services. (*Id.*, at 3-4.) Even if Appellant is not unusually reliant on Serco, ATS further contends Appellant's lack of experience in logistic and information technology services is so suggestive of reliance on Serco that the businesses should be rendered affiliates. (*Id.*, at 5.)

D. Size Determination

On May 31, 2017, the Area Office issued Size Determination No. 2-2017-075, finding Appellant is not a small business for the instant procurement based on the ostensible subcontractor rule. (Size Determination, at 1.)

First, the Area Office concluded Appellant did not misrepresent its status as a small business under NAICS code 541614. (*Id.*, at 3.) The Area Office stated the Dun & Bradstreet numbers provided by ATS are merely estimates of Appellant's annual revenue, while Appellant's SBA Form 355, tax returns, and financial statements reflect much lower revenue numbers. (*Id.*, at 3.) Thus, the Area Office concluded Appellant did not misrepresent its revenue.

Second, the Area Office considered Appellant's alleged affiliation with Serco, the incumbent contractor, based on the ostensible subcontractor rule. The Area Office found Serco was not a similarly situated entity because, as stated in Appellant's proposal, Serco is a large business unable to re-compete for the procurement. (*Id.*, at 3.) The Area Office also confirmed Serco is a large business based on its website that states Serco has “\$1.2 billion in revenues and [is] part of an \$8 billion company.” (*Id.*, at 3.)

The Area Office stated that, according to PWS § 1.0, the contractor's requirements include: “Logistic Support Facility Operation and Navy Life Cycle Logistics Support; Software, Network and Facility Management; Foreign Military Sales (FMS) Support; and Program Management.” (*Id.*, at 4.) The Area Office stated the CO confirmed the instant procurement is “primarily a logistics contract, not an [information technology] contract or management contract.” (*Id.*) Thus, the Area Office determined the primary and vital requirements of the procurement are the logistic services described in PWS § 3.1. (*Id.*) In addition, the Area Office concluded Serco would not perform these primary and vital requirements in lieu of Appellant, as the Serco employees performing these requirements would be hired by Appellant upon award of the contract. (*Id.*)

The Area Office found Appellant intends to hire “virtually all of [Serco's] employees, including all of the named key employees and managerial staff required by the RFQ.” (*Id.*, at 4.)

The Area Office stressed “it is common practice in Government services for successor companies to hire an incumbent's employees,” and highlighted Executive Order No. 13,495 that encourages hiring of qualified, non-managerial employees from the incumbent contractor. (*Id.*, at 4-5.)

However, the Area Office stressed “the Executive Order does not apply to managerial personnel and does not mandate that a successor contractor will rely upon the incumbent for its entire workforce.” (*Id.*, at 5, citing *Size Appeal of Wichita Tribal Enterprises, LLC*, SBA No. SIZ-5390 (2012), and *Size Appeal of Dover Staffing, Inc.*, SBA No. SIZ-5300 (2011) (*Dover Staffing*).) The Area Office stated, to the contrary, OHA has recognized that “when the alleged ostensible subcontractor is the incumbent, and the prime contractor proposes to hire *en masse* both the workforce and the managerial personnel . . . , this may be grounds to conclude the primary contractor is unusually reliant. . . .” (*Id.*)

The Area Office concluded the facts in the instant appeal are “almost identical” to those in *Size Appeal of Modus Operandi*, SBA No. SIZ-5716 (2016). (*Id.*) In *Modus Operandi*, the prime contractor “planned to acquire the large majority of its workforce (9 of 10 employees) from [the incumbent and proposed subcontractor], and 19 of 20 personnel that would work on the [contract] were to be current or former employees of [the incumbent and proposed subcontractor].” (*Id.*, at 6, citing SIZ-5716, at 13 (2016).) The Area Office found Appellant proposes to acquire at least 19.5 of the 21.5 FTEs required for the contract from Serco, either still employed by or subsequently hired from Serco. (*Id.*) The Area Office noted the remaining 2.5 FTEs are not named or marked as incumbents and could also be provided by Serco, meaning Serco would potentially provide 100% of the FTEs proposed. (*Id.*) Citing Appellant's proposal, the Area Office also stressed Appellant “expect[s] 100% retention of incumbent employees” and “ha[s] signed letters of intent with nearly all incumbent employees for the contract.” (*Id.*, at 9, citing Proposal, at Volume II, 3-4, and Proposal, at APT 000420, Compensation Plan, § 2.2.)

