

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

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

Equity Mortgage Solutions, LLC,

Appellant,

RE: Ideogenics, LLC

Appealed From
Size Determination No. 2-2017-102

SBA No. SIZ-5867

Decided: November 16, 2017

APPEARANCES

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Candace M. Shields, Esq., Matthew P. Moriarty, Esq., Ian P. Patterson, Esq., Koprince Law LLC, Lawrence, Kansas, for Appellant

Jerry Alfonso Miles, Esq., Deale Services, LLC, Rockville, Maryland, for Ideogenics, LLC.

DECISION¹

I. Introduction and Jurisdiction

On August 8, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2017-102, finding that Ideogenics, LLC (Ideogenics) is a small business for the subject procurement. Equity Mortgage Solutions, LLC (Appellant), which had previously protested Ideogenics's size, asserts that the Area Office clearly erred in concluding that Ideogenics complies with the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). For the reasons discussed *infra*, the appeal is granted and the size determination is reversed.

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. OHA received one or more requests for redactions and considered such 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 this appeal within fifteen days of receiving the size determination, so the appeal is timely. Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation

On November 16, 2016, the U.S. Department of Housing and Urban Development (HUD) issued Request for Proposals (RFP) No. DU208WR-17-R-0002 for Home Equity Conversion Mortgage (HECM) loan servicing. The Contracting Officer (CO) set aside the procurement entirely for participants in SBA's 8(a) Business Development program, and assigned North American Industry Classification System (NAICS) code 522390, Other Activities Related to Credit Intermediation, with a corresponding size standard of \$20.5 million average annual receipts. Proposals were due December 28, 2016. (RFP, Amendment 000002.)

According to the RFP's Performance Work Statement (PWS), the objectives of the procurement are:

- Professional, effective, and comprehensive reverse mortgage loan servicing while maintaining a high standard of customer service.
- Maximum recoveries from the loan portfolio at the earliest possibility.
- Demonstrated effective risk management that identifies opportunities for reducing the loan portfolio.
- Expanded Customer Service Support.

(PWS, § 1.4.) The PWS specified that “[t]he Contractor shall perform comprehensive loan servicing activities,” to include: assignment and title review; accounting functions; payment collection; disbursement of payments; annual recertification; foreclosure activities; bankruptcy activities; compliance monitoring; enforcement monitoring; preparation and recording of releases; and satisfaction of mortgages. (*Id.*, § 5.) The PWS identified six required key personnel: Contract Manager; Alternate Contract Manager; Cash Manager; Loan Servicing Manager; Quality Control Manager; and Title Attorney. (*Id.*, § 1.9.)

According to the PWS, “the Contractor shall establish a fully equipped office within 50 miles of Tulsa or Oklahoma City, OK no later than thirty (30) calendar days from the award date of the contract.” (*Id.*, § 1.13.)

To evaluate past performance, the RFP instructed offerors to identify “**all** relevant past performance performed in the *three year* period immediately preceding submission of the proposal and all work currently being performed.” (*Id.* at § L.1.4 (emphasis in original).) However, “[i]f the offeror has more than 5 relevant past performance references, then the offeror

shall provide the most recent 5 references.” (*Id.*) The RFP further directed offerors to submit past performance information for any proposed subcontractor(s) that would perform more than 20% of the contract value. (*Id.*)

B. Proposal

On December 28, 2016, Ideogenics submitted its proposal for the subject procurement on behalf of “Team Ideogenics,” comprised of Ideogenics, [Subcontractor 1], and [Subcontractor 2]. (Technical Proposal, at 1.) The proposal explained that [Subcontractor 1] is the incumbent prime contractor, and [Subcontractor 2] is [Subcontractor 1]’s subcontractor on the incumbent contract. (*Id.*) By partnering with [Subcontractor 1] and [Subcontractor 2], “[xxxxxxxxxxxxxxxxxxxx].” (*Id.*, at 3.) The proposal reiterated that “[xxxxxxxxxxxxxxxxxxxx].” (*Id.*) Further, Team Ideogenics “[xxxxxxxxxxxxxxxxxxxx].” (*Id.*, at 1.)

The proposal indicated that Ideogenics will perform [a majority] of the work, with [Subcontractor 1] and [Subcontractor 2] evenly dividing the [remainder]. (*Id.* at 24-25.) More specifically, [xxx] contract employees, including the Contract Manager and Alternate Contract Manager, would be Ideogenics personnel, while [Subcontractor 1] and [Subcontractor 2] would contribute [xxx] employees each. The Loan Servicing Manager, Quality Control Manager, and Cash Manager would be [Subcontractor 2] employees. The Title Attorney would be a [Subcontractor 1] employee, and [Subcontractor 1] also would provide many of the mid-level supervisory staff overseeing each of the discrete task areas. The proposal stated that the majority of personnel in the [xxxxxxxxxxxxxxxxxxxx] task areas would be Ideogenics employees. [Subcontractor 1] and [Subcontractor 2] employees would perform the [xxxxxxxxxxxxxxxxxxxx] task areas, without any Ideogenics involvement. (*Id.*)

To manage the contract, Ideogenics proposed to retain all key personnel from the incumbent contract. (*Id.* at 34-36.) The proposed Contract Manager, [xxx], is currently employed by [Subcontractor 1] as Contract Manager on the incumbent contract, and the proposed Alternate Contract Manager, [xxx], is currently [Subcontractor 1]’s Alternate Contract Manager on the incumbent contract. (*Id.* at 28, 34-35, 37, 40, 61.) The proposal included resumes and signed commitment letters from each of the proposed key personnel. The commitment letters stated that “[s]hould Ideogenics, LLC be selected as the awardee for the subject contract, I am committed to joining Team Ideogenics. . . .” (*Id.* at 39, 42, 45, 48, 51, 53.) According to the proposal, the Contract Manager and Alternate Contract Manager will be supervised by Ideogenics’s Chief Executive Officer (CEO). (*Id.*, at 31.) The CEO, in turn, is assisted by the Executive Steering Group, an advisory committee which includes representatives from Ideogenics, [Subcontractor 1], and [Subcontractor 2]. (*Id.*)

Ideogenics’s price proposal indicated that Ideogenics would be responsible for [a plurality] of the total proposed labor costs, while [Subcontractor 1] and [Subcontractor 2] account for [xxx]% and [xxx]%, respectively.

With its proposal, Ideogenics provided copies of its subcontracts with [Subcontractor 1] and [Subcontractor 2]. (Business Proposal at Appx. 1 and Appx. 2.) Both subcontracts stipulated that “Subcontractor shall provide the services, products, supplies, and/or items under this

Subcontract as an independent subcontractor.” (*Id.*, at 9.) The agreements continued, “Subcontractor's personnel who are to perform the services shall be under the employment, and ultimate control, management, and supervision of the Subcontractor.” (*Id.*) The parties “mutually agree[d] not to offer employment, nor accept for employment, each other's employees who are directly or indirectly associated with the work covered by this Subcontract” without the written consent of the other party. (*Id.* at 7.)