The Area Office acknowledged the RFP stated that “[p]roposals with a higher proportion of current named employees will be evaluated as lower performance risk . . .” and “evaluation of risk will be an integral part of the evaluation of each applicable factor.” (*Id.*, at 6-7.) However, the Area Office stressed the CO's encouragement of a higher proportion of incumbent employees “cannot be used to justify over 90% of the total employees, [including 100% of key employees and managerial positions,] being either hired or directly provided by Serco.” (*Id.*, at 7.) Based on the Staffing Chart provided in Appellant's proposal, the Area Office determined 100% of all managerial positions would be filled by individuals hired from or provided by Serco, including the Program Manager, Operations Manager, Supply Support Manager, Inventory PHS&T Manager, Software Engineer/WILD Database Manager, and OCONUS Warehouse Manager. (*Id.*, at 7.) The Area Office noted a Security Manager listed on the chart would be hired by Appellant, but attributed the position to Serco as the Area Office could not confirm the position would not be filled with an incumbent employee.

The Area Office also determined Appellant was unusually reliant on Serco for past performance based on: (1) Appellant's reliance on Serco's past performance as the incumbent; (2) Appellant's statement that it would retain 100% of the incumbent employees; (3) incumbent employees accounting for 90% of the FTEs on the new contract; and (4) Serco's contributions to

Appellant's past performance references. (*Id.*, at 9.) The Area Office stated each of Appellant's past performance references involves Serco, as Appellant references the incumbent contract and two past contracts (*i.e.*, [XXX] and [XXX]) for each of which Serco contributed 2.5 of 4 total FTEs. (*Id.*)

For these reasons, the Area Office concluded Appellant was unusually reliant on Serco for the instant procurement, thereby violating the ostensible subcontractor rule. (*Id.*) The Area Office, as a result, concluded there was “no need to address the totality of the circumstances argument appended to the end of [Appellant's] protest.” (*Id.*)

E. Appeal

Appellant asserts the Area Office clearly erred in concluding Appellant is unusually reliant on Serco for the instant procurement. According to Appellant, the Area Office incorrectly found Serco was involved in Appellant's contracts included in its proposal. (Appeal, at 1.) Appellant states [XXX] and [XXX] were the subcontractors involved in Appellant's referenced contracts. (*Id.*, at 2, 10.) Appellant further asserts the Past Performance Form submitted with its proposal “expressly identified [the subcontractor] as [XXX] (for [XXX]) and [XXX] (for [XXX])” and nowhere referred to Serco. (*Id.*)

In addition, Appellant asserts the Area Office incorrectly calculated the FTEs involved in and Serco's purported contribution to those ongoing contracts. (*Id.*, at 2, 10-11.) Referring to the Past Performance Forms, Appellant contends the forms state [XXX] and [XXX] each contributed 2.5 FTEs to the task described and 4 FTEs total to their respective contracts. (*Id.*, at 10, 11.) Appellant states the Area Office incorrectly found Serco was providing 2.5 FTEs for each contract and unreasonably concluded 4 FTEs was the total FTEs for each contract. (*Id.*, at 10.) According to Appellant, “[f]our (4) FTEs could not have been the total for [XXX], which . . . is larger in dollar value than the [instant procurement]” that involves 24 FTEs. (*Id.*, at 11.)

Appellant argues the Area Office improperly found the 2.5 FTEs labeled as TBD could be filled by Serco. (*Id.*, at 18.) According to Appellant, the proposal clearly states these positions are new, yet-to-be-named hires filled by Appellant and speculation is clearly erroneous. (*Id.*, at 18-19.) Moreover, Appellant asserts the Area Office also disregarded the surge employees necessary for the contract, the majority of which are Appellant's contribution. (*Id.*, at 19.)

Appellant also asserts the Area Office erred in determining Serco's contribution to the present contract. In Appellant's view, the Area Office cannot find unusual reliance based in-part on offering employment to seven incumbent employees, specifically three Warehouse Specialist and four Supply Clerks, that are non-exempt, incumbent personnel. (*Id.*, at 11-12.) According to Appellant, an offer of employment to these seven logistics personnel is required by the solicitation and under Executive Order 13,495. (*Id.*, at 12.) Appellant stresses the solicitation places value on “proposals with a higher proportion of current named employees” and evaluates such proposals as “lower performance risk than those proposals with higher proportion of new hires with letters of intent or TBD.” (*Id.*) In Appellant's view, the Area Office faults Appellant for “enhancing its chances for award.” (*Id.*)

Appellant contends the Area Office also erred in finding Appellant unusually reliant on Serco for Key Employees. (*Id.*, at 13.) Appellant argues the Area Office mischaracterized the role of the Contract Manager as “not having a major role in performing the contract.” (*Id.*) While the position is not billed directly to the contracting agency and is not required by the solicitation, Appellant asserts the Contract Manager manages the contract and meets daily with the Program Manager. (*Id.*, at 13, 14, 15.) Citing the Declaration of [XXX] submitted with the original protest, Appellant reasserts that it “is the absolute lead for the Contract team” and established the Contract Manager to “assure management will be firmly in [Appellant's] hands.” (*Id.*, at 13-14.) Appellant further states the Contract Manager “provides leadership, guidance and resources to support the [Program Manager] in management and execution of the contract” and is “[Appellant's] primary interface for all contract management activities.” (*Id.*, at 14.)

Concurrently, Appellant argues the Area Office's reliance on *Dover Staffing* and *Modus Operandi* is misplaced and both are distinguishable. (*Id.*, at 16.) Appellant argues *Dover Staffing* not only dissimilarly involved a President with no major role in the procurement beyond interfacing with the contracting agency, but *Dover Staffing* does not apply because Appellant has relevant experience for the instant contract. (*Id.*, at 15.) Appellant similarly distinguishes *Modus Operandi*, arguing both cases generally apply to instances where a prime contractor lacks experience and must rely on a subcontractor's experience for award. (*Id.*, at 16-17.) According to Appellant, “OHA has note previously extended *Dover Staffing* to cases . . . involving a highly-experienced prime contractor, where the prime contractor will perform the majority of the work, will manage the contract, and will perform the primary and vital contract requirements.” (*Id.*, at 17, citing *Size Appeal of InGenesis*, SBA No. SIZ-5436, at 15 (2013). Appellant asserts that it has “directly relevant, positive technical experience — without Serco — as evidenced by two other logistics contracts” and “will perform and exercise daily supervision over the primary and vital logistics requirements.” (*Id.*, at 17.) In addition, Appellant argues the Teaming Agreement does not suggest Appellant lacks experience as suggested by the Area Office. (*Id.*, at 18.) According to Appellant, the Area Office misquoted the Teaming Agreement, stating Serco would provide “the” technical subject matter expertise, rather than stating Serco would provide expertise more generally as Appellant prepares the proposal. (*Id.*)

F. ATS' Response

On July 7, 2017, ATS filed a response to the instant appeal. ATS contends the Area Office correctly concluded Appellant is unusually reliant on Serco to perform the primary and vital contract requirements, provide key employees, and offer relevant experience. (ATS' Response, at 3.) According to ATS, Appellant's past contracts “reveal very limited logistics services experience and virtually no IT contract experience” which “guarantees a total reliance on Serco to perform the most critical and essential aspects of the contract work statement.” (*Id.*, at 4.) ATS asserts Appellant's “core business centers around hardware manufacturing sales via EMALL, personnel and baggage screening, alarm monitoring, maintenance of weapons, and very small scale administrative personnel services.” (*Id.*) ATS also suggests “[t]he heart of any ostensible subcontractor case is which concern is managing the contact, and which concern is performing the primary and vital requirements of the contract.” (*Id.*, at 6, citing *Size Appeal of Maywood Closure Co., LLC & TPMC-Energy Solutions Env'tl. Servs. LLC*, SBA No. SIZ-5499, at 14 (2013).)

ATS also asserts Appellant is unusually reliant on Serco for key employees, stating the Area Office correctly determined that “100% of the named management and key employees required by the RFP will be Serco employees or hired from Serco. . . .” (*Id.*, at 4.) ATS asserts Appellant's Contract Manager is “merely a cosmetic or paper position” as the Program Manager provided by Serco “will handle the day-to-day administration.” (*Id.*) In ATS' view, the Contract Manager's primary role is to liaise between Serco and Appellant's front offices. (*Id.*)

ATS contends *Dover Staffing* and *Modus Operandi* are on point, as Appellant lacks the requisite experience and must be unusually reliant upon Serco for experience and personnel. (*Id.*, at 5.) ATS argues Appellant's “en masse hiring” and reliance on Serco for management and employees “with daily function capacity” demonstrates an unusual reliance similar to that present in *Dover Staffing*. (*Id.*) Further, in ATS' view, Appellant fails to cite relevant experience in logistics and IT support other than generally citing “two other logistics contracts,” and therefore must rely on Serco for relevant experience and personnel in the “specific subject matter of the procurement.” (*Id.*, at 6, citing *Modus Operandi*.)