For past performance, Ideogenics submitted two past performance references each for itself, [Subcontractor 1], and [Subcontractor 2]. The two Ideogenics references were for “financial portfolio management, and technical support services” at [xxx], valued at \$[xxx], and “business support services, loan support, and financial portfolio management” with [xxx], valued at \$[xxx]. (*Id.*, at 55-57.) The proposal stated that Ideogenics “[xxxxxxxxxxxxxxxxxxxx].” (*Id.* at 55.) The references for [Subcontractor 1] and [Subcontractor 2] included their work on the incumbent contract, commenting that “[Subcontractor 1] with its team partner [Subcontractor 2] provides complex loan servicing support services for a portfolio of over 1.2 million [loans] . . . [at] its dedicated loan servicing facility in [xxx].” (*Id.* at 61.) According to the proposal, the incumbent contract is valued at \$[xxx]. (*Id.* at 59.)

C. Protest

On June 1, 2017, the CO notified unsuccessful offerors, including Appellant, that Ideogenics was the apparent awardee. On June 8, 2017, Appellant filed a size protest, asserting that Ideogenics is in violation of the ostensible subcontractor rule and, therefore, is not small for the instant procurement. Specifically, Appellant contended, Ideogenics will be unusually reliant upon [Subcontractor 1] and [Subcontractor 2] to perform the contract. (Protest, at 1.)

According to Appellant, Ideogenics's reliance on [Subcontractor 1] and [Subcontractor 2] for performance of the contract contravenes the ostensible subcontractor rule based on the factors outlined by OHA in *Size Appeal of Dover Staffing*, SBA No. SIZ-5300 (2011) and the line of subsequent cases with similar fact patterns. (Protest, at 5, 7.) Appellant highlighted that [Subcontractor 1] is the incumbent prime contractor, is no longer an 8(a) program participant, and is “rapidly approaching being large under the Solicitation's NAICS code.” (*Id.*, at 3, 5.) [Subcontractor 2], which is [Subcontractor 1]'s subcontractor on the incumbent contract, is a large business with more than 1,500 employees and over \$4 billion in annual revenues. (*Id.*, at 4, 7.)

Appellant alleged that Ideogenics plans to hire a significant portion of [Subcontractor 1]'s workforce and also fill staffing gaps with [Subcontractor 2] employees. (*Id.*, at 6, 8.) According to Appellant, the RFP will require far more employees than Ideogenics alone can provide. (*Id.*, at 6.) Appellant argued that Ideogenics intends to rely on [Subcontractor 1] and [Subcontractor 2] “to supply its non-key management and non-management personnel *en masse*,” noting that Ideogenics “has not advertised for positions even at this stage for such a large contract award.” (*Id.*, at 4.)

Appellant suggested that Ideogenics also will rely upon its subcontractors for key personnel, as all of the key personnel identified are former employees of [Subcontractor 1] or

[Subcontractor 2] on the incumbent contract. (*Id.*, at 4.) In addition, Appellant alleged, subcontractor employees will transition to Ideogenics in name only, as Ideogenics also intends to utilize [Subcontractor 2]'s facility that is already being used for the incumbent contract. (*Id.*, at 6.)

Appellant argued that Ideogenics is “an IT services and management firm with experience in database development, cybersecurity, software implementation and related fields” and must rely on [Subcontractor 1] and [Subcontractor 2]'s expertise in mortgage and loan servicing to perform the contract. (*Id.*, at 6, 8.) [Subcontractor 2] “has more than 25 years of experience providing mortgage servicing, processing, risk management, underwriting, and fraud detection.” (*Id.*, at 8.) [Subcontractor 1] is the incumbent prime contractor, and its past experience “includes project management, financial and compliance audits, program financial advisory services, organizational development, property/portfolio management, and network and computer systems administration.” (*Id.*, at 6.)

Appellant also alleged that Ideogenics is affiliated with [xxx] through its affiliation with [Subcontractor 1]. (*Id.*, at 4, 8-9.) According to Appellant, [Subcontractor 1] is owned and controlled by [xxx], who also owns and controls [xxxxxxxxx]. Thus, because Ideogenics is affiliated with [Subcontractor 1], its ostensible subcontractor, Ideogenics is also affiliated with [xxx]. (*Id.*, at 9.)

The Area Office forwarded Appellant's protest to Ideogenics, and directed Ideogenics to “highlight your firm's past experience in [] providing the services/tasks outlined in the solicitation, including the name of the agency, dates of performance and a description of the services rendered and how it relates to the instant procurement.” (Letter from V. Mazzotta to B. Barrett (June 13, 2017), at 2.) In response to the protest, Ideogenics acknowledged that three of the proposed key personnel will be [Subcontractor 2] employees and one will be a [Subcontractor 1] employee. (Response at 16.) However, the proposed Contract Manager and Alternate Contract Manager will be Ideogenics employees, thereby giving Ideogenics control over the management of the contract. (*Id.* at 16-17.) With regard to non-key personnel, “Ideogenics intends to offer employment to no less than [xxx] employees, who are either staffed as [Subcontractor 1] or [Subcontractor 2] employees, in accordance with Executive Order 13,495.” (*Id.* at 17.) Ideogenics stated that it intends to enter into a sublease of [Subcontractor 2]'s existing office space in [xxx], and “will negotiate terms sufficient to allow Ideogenics to terminate the lease at any time and for any reason.” (*Id.* at 21.) Accompanying its protest response, Ideogenics submitted a completed SBA Form 355. The Form 355 indicates that Ideogenics's primary industry is in NAICS code 541511, Custom Computer Programming Services.

D. Size Determination

On August 8, 2017, the Area Office issued Size Determination No. 2-2017-102, concluding that Ideogenics did not violate the ostensible subcontractor rule and is small for the instant procurement.

The Area Office first found that Ideogenics will self-perform the primary and vital requirements of the contract. The CO opined that the primary and vital requirements are “reverse mortgage loan servicing,” but not customer service, and the Area Office found that the NAICS code assigned to the RFP confirmed that mortgage loan servicing is the focus of the procurement. (*Id.*, at 5.)

According to the Area Office, “the record is insufficient to support a finding that either [Subcontractor 1] or [Subcontractor 2] is performing the primary and vital requirements of the subject procurement.” (*Id.*, at 6.) Based on Ideogenics's proposal, the Area Office determined that Ideogenics will have [xxx] contract employees, a majority, while [Subcontractor 1] and [Subcontractor 2] will have only [xxx] contract employees each. (*Id.*, at 5.) In addition, the Contract Manager and Alternate Contract Manager will be Ideogenics employees, and Ideogenics personnel will comprise a majority of the staff performing many of the discrete task areas, including “[xxxxxxx].” (*Id.*, at 5-6.) The Area Office noted that Ideogenics will not contribute employees to “[xxxxxxx]” tasks. (*Id.*, at 6.)