G. Motions

On June 16, 2017, Appellant moved to introduce as new evidence the declaration of [XXX] of Appellant. (Motion to Supplement the Record, at 1.) Appellant asserts the Area Office clearly erred when finding Serco was a subcontractor for either of Appellant's contracts demonstrating past performance in its proposal, and the declaration explains Appellant's preparation of the Past Performance Form and the Area Office's misinterpretation. (*Id.*, at 2, citing *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017).)

In his declaration, [XXX] states “it was not our intent to state or imply that Serco was our one subcontractor on [XXX]” and intended to state “[XXX] was our one subcontractor” in Block 13. (Declaration, at ¶ 6.) [XXX] similarly states “[o]ur purpose was to state that [XXX] was our one subcontractor” on [XXX], and explains Block 13 described “the subcontractors who supported [Appellant] on our past performance references” on each Past Performance Form. (*Id.*, at ¶¶ 6, 7.) Regarding the subcontractors' FTE contributions to [XXX] and [XXX], [XXX] states [XXX] and [XXX] each provided 2.5 FTEs “in positions that are directly relevant to the Performance Work Statement for the IUSS Program” as described on each form. (*Id.*, at ¶ 8.) Specifically, [XXX] provides “two (2.0) for Material Coordinators and one-half (0.5) for an Order Filler,” and [XXX] provides 2.5 FTEs for “Heavy Equipment Mobile (1.0 FTE), Heavy Equipment Afloat (1.0 FTE), and Safety (0.5 FTE).” (*Id.*, at ¶¶ 9, 10.) [XXX] continues, stating the 4 FTEs noted separately in Block 13 on each form “[do] not represent the total number of FTEs for the total contract . . . but rather, the total FTEs provided by the subcontractor alone.” (*Id.*)

On June 20, 2017, ATS responded to Appellant's motion, opposing the introduction of [XXX]'s declaration. (Motion to Exclude New Evidence, at 1.) ATS contends Appellant had “ample opportunity for [XXX] to submit a declaration refuting the allegations of being an ‘ostensible subcontractor’ ” during the protest before the Area Office and “failed to do so.” (*Id.*, at 2.)

III. Discussion

A. Threshold Matters

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

In this case, Appellant has established good cause to admit [XXX]'s declaration. Appellant offers [XXX]'s declaration to explain its preparation of the Past Performance Form and address the Area Office's misinterpretation of its answers. Appellant could not have submitted a declaration addressing the Area Office's interpretation until *after* its size determination was issued and its findings and underlying interpretations were disclosed. [XXX]'s intended responses in Block 13 are directly relevant to Appellant's reliance on Serco, and help clarify Serco's past performances, or lack thereof, with Appellant. Accordingly, [XXX]'s declaration is ADMITTED to the record and will be considered for the purposes of this decision.

B. 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).

C. Analysis

Having reviewed the record, OHA precedent, and the parties' arguments, I find the Appellant has failed to demonstrate the Area Office clearly erred in its size determination. Therefore, this appeal must be denied.

OHA has consistently found a prime contractor violates the ostensible subcontractor rule when it is unusually reliant on a subcontractor, and has identified “four key factors” in finding such unusual reliance. In *Modus Operandi*, OHA delineated these factors as follows:

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.

SIZ-5716, at 28-29.

Based on the facts discussed *infra*, I find the instant case is indistinguishable, if not more egregious, than *Modus Operandi*. In *Modus Operandi*, the prime contractor's proposed subcontractor was large incumbent contractor ineligible to re-compete for the procurement. *Modus Operandi*, SIZ-5716, at 12 (2016). The prime contractor and subcontractor intended to split the 20 FTEs required, each providing 10 FTEs, but the prime contractor portion was “almost entirely . . . personnel hired from [the incumbent subcontractor].” *Id.* OHA found “[a]ll 20 [FTEs] would be incumbent . . . personnel, and the 18 non-managerial employees would continue to perform the same role on the [new] contract.” *Id.*, at 3. OHA held the prime contractor intended to adopt the incumbent's non-managerial workforce *en masse*, and even proposed to retain the Deputy Program Manager to serve as Program Manager. *Id.*, at 12. OHA also rejected the prime contractor's assertion that it “proposed its own personnel to perform executive management, contract administration, security, and supporting function,” holding that those personnel did not work directly on the contract and “their involvement does not lessen [the prime contractor's] reliance on [the incumbent subcontractor] to perform the contract.” *Id.*, at 13, citing *Size Appeal of Dover Staffing*, SBA No. SIZ-5300, at 8 (2011) (rejecting the appellant's assertion that its president would control the contract because “the proposal does not assign a major role to the [prime contractor's] President.”).