The Area Office found that [Subcontractor 1] and [Subcontractor 2] will provide many of the mid-level supervisory staff overseeing the task areas. (*Id.*, at 6.) However, the Contract Manager and Alternate Contract Manager are both Ideogenics employees, and the mid-level supervisors are subordinate to the Contract Manager, who in turn reports to Ideogenics's Chief Executive Officer. As a result, the Area Office concluded, Ideogenics controls the management of the contract. (*Id.*)

The Area Office determined that, from a cost standpoint, Ideogenics will be responsible for [a plurality] of the total labor costs, while [Subcontractor 1] and [Subcontractor 2] are responsible for [xxx]% and [xxx]%, respectively. (*Id.*, at 6.) Although [Subcontractor 1] and [Subcontractor 2] together represent a majority of the labor costs, OHA has recognized that “[w]here there are a number of subcontractors, but with no one subcontractor having a majority of the work, control over the management of the contract can lead to a finding of no violation of the ostensible subcontractor rule even where the challenged concern is not performing the majority of the work.” (*Id.*, quoting *Size Appeal of A-P-T Research, Inc.*, SBA No. SIZ-5798, at 13 (2016).)

The Area Office next determined that “the record is insufficient to support a finding that Ideogenics is unusually reliant on [Subcontractor 1] and [Subcontractor 2].” (*Id.*, at 7.) The Area Office noted that Ideogenics did not dispute that [Subcontractor 1] and [Subcontractor 2] are the incumbent prime contractor and subcontractor. “Nor does Ideogenics dispute that its proposed management previously served with [Subcontractor 1] on the incumbent contract.” (*Id.*) However, the Area Office stated, the factors discussed in the *DoverStaffing* line of cases do not establish that Ideogenics is unusually reliant upon its subcontractors.

The Area Office found that “Ideogenics plans to hire subcontractor staff that worked on the incumbent contract.” (*Id.*) Nevertheless, under Executive Order 13,495, “Nondisplacement of Qualified Workers Under Service Contracts,” service contractors are encouraged to offer employment to qualified employees performing under a predecessor contract for similar services at the same location. In light of Executive Order 13,495, OHA has made clear that “the hiring of

incumbent non-managerial personnel cannot be considered strong evidence of unusual reliance.” (*Id.*, at 8, quoting *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5785, at 9 (2016).) Further, Ideogenics does not intend to hire a large majority of its workforce from its subcontractors, unlike the situation described in *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017). (*Id.*, at 9.) The Area Office found that Ideogenics intends to retain incumbent managerial staff, but this factor alone does not suffice to establish unusual reliance. (*Id.*, at 8.) Moreover, mid-level managerial hires from [Subcontractor 1] and [Subcontractor 2] would “remain subordinate to the prime contractor,” as all contract employees report to Ideogenics's Contract Manager. (*Id.*)

The Area Office found that Ideogenics is not unusually reliant on its subcontractors for past performance. (*Id.*, at 8.) According to the Area Office, “nothing in the record suggests that the decision to award to Ideogenics was due to the experience of its proposed subcontractors.” (*Id.*) While [Subcontractor 1] and [Subcontractor 2] do have “extensive experience in mortgage loan servicing,” the Area Office noted that Ideogenics also submitted two past performance references for itself which pertained to “financial portfolio management and reconciliation services.” (*Id.*) Further, the mere fact that Ideogenics supplied an equal number of references for itself and each subcontractor does not establish unusual reliance. (*Id.*, at 9, citing *Size Appeal of Bering Straits Logistics Servs., LLC*, SBA No. SIZ-5277 (2011).)

The Area Office reiterated that Ideogenics is not unusually reliant upon [Subcontractor 1] and [Subcontractor 2], explaining:

Ideogenics is not hiring a “large majority” of its workforce from its subcontractors; its Contract Manager has the ultimate supervisory authority over all contract staff; nothing in the record suggests the CO decided to award based on the experience of Ideogenics' subcontractors; and, neither subcontractor will perform more than 40% of the contract.

(*Id.*)

The Area Office concluded that Ideogenics does not violate the ostensible subcontractor rule as it is not unusually reliant on its subcontractors and will self-perform the majority of the primary and vital contract requirements. Because Ideogenics and [Subcontractor 1] are not affiliated, there is also no affiliation between Ideogenics and [xxx]. (*Id.*) Ideogenics's average annual receipts do not exceed the size standard. (*Id.* at 10.) Therefore, Ideogenics is a small business.

E. Appeal

On August 23, 2017, Appellant appealed the size determination to OHA, arguing that the Area Office clearly erred in finding that Ideogenics does not violate the ostensible subcontractor rule.

Appellant asserts that the Area Office correctly found that [Subcontractor 1] and [Subcontractor 2] are the incumbent prime contractor and subcontractor for this procurement,

and that Ideogenics's proposed managerial staff previously served with [Subcontractor 1] on the incumbent contract. (Appeal at 9.) However, Appellant contends, the Area Office misapplied the factors outlined in the *DoverStaffing* line of cases, and all four factors are present here. (*Id.*)

First, Appellant contends, Ideogenics plans to hire incumbent personnel *en masse* from [Subcontractor 1] and/or [Subcontractor 2]. (*Id.*, at 10-11.) Indeed, the size determination “hints that Ideogenics will hire *all* of its contract staff from its subcontractors,” just as Appellant predicted in its size protest. (*Id.* at 10, emphasis Appellant's.) Appellant asserts that the Area Office failed to distinguish between managerial and non-managerial employees when considering Executive Order 13,495, as managerial and supervisory employees have no right of first refusal of employment. (*Id.*, at 11.) Moreover, the Executive Order does not permit a prime contractor to hire its entire workforce from a subcontractor without contributing its own employees or other value to the project. Here, Appellant argues, the Area Office erroneously relied on Executive Order 13,495 since 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” nor “does [it] shield [a challenged firm] from the application of the ostensible subcontractor rule.” (*Id.*, at 13.)

Appellant complains that the Area Office overlooked at least two significant factual issues when considering Ideogenics's proposed staffing. (*Id.*, at 14.) First, the Area Office did not address the fact that Ideogenics will hire the proposed Contract Manager and Alternate Contract Manager from [Subcontractor 1], and “Ideogenics itself will not provide any management personnel under the Contract.” (*Id.*) As a result, Ideogenics is dependent upon its subcontractors to manage the contract. Second, the Area Office failed to consider that Ideogenics must rely upon [Subcontractor 1] and [Subcontractor 2] for facilities and office equipment. Appellant highlights that “Ideogenics does not have any office in Oklahoma, even though the Solicitation requires a contractor to work within 50 miles of Tulsa or Oklahoma City.” (*Id.* at 15.) Because Ideogenics's entire workforce will be hired from its subcontractors and will continue to work at the subcontractors' facilities, they are “Ideogenics' personnel in name only — they would still be housed in [Subcontractor 1]'s and [Subcontractor 2]'s existing office(s) and use the subcontractors' equipment and resources to complete their work.” (*Id.*, at 14-15.)

Appellant asserts that the Area Office also erred by ignoring that Ideogenics lacks experience in mortgage loan servicing. OHA has held that “it is appropriate . . . to consider the prime contractor's experience as part of an ostensible subcontractor analysis, because such matters are relevant to whether the prime contractor can perform independently from the subcontractor.” (*Id.*, at 15-16, quoting *Size Appeal of Wichita Tribal Enters., LLC*, SBA No. SIZ-5390, at 13 (2012).) Here, Appellant contends that, although the Area Office recognized that Ideogenics has no relevant experience, “it balked at wading too far into this analysis, hesitant that doing so would second guess the Contracting Officer's responsibility determination.” (*Id.*, at 16.) Had the Area Office performed a proper review, it would have concluded that Ideogenics's inexperience will contribute to heavy reliance upon its subcontractors. (*Id.*, at 16-17.)

Appellant supports the Area Office's determination that the primary and vital contract requirements are mortgage loan servicing, and not customer service. (*Id.*, at 17.) The Area Office erred, however, in finding that Ideogenics will self-perform these requirements. Because “*all* of

the key and most, if not all, of the non-key personnel were employed by [Subcontractor 1] and [Subcontractor 2] under the incumbent effort,” the Area Office's conclusion that Ideogenics will provide the majority of the workforce is incorrect. (*Id.*, emphasis Appellant's.) Similarly, in Appellant's view, the Area Office erred in equating Ideogenics's plurality of total labor costs with performing the majority of the primary and vital requirements, given that Ideogenics has no relevant experience and will not contribute any of its own employees to the contract. (*Id.*, at 18.)

F. Ideogenics's Response

On September 7, 2017, Ideogenics responded to the appeal. Ideogenics maintains that the Area Office correctly determined that Ideogenics did not violate the ostensible subcontractor rule. Ideogenics acknowledges that [Subcontractor 1] and [Subcontractor 2] are the incumbent prime contractor and subcontractor, that they are ineligible to compete for the instant procurement, and that Ideogenics will hire the incumbent Contract Manager from [Subcontractor 1]. (Response at 1, 4.) The Area Office, though, correctly “decided that incumbency alone cannot establish unusual reliance.” (*Id.*, at 4.)

Ideogenics maintains that the Area Office correctly found that it is not unusually reliant on [Subcontractor 1] and [Subcontractor 2], particularly as Ideogenics does not intend to hire its workforce *en masse* from [Subcontractor 1] and [Subcontractor 2]. (*Id.*, at 1, 3.) Ideogenics highlights that “the majority of the total contract staff, [and] the majority of the non-key personnel assigned to the discr[ete] task areas” will be provided by Ideogenics. (*Id.*, at 4.) Moreover, Ideogenics “has already executed employment agreements for all key personnel in anticipation of award.” (*Id.*, at 5.) Contrary to Appellant's suggestions that hiring of incumbent managerial personnel establishes unusual reliance, Ideogenics points to *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436 (2013) for the proposition that “a prime contractor's hiring of key managerial personnel from an incumbent contractor does not undermine the prime contractor's control of the contract, or suggest any reliance on the incumbent.” (*Id.*) According to Ideogenics, “the incumbent managerial staff will be retained on an individual basis” and “the mid-level managers will remain subject to the control of Ideogenics.” (*Id.*, at 7.)

Ideogenics argues that the Area Office correctly applied Executive Order 13,495, and insists that all key and non-key personnel will remain under Ideogenics's control and supervision. (*Id.*, at 6.) Ideogenics indicates that it intends to offer first right of refusal to key and non-key personnel pursuant to the Executive Order, but “all key personnel and non-key personnel will be subject to Ideogenics' control and supervision.” (*Id.*, at 5.) Ideogenics distinguishes the instant appeal from the *DoverStaffing* line of cases. (*Id.*, at 6.) Unlike a prime contractor that contributes nothing of value beyond its small business status, “Ideogenics will provide [xxx] key personnel as ultimate supervisors and [xxx] subordinate contract employees.” (*Id.*, at 5.) Further, Ideogenics's Contract Manager and Alternate Contract Manager have “princip[al] responsibility for contract delivery and general oversight of the team,” including day-to-day management. (*Id.* at 6-7.)

According to Ideogenics, use of [Subcontractor 2]'s offices and equipment in [xxx] is not indicative of unusual reliance and does not alter the fact that Ideogenics will be performing the majority of the work. (*Id.*, at 7, citing *Size Appeal of Logistics & Tech. Servs., Inc.*, SBA No.

SIZ-5482 (2013).) Ideogenics intends to enter into a commercial sublease with [Subcontractor 2] at fair market value subject to annual rent increases, and believes such an arrangement “in no way allows [Subcontractor 2] to have the power to control Ideogenics.” (*Id.*)

Ideogenics maintains that the Area Office correctly determined that Ideogenics possesses relevant experience, and properly deferred to the CO's judgment regarding Ideogenics's capability to perform the contract. (*Id.*) According to Ideogenics, OHA has held that it is improper for an area office to review “whether a concern is capable of independently performing the contract as it amounts to a responsibility determination that is province to the [CO].” (*Id.*, at 7-8, citing *Size Appeal of J.W. Mills Management, LLC*, SBA No. SIZ-5416, at 8-9 (2012).) Even so, Ideogenics asserts that it was selected for award of the contract on its own performance record, particularly as its past performance demonstrated “relevant program management, loan support management, financial portfolio management, and technical support services management” analogous to the RFP's requirements. (*Id.*, at 8.) Further, “no evidence [suggests] that HUD based its evaluation predominantly or solely on the subcontractors' experience.” (*Id.*)

Ideogenics also maintains that the Area Office correctly found Ideogenics will self-perform the primary and vital contract requirements. (*Id.*, at 9.) According to Ideogenics, the Area Office properly concluded that Ideogenics will perform the majority of the mortgage loan servicing based on the proposed labor mix, the degree of Ideogenics's control over performance, and the subcontract agreements. Ideogenics highlights that “when a prime contractor and its subcontractors are performing the same types of work, the firm that will perform the majority of the total contract must be deemed to be performing the primary and vital contract requirements.” (*Id.*, at 10, quoting *A-P-T Research*, SBA No. SIZ-5798, at 11.) Although [Subcontractor 1] and [Subcontractor 2] together account for a majority of the total labor costs, OHA has recognized that “[w]here there are a number of subcontractors, but with no one subcontractor having a majority of the work, control over the management of the contract can lead to a finding of no violation of the ostensible subcontractor rule even where the challenged concern is not performing the majority of the work.” (*Id.*, at 11, quoting *A-P-T Research*, SBA No. SIZ-5798, at 13.) Thus, Ideogenics reasons, irrespective of whether Ideogenics will perform the majority of the work, its control over contract management supports a finding of no violation of the ostensible subcontractor rule. (*Id.*)