In this case, Appellant intends to hire the large majority of its workforce, both managerial and non-managerial, from the incumbent contractor that is ineligible to re-compete for the procurement. Appellant does not dispute that Serco, the incumbent contractor, is a large business concern with “\$1.2 billion in revenues and [is] part of an \$8 billion company,” as the Area Office

determined. *See* Section II.D, *supra*. Serco is easily ineligible for the instant procurement with a size standard of \$15 million. *See* Section II.A, *supra*. Relatedly, Appellant does not dispute the Area Office correctly concluded Serco is not a similarly situated entity, which would otherwise preempt the ostensible subcontractor rule. *See* Section II.D, *supra*.

Appellant clearly intends to hire the incumbent's workforce *en masse*, and almost entirely rely on Serco for managing the contract. In its proposal, Appellant repeatedly promotes its retention of over 90% of the incumbent employees as “the lowest possible performance risk.” *See* Section II.B, *supra*. This assertion appears truthful, as all but 2.5 FTEs will be filled with incumbent employees. *See id.* According to Appellant's Staffing Chart, Appellant intends to fill 19 FTEs with incumbent employees, and the remaining 2.5 FTEs attributable to the Appellant are listed as TBD. *See id.* These allocations do not account for the Contract Manager, as that position is not listed on the Staffing Chart and is not billed to the agency. *See id.* However, even counting the Contract Manager position, Appellant only provides 3.5 FTEs, roughly 16%, of 22.5 FTEs total. Stated differently, incumbent employees account for 85% to 90% of the total FTEs required — as promoted by Appellant. *See id.* Thus, it is clear Appellant intends to hire the large majority of its workforce, *en masse*, from the incumbent.

Appellant's proposed management is also almost entirely incumbent employees. The solicitation indicates seven key personnel, all of which are managerial positions. *See* Section II.B, *supra*. According to Appellant's Staffing Chart, all seven key personnel positions will be filled by incumbent employees, including [XXX] as the Program Manager and Operations Manager. *See id.* The only managerial position proposed by Appellant that is not filled by an incumbent employee is a Security Manager, which is listed as TBD. *See id.* Thus, it is clear Appellant intends to hire the large majority of its workforce, both managerial and non-managerial, from Serco.

Appellant correctly suggests the Executive Order advocates for retention of incumbent employees, but ignores its focus on the retention of qualified, non-managerial employees. OHA has stated, and the Area Office correctly highlights, the Executive Order does not intend for a prime contractor to rely on an incumbent for its entire workforce. *See* Section II.C, *supra*; *e.g.*, *Size Appeal of Wichita Tribal Enterprises, LLC*, SBA No. SIZ-5390 (2012). Here, Appellant intends to retain a large majority of incumbent employees, both non-managerial and managerial, “to enhance its chance of award.” *See* Section II.E, *supra*. Appellant's retention of incumbent employees in managerial positions goes beyond the scope of the Executive Order. Furthermore, the instant solicitation's incentive for retaining a high percentage of incumbent personnel does not contravene the ostensible subcontractor rule's prohibition against unusual reliance on the incumbent.

Appellant asserts that it manages overall performance of the contract through a Contract Manager, but this assertion fails in attempting to obscure Appellant's reliance. The solicitation states the Program Manager is “charged with the responsibility of accomplishing the overall efforts of the contract” and is the top management official. *See* Section II.A, *supra*. The PWS states the Program Manager provides “programmatically oversight [including] tasking, budgeting, monitoring & reporting of tasks” and the Operations Manager “manages the planning, execution, and control of the efforts required to operate the [IUSS LSF].” *See id.* Appellant's proposal

similarly states the Program Manager “is responsible for day-to-day contract management with the authority to obligate Team [Appellant] within contract terms,” and bolsters the Program Manager's role by combining it with the Operations Manager in one role filled by an incumbent employee, [XXX]. *See* Section II.B, *supra*. Appellant asserts the Contract Manager “assures management will be firmly in [Appellant's] hands,” but the Contract Manager merely “provides leadership, guidance, and resources to support the [Program Manager] in management and execution of the contract.” *See* Section II.B, II.C, *supra*. Thus, the Contract Manager appears to be more of a liaison and an advisor than a manager. Akin to the executive management in *Modus Operandi* and the President in *Dover Staffing*, it appears the Contract Manager does not work directly on and has no major role in performing the contract. *See Modus Operandi*, SIZ-5716, at 13 (2016); *Dover Staffing*, SIZ-5300, at 8 (2011).