G. Supplemental Appeal

On September 7, 2017, after reviewing the record under the terms of an OHA protective order, Appellant moved to supplement its appeal. Appellant asserts that, based on Ideogenics's proposal, Ideogenics intended to hire its entire workforce from its subcontractors. (Supp. Appeal, at 2.) According to Ideogenics's subcontracts with [Subcontractor 1] and [Subcontractor 2], though, the parties agreed “not to offer employment, nor accept for employment, each other's employees who are directly or indirectly associated with the work” on the procurement. (*Id.*, at 3, quoting Subcontracts at 7.) Thus, Ideogenics cannot actually hire the proposed Contract Manager and Alternate Contract Manager from [Subcontractor 1], and both presumably will remain [Subcontractor 1] employees for the instant contract. (*Id.*, at 4.) Appellant highlights that the commitment letters signed by the proposed Contract Manager and Alternate Contract Manager

stated that they will join “Team Ideogenics” rather than Ideogenics itself, further suggesting that both individuals will remain with [Subcontractor 1]. (*Id.*)

Appellant maintains that Ideogenics will not supervise [Subcontractor 1] and [Subcontractor 2]'s performance. Although Ideogenics is nominally the prime contractor, Ideogenics's CEO will report to an “Executive Steering Group” controlled by [Subcontractor 1] and [Subcontractor 2] that is the ultimate authority. (*Id.*, at 4-5, 6.) Moreover, Ideogenics's subcontracts with [Subcontractor 1] and [Subcontractor 2] state the “Subcontractor shall provide the services, products, supplies, and/or items under this Subcontract as an independent subcontractor” and that the “personnel who are to perform the services shall be under the employment, and ultimate control, management, and supervision of Subcontractor.” (*Id.*, at 5, quoting Subcontracts at 9.) Thus, Ideogenics will not manage the contract. In addition, the subcontracts do not indicate that Ideogenics will perform any loan servicing support services, meaning that [Subcontractor 1] and [Subcontractor 2] will perform the primary and vital requirements. (*Id.*, at 7.)

Appellant contends that the record confirms that Ideogenics will be unusually reliant upon [Subcontractor 1] and [Subcontractor 2]. (*Id.*, at 8-9.) Ideogenics acknowledges that all [xxx] of its proposed contract personnel are currently [Subcontractor 1] or [Subcontractor 2] employees. (*Id.*, at 9.) Indeed, Ideogenics “boasts about the ‘minimal number of transition activities’ required for its effort, as ‘[t]he current staff has been servicing the HUD HECM loan portfolio since 2014 and has acquired an in-depth knowledge of the process and procedures.’” (*Id.*, at 10, quoting Technical Proposal at 3.) Ideogenics's complete dependence on [Subcontractor 1] and [Subcontractor 2] for its workforce is not excused by Executive Order 13,495, which is not mentioned anywhere in Ideogenics's proposal. (*Id.*, at 10.) Further, OHA has held that, notwithstanding the Executive Order, *en masse* hiring of subcontractor personnel, including both managerial and non-managerial staff, is a “strong indicia” of unusual reliance. (*Id.*, at 12, quoting *DoverStaffing*, SBA No. SIZ-5300, at 8.)

Appellant renews its contention that Ideogenics is reliant on its subcontractors for past performance. According to Appellant, the Area Office merely assumed that Ideogenics was not selected for award based on [Subcontractor 1] and [Subcontractor 2]'s relevant experience, despite the absence of evidence suggesting such. (*Id.*, at 13-14.) Appellant observes that Ideogenics's Form 355 indicates that Ideogenics is “an IT service company [that] . . . does not have any experience under the Solicitation's NAICS code” and Ideogenics's past performance references were significantly smaller than the instant procurement and involved no loan servicing functions. (*Id.*, at 14.) Further, Ideogenics's proposal highlighted [Subcontractor 1] and [Subcontractor 2]'s loan servicing experience, even suggesting that “Team Ideogenics requires minimal preparation time since we are currently servicing HECM loans under the [incumbent] contract.” (*Id.*, at 15, quoting Technical Proposal at 3.)

Appellant reiterates its arguments that Ideogenics will not manage the contract or self-perform the majority of the primary and vital requirements. (*Id.*, at 16.) While [Subcontractor 1] and [Subcontractor 2] individually will not perform a majority of the work, together they will perform [a majority] of the loan servicing work. (*Id.*)

Appellant asserts that the Area Office further erred by failing to consider that Ideogenics must rely upon [Subcontractor 1] and [Subcontractor 2] for office space and equipment necessary to perform the contract. (*Id.*, at 17.) Although Ideogenics may intend to lease these facilities and equipment from its subcontractors, it has yet to execute such a lease, thereby magnifying Ideogenics's dependence upon [Subcontractor 1] and [Subcontractor 2]. (*Id.*, at 18.)

Appellant lastly argues that the Area Office should have drawn an adverse inference against Ideogenics due to its failure to submit requested information, including “a list of the specific services/tasks to be performed by [the prime contractor] and each subcontractor,” teaming agreements, employment agreements, and other missing information. (*Id.*, at 19-20.)

H. Supplemental Response

On September 18, 2017, Ideogenics responded to the supplemental appeal. Ideogenics disputes Appellant's contention that the subcontracts prevent Ideogenics from hiring personnel, including the Contract Manager and Alternate Contract Manager, from its subcontractors. (Supp. Response, at 2.) In particular, Ideogenics asserts that the subcontract language cited by Appellant “exists in almost any standard subcontract agreement between prime contractor and subcontractor.” (*Id.*) Moreover, Ideogenics argues, Executive Order 13,495 “requires contractors to offer a right of first refusal of employment to qualified incumbent non-managerial employees” and Appellant's construction of the subcontracts would impede the Executive Order's implementation, at least in situations where the incumbent contractor is also a proposed subcontractor. (*Id.*) Ideogenics also maintains that [Subcontractor 1] and [Subcontractor 2]'s participation in the proposal amounts to implied consent to hire their employees for the instant procurement. (*Id.*)

Ideogenics next asserts that the use of the term “Team Ideogenics” does not affect its relationship with its subcontractors, and does not suggest that Ideogenics intends for certain employees to remain with the subcontractors. (*Id.*, at 3.) Further, “such reference does not indicate a failure to properly designate the functions to be performed by each subcontractor.” (*Id.*) Ideogenics distinguishes the instant case from *Size Appeal of Modus Operandi*, SBA No. SIZ-5716 (2016). Unlike in *Modus Operandi* where an employee authorized the proposed subcontractor to submit his resume, the proposal here indicated that the proposed Contract Manager and Alternate Contract Manager would be Ideogenics employees. (*Id.*, at 3-4.) Ideogenics further claims that use of the term “Team Ideogenics” does not suggest that Ideogenics lacks ultimate control over contract performance, but was intended to merely to make the proposal as attractive as possible to the procuring agency. (*Id.*, at 4.)

Ideogenics disputes Appellant's characterization of the Executive Steering Group. Ideogenics maintains that this is an advisory committee and “part of Ideogenics' management plan to prevent and remediate program risks.” (*Id.*) Ideogenics stresses that “Ideogenics will be the sole party to have control over the Contract Manager and Alternate Contract Manager, the rest of the management team, and the [Executive Steering Group].” (*Id.*, at 4-5.) In Ideogenics's view, the Executive Steering Group is no different than ordinary contractor meeting practices. (*Id.*, at 5.)

Ideogenics maintains the subcontracts require Ideogenics to perform the primary and vital requirements, and Ideogenics duly submitted to the Area Office a list of specific tasks to be performed by each entity. (*Id.*) The labor mix in the proposal “expressly demonstrates which key personnel positions are to be filled by Ideogenics, [Subcontractor 1], or [Subcontractor 2],” and another table summarizes the particular tasks performed by each key employee. (*Id.*, at 5-6.) The terms “subcontract” and “teaming agreement” were used interchangeably, so Ideogenics did not fail to submit all relevant information to the Area Office. (*Id.*, at 11.) Ideogenics further maintains that its subcontracts with [Subcontractor 1] and [Subcontractor 2] contemplated that the parties would draft more detailed provisions that include “performance requirements” and “allocating each parties' duties and responsibilities” following award of the prime contract. (*Id.*, at 7.)

Ideogenics argues that “a prime contractor is equally capable of performing the primary and vital requirements even when it apportions aspects of the work to its subcontractor,” and the subcontracts here require Ideogenics to perform “[a majority] of the prime contract value.” (*Id.*, at 7, citing *Size Appeal of Diverse Construction Group, LLC*, SBA No. SIZ-5112 (2010).) Therefore, Ideogenics urges, subcontracting less than [xxx]% of the work each to [Subcontractor 1] and [Subcontractor 2] does not indicate unusual reliance. (*Id.*)

Ideogenics distinguishes the present case from the *DoverStaffing* line of cases, insisting that the proposal indicates that Ideogenics will have ultimate control over the contract. Ideogenics has “carefully reviewed our team's capabilities and their current knowledge and experience at the individual level” and “does not intend to retain all of the key and non-key incumbent personnel from [Subcontractor 1] and [Subcontractor 2].” (*Id.*, at 7, 9.) Although Ideogenics will offer a right of first refusal of employment to incumbent employees pursuant to the Executive Order, Ideogenics reserves the right to terminate any personnel post hire. (*Id.*, at 7.) In this regard, “OHA has found that it is not problematic for a prime contractor to hire from subcontractor workforce, provide that personnel are reviewed individually rather than unilaterally transferred or hired *en masse*.” (*Id.*, at 9, citing *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305, at 12 (2011).)

Ideogenics reiterates its arguments that it does have relevant past experience, and states that it has “provide[d] loan servicing support services including business process re-engineering, loan and financial analysis, and housing/mortgage counseling through its technical expertise.” (*Id.*, at 9.) With regard to the RFP's requirement to provide certain equipment, Ideogenics states that it has previously “provide[d] IT systems that support [xxxx]” and “provide[d] financial reconciliation services as a prime contractor via secure cloud” to [xxxxx]. (*Id.*)

Ideogenics also disputes Appellant's characterization of its transition readiness, asserting that Team Ideogenics's ability to “provide experienced management performance that would assure HUD a smooth transition” is not indicative of unusual reliance. (*Id.*, at 10.) To the contrary, the RFP required that “the Contractor shall have sufficient personnel on board during the ninety (90) day Transition-In period to ensure a smooth transition.” (*Id.*) Although Ideogenics will lease the required facilities from [Subcontractor 2], rather than another source, this is not sufficient to demonstrate unusual reliance. (*Id.*, at 10, citing *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155, at 8 (2010).)

Lastly, Ideogenics rejects the notion that there are “missing documents” that might reinforce Appellant's allegations. (*Id.*, at 11.) An area office “is not required to ferret out information to support unspecific protests” and shall base its decision “primarily on the information supplied by the protestor or the entity requesting the size determination and that provided by the concern whose size status is at issue.” (*Id.*, at 11, citing *Size Appeal of Jacob-Reliable Enterprises*, SBA No. SIZ-4836, at 3 (2007).)

I. New Evidence

Accompanying its supplemental response, Ideogenics moved to introduce a subcontract between [Subcontractor 1] and [Subcontractor 2] for the incumbent contract. (Motion, at 1.) According to Ideogenics, the agreement is relevant “to show why Ideogenics is paying commercial fair value to sublease [Subcontractor 2]'s facility, and therefore, is not unusually reliant upon [Subcontractor 2].” (*Id.*) Ideogenics also offers a declaration from its CEO, [xxx], describing how the Executive Steering Group will function, but does not address this new evidence in its motion.

On September 25, 2017, Appellant opposed the admission of the new evidence. The subcontract between [Subcontractor 1] and [Subcontractor 2] has no bearing on the instant case, Appellant argues, and in any event, Ideogenics could and should have provided this document to the Area Office if Ideogenics wished for it to be considered. (Opp. at 2.) As for the [xxx] declaration, Ideogenics did not file a proper motion to admit the declaration, and this document also could have been submitted to the Area Office during the size review. (*Id.* at 3.)

On September 28, 2017, Ideogenics replied to Appellant's opposition. There is good cause to admit the subcontract, Ideogenics maintains, because the Area Office did not ask Ideogenics to submit subcontracts to which Ideogenics was not a party. Further, Ideogenics did not have access to the Area Office file at the time it responded to the appeal. The [xxx] declaration is relevant to explain the Executive Steering Group, which is not addressed in detail in Ideogenics's proposal.

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 the Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on 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, Ideogenics has not established good cause to admit new evidence. As Appellant emphasizes, not only did Ideogenics fail to submit the subcontract to the Area Office during the size review, but the agreement also does not bear on the question presented here, *i.e.*, whether Ideogenics is in violation of the ostensible subcontractor rule. Accordingly, the subcontract is EXCLUDED from the record and has not been considered for the purposes of this decision. [xxx]'s declaration is also EXCLUDED from the record because it was not accompanied by a motion establishing good cause for admission, and because it is information that could have been submitted to the Area Office. *See Size Appeal of Megen-AWA 2, LLC*, SBA No. SIZ-5845, at 6-7 (2017), *recons. denied*, SBA No. SIZ-5852 (2017) (PFR).