Appellant is correct that the Area Office erred in misinterpreting Appellant's Past Performance Forms for [XXX] and [XXX], but this error amounts to harmless error. As stated in the Declaration of [XXX], Appellant's Past Performance Forms for [XXX] and [XXX] clearly indicate that [XXX] and [XXX] are Appellant's sole subcontractors on those ongoing contracts, respectively. *See* Section II.G, *supra*. Appellant's Past Performance Forms are also devoid of any mention of Serco. *See* Section II.B, *supra*. The Declaration of [XXX] also suggests the Area Office misinterpreted the contributions of [XXX] and [XXX] to those contracts, as his declaration states each subcontractor provided 2.5 FTEs in positions relating to the instant procurement and 4 FTEs total to the contracts' overall performance. *See* Section II.G, *supra*. In its appeal, Appellant also suggests the total FTEs for each contract far exceed the 4 FTEs contributed by the subcontractors. *See* Section II.E, *supra*. From this, it appears the Area Office incorrectly concluded Serco was involved in and contributed to Appellant's ongoing performances of [XXX] and [XXX]. *See* Section II.D, *supra*. However, these conclusions would not have affected the outcome. Despite the Area Office's erroneous conclusion that Serco contributed to Appellant's past performance references, the Area Office correctly concluded the Appellant is still unusually reliant on Serco because intends to hire its workforce *en masse* from Serco. Thus, the Area Office's errors are harmless. *See e.g., Size Appeal of Synergy Solutions, Inc.*, SBA No. SIZ-5843 (2017); *Size Appeal of Global Submit, Inc.*, SBA No. SIZ-5804 (2017); *Size Appeal of Barlovento, LLC*, SBA No. SIZ-5191 (2011), *recons. denied*, SBA No. SIZ-5210 (2011) (PFR) (errors in size determination were harmless because they would not have affected outcome).

Notably, the Area Office erred in concluding Appellant intended to “retain 100% of the incumbent employees” by speculating that the 2.5 FTEs designated as TBD could eventually be provided by Serco. *See* Section II.D, *supra*. The ostensible subcontractor analysis must be based upon the solicitation and offeror's Proposal, and not on mere speculation. *E.g., Size Appeal of Synergy Solutions, Inc.*, SBA No. SIZ-5843, at 18 (2017) (rejecting as mere speculation an appellant's assertion that a prime contractor may be reliant on a subcontractor for more personnel if none of the incumbent personnel sign on); *Size Appeal of Four Winds Servs., Inc.*, SBA No. SIZ-5260 (2011) (rejecting an appellant's assertion that it could have hired a subcontractor's employee, stating “OHA must cannot base its analysis on the assumption that a firm will be able to hire an employee at a later date”). The Area Office, as well as the parties, should not engage in such speculation. Again, however, the Area Office's error is harmless, as Appellant is unusually reliant on Serco whether it fills 100% or 90% of its workforce with incumbent employees.

In sum, three of the four *Modus Operandi* factors are applicable here. Serco, Appellant's proposed subcontractor, is the incumbent, and is ineligible for this award. Appellant seeks to hire its workforce from Serco *en masse*. Appellant's proposed management previously served with Serco on the incumbent contract. Indeed, Appellant's Contract Manager will perform only as a liaison, and will not directly on the contract. While Appellant is not unusually reliant on Serco for its past performance, the other three factors are so strong here as to tip the balance in favor of a finding that Appellant is unusually reliant upon Serco for its contract performance.

Based on the facts discussed *supra*, I find Appellant has failed to show the Area Office clearly erred in finding it is unusually reliant on Serco, a large incumbent contractor, in violation of the ostensible subcontractor rule. Therefore, Appellant and Serco are affiliated for the instant procurement.²

IV. Conclusion

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

CHRISTOPHER HOLLEMAN
Administrative Judge

² The Area Office found no need to address ATS's argument Appellant and Serco were affiliated under the totality of the circumstances, and ATS did not raise it the issue in its Response to the Appeal. Accordingly, the issue is not before me and I will not address it. *Size Appeal of Apex Group, Inc.*, SBA No. SIZ-4300 (1998).