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

I agree with Appellant that the instant case is highly analogous to *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011) and the line of cases following it, where OHA has found violation of the ostensible subcontractor rule due to a prime contractor's unusual reliance upon a subcontractor. As a result, this appeal must be granted.

In *DoverStaffing*, the prime contractor was to perform 51% of the contract, and the alleged ostensible subcontractor was responsible for 40%. *DoverStaffing*, SBA No. SIZ-5300, at 3. Several factors, though, demonstrated that the prime contractor was unusually reliant upon the

subcontractor. The subcontractor was the incumbent contractor and was ineligible to submit a proposal in its own name. *Id.* at 10. None of the prime contractor's proposed personnel — including both managerial and non-managerial personnel — was employed by the prime contractor at the time of proposal submission. Rather, the prime contractor planned to staff the contract by “hiring the [subcontractor]'s incumbent employees *en masse* to perform [the prime contractor's] 51% of the work.” *Id.* at 7. 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 9-10. On these facts, OHA determined that the prime contractor was “bringing nothing to the contract but its small business status,” in contravention of the ostensible subcontractor rule. *Id.* at 9.

OHA has affirmed the reasoning of *DoverStaffing* in several subsequent cases. *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850 (2017); *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017); *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). In addition, 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. *Automation Precision Tech.*, SBA No. SIZ-5850, at 15; *Charitar Realty*, SBA No. SIZ-5806, at 13; *Modus Operandi*, 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).

In the instant case, the Area Office considered the *DoverStaffing* line of cases, but found that only the first and the third of the above factors are present. The first factor is met, the Area Office determined, because [Subcontractor 1] and [Subcontractor 2] are incumbents on the predecessor contract for similar services, and are ineligible to submit their own proposals for the instant RFP. More specifically, [Subcontractor 1] is the incumbent prime contractor and has graduated from the 8(a) program, while [Subcontractor 2] is [Subcontractor 1]'s subcontractor on the incumbent contract and is a large business. Section II.D, *supra*. The third factor is also met, the Area Office determined, because Ideogenics proposed to retain [Subcontractor 1]'s incumbent Contract Manager, [xxx], and [Subcontractor 1]'s incumbent Alternate Contract Manager, [xxx], to manage the contract for Ideogenics. *Id.*

While I agree with the Area Office that the first and third factors are met, I agree with Appellant that the Area Office clearly erred in its review of the second and fourth factors. The Area Office found that the second factor is not met because “Ideogenics is not hiring a ‘large majority’ of its workforce from its subcontractors.” *Id.* As Appellant emphasizes in its response to the appeal, though, this finding is factually incorrect. Out of its proposed workforce of [xxx] employees, Ideogenics stated that it would hire “no less than [xxx]” employees from

[Subcontractor 1] and [Subcontractor 2], and the remaining [xxx] employees were [xxxxxxx]. Section II.C, *supra*. Nor has Ideogenics identified any proposed employees that are not current employees of [Subcontractor 1] or [Subcontractor 2]. Accordingly, because Ideogenics proposed to staff Ideogenics's portion of the contract entirely with personnel hired from [Subcontractor 1] and [Subcontractor 2], the Area Office clearly erred in concluding that the second factor is not met. *E.g.*, *SM Resources*, SBA No. SIZ-5338, at 11 (applying *DoverStaffing* and finding violation of ostensible subcontractor rule when “[o]nly 14% of the proposed contract personnel are currently [the prime contractor's] employees”).

With regard to the fourth factor, the Area Office determined that “nothing in the record suggests the CO decided to award based on the experience of Ideogenics' subcontractors.” Section II.D, *supra*. As Appellant observes, however, this conclusion is flawed because the Area Office did not request, or obtain, information as to what impact Ideogenics's past performance had on the source selection, or how the procuring agency evaluated Ideogenics's past performance relative to that of [Subcontractor 1] and [Subcontractor 2]. Given this absence of information, the Area Office could only speculate as to whether [Subcontractor 1] and [Subcontractor 2]'s past performance played a significant role in the award decision, and OHA has made clear that an ostensible subcontractor analysis cannot be based on “mere speculation.” *Automation Precision Tech.*, SBA No. SIZ-5850, at 18. Moreover, the Area Office overlooked indications in the record that Ideogenics lacks relevant experience. Although the RFP directed offerors to submit “all relevant past performance performed in the *three year* period immediately preceding submission of the proposal and all work currently being performed,” Ideogenics provided two past performance references for itself, neither of which involved mortgage loan servicing. Sections II.A and II.B, *supra*. Further, Ideogenics identified no additional relevant projects in response to the Area Office's instruction that Ideogenics “highlight your firm's past experience in [] providing the services/tasks outlined in the solicitation, including the name of the agency, dates of performance and a description of the services rendered and how it relates to the instant procurement.” *See* Section II.C, *supra*. According to Ideogenics's sworn SBA Form 355, Ideogenics's primary industry is in NAICS code 541511, Custom Computer Programming Services, and Ideogenics does not generate revenues under the NAICS code assigned to this procurement, 522390, or under other NAICS codes within NAICS Sector 52 — Finance and Insurance. *Id.* Further, Ideogenics's proposal repeatedly emphasized [Subcontractor 1] and [Subcontractor 2]'s experience in performing the incumbent contract, but did not state that Ideogenics itself brings such experience. Section II.B, *supra*. Accordingly, the Area Office clearly erred in determining that the fourth factor in the *DoverStaffing* line of cases is not met. Although the record does not establish whether or not the subcontractors' past performance played a major role in the award decision, the fourth factor of the test is nevertheless met because Ideogenics “lacks experience in the principal subject matter of this procurement.” *Modus Operandi*, SBA No. SIZ-5716, at 12; *see also DoverStaffing*, SBA No. SIZ-5300, at 9.

As Appellant highlights, the record in this case also contains other indicia of unusual reliance, and thus arguably presents even stronger grounds for affiliation than *DoverStaffing* itself. First, according to Ideogenics's subcontracts with [Subcontractor 1] and [Subcontractor 2], the parties “mutually agree[d] not to offer employment, nor accept for employment, each other's employees who are directly or indirectly associated with the work covered by this Subcontract.” Section II.B, *supra*. Based on this provision, then, it is not evident that Ideogenics would be able

to carry out its plan to hire its workforce from its subcontractors, raising the possibility that these personnel would remain subcontractor employees, and that no Ideogenics personnel would be involved in performing the contract. In this respect, the instant case is similar to OHA's decision in *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260, at 5 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR), where OHA found that the challenged firm's proposal was so ambiguous that it was “unclear whether [the prime contractor] proposed to provide any contract employees at all” and that “[i]f [the prime contractor] cannot provide contract employees, it cannot be performing the primary and vital contract requirements.” Likewise, in the instant case, Ideogenics has not explained how its plan to hire incumbent subcontractor personnel can be reconciled with the terms of the subcontracts. Second, the subcontracts also provide that subcontractor employees “shall be under the employment, and ultimate control, management, and supervision of the Subcontractor.” Section II.B, *supra*. Insofar as the subcontracts prevent or restrict Ideogenics from managing and supervising its subcontractors' work, this is suggestive of unusual reliance. It is settled law that “[a]mong the main considerations in ostensible subcontractor analysis are which concern will be managing the contract.” *DoverStaffing*, SBA No. SIZ-5300, at 8. Third, as Ideogenics acknowledges, Ideogenics does not itself have the necessary facility to perform this contract, a requirement of the RFP. Sections II.A and II.B, *supra*. While Ideogenics maintains that it will sublease the facility used for the incumbent contract on commercially-reasonable terms, Ideogenics has not yet done so and such a lease is not in the record. The fact that Ideogenics is dependent upon its subcontractor to meet an important contractual or solicitation requirement is suggestive of unusual reliance. *Modus Operandi*, SBA No. SIZ-5716, at 13; *Profl Sec.*, SBA No. SIZ-5548, at 9 fn. 3.

In sum, the Area Office clearly erred in concluding that *DoverStaffing* and its progeny are inapposite here. On the contrary, all four factors established in these cases are present, and the record also contains other significant indicia of reliance and therefore affiliation.

Ideogenics attempts to distance itself from the *DoverStaffing* line of cases, but none of Ideogenics's arguments are persuasive. Ideogenics maintains that it will not hire its workforce *en masse* from its subcontractors because Ideogenics will merely offer employees a right of first refusal pursuant to Executive Order 13,495. Ideogenics's proposal, though, does not refer to Executive Order 13,495, but instead suggests that employees would simply continue to work in the same roles that they performed on the incumbent contract, and thus would be “[xxx].” Section II.B, *supra*. Such an approach is equivalent to adopting the incumbent workforce *en masse*. *Modus Operandi*, SBA No. SIZ-5716, at 12. Moreover, OHA has repeatedly addressed Executive Order 13,495 in the context of the *DoverStaffing* line of cases, and has explained that “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.” *Profl Sec.*, SBA No. SIZ-5548, at 9 (quoting *Wichita Tribal Enters.*, SBA No. SIZ-5390, at 9). Notwithstanding Executive Order 13,495, then, a prime contractor may still run afoul of the ostensible subcontractor rule when — as here — it “propose[s] to rely upon [a subcontractor] for virtually all staffing, including both managerial and non-managerial employees, and without contributing [the prime contractor's] own employees or other value to the project beyond [its] small business status.” *Id.*

Ideogenics also emphasizes that the Area Office found that Ideogenics will self-perform the majority of the primary and vital contract requirements. The Area Office's finding, however, was based on the premise that most of the contract workforce, including the Contract Manager and Alternate Contract Manager, would be Ideogenics employees. Section II.D, *supra*. As discussed above, this conclusion appears questionable in light of the subcontract provisions that may prevent Ideogenics from hiring subcontractor employees. In any event, though, under the ostensible subcontractor rule, “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.” *Charitar Realty*, SBA No. SIZ-5806, at 14. Thus, even assuming that Ideogenics will self-perform the majority of the primary and vital requirements, this does not preclude a finding that Ideogenics is unusually reliant upon its subcontractors based on the *DoverStaffing* line of cases.

Ideogenics also observes that, according to OHA precedent, “[w]here there are a number of subcontractors, but with no one subcontractor having a majority of the work, control over the management of the contract can lead to finding of no violation of the ostensible subcontractor rule.” *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 12 (2011). Neither [Subcontractor 1] nor [Subcontractor 2] will perform a majority of the work, Ideogenics emphasizes, so OHA should find no violation of the ostensible subcontractor rule. This argument lacks merit. Ideogenics offers no rationale as to how Ideogenics would be less dependent upon its subcontractors merely because Ideogenics will engage two different firms rather than one, and, contrary to Ideogenics's suggestions, it is possible to find a violation of the ostensible subcontractor rule even when a prime contractor will utilize multiple subcontractors. *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5369 (2012), *recons. denied*, SBA No. SIZ-5392 (2012) (PFR). Moreover, as discussed above, it is not evident here that Ideogenics actually will have “control over the management of the contract.” Four of the proposed six key personnel, as well as many of the mid-level managerial staff, will be subcontractor employees, and the terms of the subcontract agreements appear to restrict Ideogenics from directly managing its subcontractors or from hiring the proposed Contract Manager and Alternate Contract Manager, who are current [Subcontractor 1] employees. Section II.B, *supra*. Ideogenics's CEO appears to be the only current Ideogenics staff member referenced in its proposal, but he has no major role on the contract beyond interfacing with the Contract Manager, Alternate Contract Manager, and the Executive Steering Group, which Ideogenics concedes is merely an advisory committee conforming to ordinary contractor meeting practices. *See* Sections II.B and II.H, *supra*. OHA has held that tangential involvement by the prime contractor's senior leadership is insufficient to dissipate unusual reliance on a subcontractor. *DoverStaffing*, SBA No. SIZ-5300, at 8 (finding the prime contractor's President had no major role on the contract other than interfacing with the procuring agency, and, thus, did not show that the prime contractor had ultimate control over the contract).

Lastly, Ideogenics highlights that several of the factors in the *DoverStaffing* line of cases are not, by themselves, sufficient to establish unusual reliance. OHA has recognized, for example, that “engaging the incumbent as a subcontractor leads to heightened scrutiny of the arrangement, but is not a *per se* violation” of the ostensible subcontractor rule. *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436, at 16 (2013). Likewise, a prime contractor's inexperience and reliance upon a subcontractor's past performance is “only one among other factors in the ostensible subcontractor analysis.” *Size Appeal of Logistics & Tech. Servs., Inc.*, SBA No. SIZ-

5482, at 8 (2013). Nevertheless, the problem for Ideogenics here is that all four of the key factors identified in the *DoverStaffing* line of cases are present. Under such circumstances, OHA has found unusual reliance, notwithstanding that each of the individual factors, standing alone, would not suffice.

IV. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED and the size determination is REVERSED. Ideogenics is affiliated with [Subcontractor 1] and [Subcontractor 2] under the ostensible subcontractor rule for purposes of this procurement. It is undisputed that the combined receipts of Ideogenics, [Subcontractor 1], and [Subcontractor 2] exceed the \$20.5 million size standard. Therefore, the conclusion that Ideogenics is a small business for this procurement is also REVERSED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge