

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

SIZE APPEAL OF:

Jacob's Eye, LLC

Appellant,

Appealed From  
Size Determination No. 3-2018-014

SBA No. SIZ-5895

Decided: April 5, 2018

APPEARANCES

Todd Whay, Esq., The Whay Law Firm, McLean, VA, for Appellant

Constance M. Kobayashi, Esq., Office of General Counsel, U.S. Small Business Administration, for the Agency

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On December 26, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2018-014, finding Jacob's Eye, LLC (Appellant) is other than small. The Area Office concluded that Appellant was other than small based on its relationship with two large subcontractors, under the ostensible subcontractor rule. On appeal, Appellant maintains that the Area Office clearly erred, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted and the matter remanded to the Area Office for further investigation.

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. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

---

<sup>1</sup> This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to request redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release

## II. Background

### A. The Solicitation

On March 2, 2017, the National Guard Bureau issued Request for Proposals No. W9133L-17-R-0037 (RFP) seeking to award an Indefinite-Delivery, Indefinite-Quantity (IDIQ) contract. The maximum dollar value of the contract was \$90 million but the ceiling was later increased to \$112 million. (RFP, at 22; Amendment No. 0001, at 1.) The Contracting Officer (CO) set the procurement aside for small business, and designated North American Industry Classification System (NAICS) code 541810, Advertising Agencies, with a corresponding size standard of \$15 million in average annual receipts.

The RFP seeks a contractor to “provide all personnel, equipment, tools, materials and supervision necessary to perform Recruiting and Retention Services (R&R) for the Air National Guard (ANG). (RFP, at 23.) The contractor will provide and coordinate day-to-day management of the R&R program support services. (*Id.*, at 39.) In particular, the RFP states that a contractor “shall provide collaboration, cooperation, and coordination to achieve overall R&R objectives for recruiting and retaining qualified individuals to meet the congressional mandated end-strength.” (*Id.*)

The Performance Work Statement (PWS) lists the following tasks as part of the contract: Recruiting and Retention Management Support Services; Administrative Website Support Services; Local Recruiting and Retention Activity Support; National/Regional Advertising; Lead Processing (through inbound and outbound call centers, chat services, and social media outreach and monitoring); Lead Advisory Screening; Lead Nurturing; Lead Fulfillment; Data Collection, Analytics, Research and Reporting; Research; Storefront Office Support; Centers of Influence and R&R Recognition Support; and Creative Support Services. (*Id.*, 40-48.) Specifically, National/Regional Advertising requires the contractor to procure advertising in numerous mediums, including broadcast (*e.g.*, television, radio, and movie theaters), print (*e.g.*, magazines, publications, and newspapers), online, outdoor marketing (*e.g.*, billboards), direct marketing (*e.g.*, e-mail and mail), and new mediums. (*Id.*, at 43.) The Storefront Office Support element required “the development and execution of interior design products and services for ANG storefronts.” (*Id.*, at 42). This task includes providing a “storefront revitalization strategy” for the exterior and interior of ANG R&R offices, and exterior building signs. (*Id.*)

The RFP identifies a Senior Account Manager and Assistant Account Manager as key personnel. (*Id.*) The RFP indicates that these key individuals would be able to “provide market analysis, statistical analysis and presentation of program results and Information Technology (IT) infrastructure management.” (*Id.*) The RFP requests that the contractor provide the names and resumes of key personnel and their alternates to the CO with its proposal, and requires the contractor to notify the CO of any changes to the key personnel identified in the proposal. (*Id.*, at 39.)

The RFP indicates the CO will make award based on four evaluation factors: (1) Technical Approach; (2) Management Approach; (3) Past Performance; and (4) Price. (*Id.*, at

137-138.) The Technical Approach comprises two subfactors: (1) Overall IDIQ Approach and (2) Sample Task Order. (*Id.*, at 137.) The Management Approach comprises three subfactors: (1) Management/Staffing Plan; (2) Key Personnel; and (3) Quality Control Plan. (*Id.*, at 138.) The RFP notes “Technical Approach [is considered] more important than Management Approach . . . Management Approach is considered more important than Past Performance . . . [and] all non-price factors [are] considered significantly more important than Price.” (*Id.*, at 138.) The RFP notes the Technical Approach subfactors are of equal importance, while the Management Approach subfactors decrease in importance from Management/Staffing Plan to Key Personnel to Quality Control Plan. (*Id.*, at 138.) The RFP later specifies, for the Key Personnel subfactor, “[t]he Government will evaluate the strength and quality of personnel proposed for this solicitation as part of the Management Approach Factor. Resumes will be reviewed to ensure relevant skills and experiences are present. Resumes detailing highly specialized and/or relevant experience and higher education levels will be evaluated more favorable.” (*Id.*, at 141.) According to the RFP, “[a]ll proposals shall be subject to evaluation by the Source Selection Team (SST) . . . The proposal will be evaluated to determine the extent to which each requirement has been addressed in the proposal in accordance with the proposal submission section of the RFP.” (*Id.*, at 138.)

According to the RFP, the offeror's proposal must consist of five volumes: Volume I — Technical Approach; Volume II — Management Approach; Volume III — Past Performance; Volume IV — Cost/Price; and Volume V — Solicitation, Offer and Award Documents and Certifications/Representations. (*Id.*, at 124.) The first two volumes may comprise, at most, 125 pages. (*Id.*) The RFP stresses “***NOTE: Pages that exceed the required page limitations will not be evaluated. Additional pages over the maximum allowed will be removed or not read and will be evaluated by the Government.***” (*Id.*, at 134, emphasis in original.) The RFP cautions, “[o]fferors are responsible for including sufficient details to permit a complete and accurate evaluation of each proposal” and “the Government . . . will base its evaluation on the information presented in the offeror's proposal.” (*Id.*, at 124-125.) For the Sample Task Order subfactor, the RFP directs the offeror to “provide a narrative of *all* personnel proposed to support the execution of the requirement as it relates to this task.” (*Id.*, at 127.) For the Management Approach factor, the RFP requires the offeror to “provide a management/ staffing plan that addresses the requirements of this IDIQ. This approach must include adequate details of chain command structure and methodology, and internal controls for problem resolution.” (*Id.*, at 128.) The RFP states “[t]he offeror will provide an organization chart that shall identify staff and key personnel positions” and “shall describe existing policies and procedures [that] the offeror will use in the operation of this contract, including the management of subcontractors.” (*Id.*, at 128.)

Offers were due on April 17, 2017. Appellant submitted its proposal on that date.

#### B. Appellant's Proposal

Appellant's proposal states it is a Service-Disabled, Veteran-Owned Small Business concern (SDVO SBC) and is headquartered in a HubZone. (Proposal, Volume I - General, § E.) Appellant's proposal identifies six proposed subcontractors team including: [Subcontractor 1]; [Subcontractor 2]; [Subcontractor 3]; [Subcontractor 4]; [Subcontractor 5]; and [Subcontractor 6]. (*Id.*, at § D.)

[Subcontractor 2]'s task area would be “call centers.” [Subcontractor 2] would be on duty 24 hours per day, every day, answering inbound calls, and would also make 8,000 to 12,000 outbound follow up and lead calls per month. (*Id.*)

[Subcontractor 1] would be involved with “Media Planning Management and Execution.” (*Id.*) The proposal states “[Subcontractor 1] launched the [Subcontractor 1]” which works with all levels of government on communication RFP response work. (*Id.*) Programming would be distributed through AM, FM, and HD radio stations, online, and through digital applications. (*Id.*) The proposal further states the experts on the [Subcontractor 1] team were “focused on fine tuning approaches and skills in servicing complex media contracts with the added benefit extended media budgets through bonus.” (*Id.*) The proposal notes that Appellant decided to work with [Subcontractor 1] to utilize their “state by state expertise” and to deliver a campaign that “reached each state effectively.” (Proposal, Volume II — Technical and Management Approach, Tab A, at 30-31.) [Subcontractor 1] outlined a digital campaign for reaching ANG's target audience of 18-34 year olds (more specifically, 18-30 year old males). (*Id.*, at 38.) “[Appellant]/[Subcontractor 1] will provide and execute a comprehensive ANG national and regional advertising program as part of the deliverables for this contract.” (*Id.*, at 77.) [Subcontractor 1] will use broadcast media, print, online media, direct marketing, new media, and billboards to reach the target audience. (*Id.*, at 79.) The proposal describes [Subcontractor 1] as “our one stop shop partner” for media buying. (*Id.*, at 122.)

[Subcontractor 3] would be involved with Storefront Office Support, including storefront revitalization. (*Id.*, at 66, 77.) According to the proposal, [Subcontractor 3] is a global practice that provides clients with design across capabilities, including designing office/ industrial buildings. (*Id.*) [Subcontractor 3]'s Storefront Revitalization Approach is outlined in the proposal. (*Id.*) [Subcontractor 3] would develop the interiors of recruitment centers to design attractive spaces that young career seekers would desire to enter and participate within. (*Id.*, at 66.) [Subcontractor 3] would develop design elements for the space including specialty lighting, finishes, millwork, and ceiling fixtures. (*Id.*, at 69).

[Subcontractor 4] is a full-service communications and digital marketing firm concentrating on website design and development. They will provide Digital, IT, and Web management services, as well as work on social media campaigns. (*Id.*, at 35-57.) [Subcontractor 4] is Appellant's small business IT/Web portal partner. (*Id.*, at 122.)

[Subcontractor 5] is listed as performing “fulfillment.” The proposal refers to the solicitation tasks of providing print-on-demand products; procuring display materials with ANG branding; procuring warehouse, ship, set-up, and tear down display materials with ANG branding; and producing and distributing recognition materials like certificates and plaques. (*Id.*, at 65; *see* Solicitation, at 39-48.)

Finally, the proposal designated [Subcontractor 6], a research organization, for research under the contract, including data collection, analytics, research associated with ANG leads. (Proposal, Volume II — Technical and Management Approach, Tab A, at 58-60.)

The proposal includes a total cost breakdown for each Contract Line Item Number (CLIN) listed in the solicitation. The estimated cost for: Recruiting and Retention Program is [xxx]; Website and Interactive Portion is [xxx]; Local Event Outreach is [xxx]; National and Regional Event Outreach is [xxx]; Lead Processing is [xxx]; Centers of Influence and R&R Recognition Support is [xxx]; and Creative Support Services is [xxx]. (Proposal, Volume — IV, at \*2 (table titled, “Base Year”).) Digital Outreach and Advertising is estimated to cost [xxx], with [xxx] of that going to “media buy.” (*Id.*) Local Recruiting and Retention Activity Support, is estimated to cost [xxx], with [xxx] of that designated for construction of storefronts and [xxx] for printing, promotional items, shipping, and warehouse storage related to the storefront revitalization. (*Id.*, at \*3.)

Regarding staffing, the proposal stated: “[i]n consideration of our joint venture, collectively we have a number of full time employees and can ramp to upwards of [xxx] people based upon project needs.” (Proposal, Volume II — Technical and Management Approach, Tab A, at 75.) The proposal's “Personnel and Staffing Plan” for the Sample Task Order subfactor, the proposal identifies a Senior Media Strategist/National Advisor, National/Regional Media Managers, State Specific Project Managers, a Digital Strategist, and an Accounting Specialist. (*Id.*, at 119.) According to the proposal, [Subcontractor 1] “has its own digital strategist and digital campaign manager,” as well as its own Accounting Specialist. (*Id.*) The proposal continues, providing a “visual of the MEDIA team and the flow of our work responsibility” that lists ANG, the aforementioned positions, several project managers, and several “Local Activation” in descending order. (*Id.*, at 120.) The visual does not mention Appellant or any of the subcontractors by name. (*Id.*)

Then, for the Management Approach factor, the proposal includes an organizational chart in its “Management/Staffing Plan.” (*Id.*, at 121.) The chart lists: [xxx], Senior Account Manager; [xxx], Creative Account Manager; [xxx], Call Center Director; [xxx], Tech. Lead; [xxx], Media Lead; [xxx], Fulfillment Lead; [xxx], Storefront Design & Build Lead; and [xxx], Research Director. (*Id.*, at 121.) The chart does not delineate the employer of each. (*Id.*)

According to “Proposal Package Contents,” Volume II — Technical and Management includes Tab A, addressing the Technical Approach factor, and Tab B, addressing the Management Approach factor. (Proposal, Volume I — General, at 1-2.) The proposal states Tab B includes a “Key Personnel” section, comprising resumes and commitment letters, following the Management/Staffing Plan section and preceding the Quality Control Plan section. (Proposal, Volume I — General, at 1-2.) Under “Key Personnel,” the proposal states “[p]lease take a look at the skills and experience of our internal Key Personnel below,” and provides the following list: “Individual Roles, Responsibilities and Lines of Authority”; “Description of Structure, Composition and Duties Involved”; “Organizational Structure Ensures Coherent Governance”; “Element 1 — Resumes”; “Element 2 — Listing of Key Personnel, Commitment Letters (Appendix — Volume II)”. (Proposal, Volume II — Technical and Management Approach, Tab A, at 124; Proposal, Volume II — Technical and Management Approach, Tab B, at 52-53.) The Quality Control Plan section immediately follows the list. (*Id.*) Later, the proposal includes a breakdown of Appellant's proposed labor rates and total costs based on CLIN.

The proposal listed three past performance references relevant to the solicitation. (Proposal, Volume III — Past Performance, at \*4.) The first reference is Appellant's work with the U.S. Army Research & Marketing Group: Steve Harvey National Mentoring Recruitment Program. The proposal states Appellant “produced and executed mentoring camps for the Steve Harvey Foundation and U.S. Army.” (*Id.*) According to the proposal, Appellant worked with the U.S. Army Marketing & Research Group, and Recruiting Command to create national community outreach programs geared toward generating new recruits. (*Id.*)

The second past performance reference is [Subcontractor 1's] work with the California Highway Patrol Recruitment Media and Marketing Campaign. (*Id.*) The proposal states [Subcontractor 1] worked with the California Highway Patrol Recruitment team to use radio, television, digital applications, gaming, streaming radio, and local events to run a recruitment campaign. According to the proposal, “[Subcontractor 1] managed all production” and “provided talent.” (*Id.*) The [Subcontractor 1] “researched, strategized, planned, purchased media with [Subcontractor 1] and non-[Subcontractor 1] owned media statewide, as well as regionally.” (*Id.*) [Subcontractor 1] provided campaigns, created digital content, developed recruitment tools, deployed a campaign that would drive traffic to a call center and website, and utilized targeted digital delivery to increase recruit applications. (*Id.*)

The third past performance reference is [Subcontractor 4]'s past performance with the U.S. Department of Veteran's Affairs on their “Make the Connection” campaign. The proposal states [Subcontractor 4] created a research-based strategic, integrated communications campaign to help veterans and their families and friends overcome the stigma associated with seeking mental health services, and to increase the number of veterans who obtain support. (*Id.*) [Subcontractor 4] created a website, branded Facebook page, and illustrated collateral for the project. (*Id.*)

The CO was awarded Contract No. W9133L-17-D-0004 to Appellant on September 25, 2017.

### C. The Protest

On October 2, 2017, March Marketing, LLC (March), an unsuccessful offeror, filed a protest with the CO alleging that Appellant is unable to perform the primary and vital requirements of the contract and is unusually reliant on its large business subcontractors. On November 1, 2017, the CO forwarded the size protest to the Area Office.

March alleged Appellant does not have the resources or capacity to support the primary and vital requirements of the contract, because it has only one employee. (Protest, at 3.) March maintains the awardee here must perform media and management services on a national, state and local level, which requires staffing resources Appellant lacks. (*Id.*, at 4.) March alleges Appellant could only perform the work if it used personnel provided by subcontractors, in violation of the ostensible subcontractor rule. (*Id.*)

March also alleged Appellant did not “have the requisite experience to manage and support a nationwide recruiting and retention program.” (*Id.*, at 4.) March alleged one of

Appellant's subsidiaries was subject to a state lien, and that this suggested that Appellant lacked financial resources to sustain its business. (*Id.*)<sup>2</sup> Finally, March contended Appellant “has undergone multiple changes in corporate structure in recent years, suggesting a lack of management stability needed to perform any government contracts or subcontracts. . . .” (*Id.*)

In response to the protest, Appellant maintained that it had the financial resources to perform the contract. Appellant provided the Area Office with a financing letter from [xxx], indicating that it would have sufficient funds to cover its initial costs for the subject procurement. (Response, at 4; *see id.*, at Tab 31.) Appellant also indicated that there were no liens against it that might prevent performance. (*Id.*, at Tab 33.)

Appellant also maintained that it did not violate the ostensible subcontractor rule because it would perform more than 50% of the work and is not unusually reliant on its subcontractors. (*Id.*, at 5-10.) In particular, Appellant states it will perform 72% of all labor hours, which accounts for 73% of all labor costs. (*Id.*, at 5; *see* Declaration of D. Massey, at ¶12 (Nov. 9, 2017).) Appellant provided a breakdown of the proposed labor costs based on CLIN. (E-mail from T. Whay to K. Matthews (Dec. 13, 2017).) The breakdown also specifies whether Appellant or one of its subcontractors is responsible for each labor category for each CLIN. (*Id.*) For example, Appellant's breakdown indicates [Subcontractor 1] will perform 67% of CLIN 0003, while Appellant performs approximately 25%. For CLIN 0005, Appellant will perform 100%. (*Id.*)

In addition, Appellant provided a letter from the CO to Appellant requesting additional information relating to its proposal and asking Appellant to “[p] lease explain how [it] is going to perform 50% of the work in the performance work statement” no later than July 25, 2017. (Response, at Tab 32; Letter from T. Glasgow to D. Mardis (July 26, 2017).) In response, Appellant provided the CO with “the actual Division of Work” between Appellant and its subcontractors based on the Performance Work Statement. (Response, at Tab 32; Letter from D. Massey to T. Glasglow (July 26, 2017).) In concluding the letter, Appellant provides the “percentage of work expected to be performed by us, the Prime, for each CLIN in the Base Year and Option Years.” (*Id.*) According to Appellant, it will perform: 90% of CLIN 0001: Recruiting and Retention Program; 17% of CLIN 0002: Website & Interactive; 68% of CLIN 0003: Digital Outreach and Advertising; 63% of CLIN 0004: Local Recruiting and Retention Activity Support; 92% of CLIN 0005: Local Event Outreach; 96% of CLIN 0006: National/Regional Event Outreach; 35% of CLIN 0007: Lead Processing Program; 57% of CLIN 0008: Centers of Influence and R&R Recognition Support; and 89% of CLIN 0009: Creative Support Services. (*Id.*) Appellant states it will perform 67.4% of the “average CLIN percentage of work.” (*Id.*)

---

<sup>2</sup> On appeal, Appellant again asserts it has the necessary funding to perform the contract. (Appeal, at 6-7.) Assertions that an awardee is not capable of performing are akin to a responsibility determination, and as such are under the province of the CO, not the area office. Moreover, the ability to perform the contract cannot be the basis for an affiliation under the ostensible contractor rule. *Size Appeal of Loyal Source Government Services, LLC*, SBA No. SIZ-5662 (2015). *Size Appeal of Synergy Solutions, Inc.*, SBA No. SIZ-5843 at 46-47 (2017). Accordingly, I will not discuss Appellant's financial ability to perform the contract.

#### D. Size Determination

On December 26, 2017, the Area Office issued Size Determination No. 03-2018-014, concluding Appellant was other than small for this procurement.

First, the Area Office examined Appellant's size. Appellant's sole shareholder is Mr. Delano Massey. Mr. Massey also holds a 100% interest in Jacob's Eye Publishing Group, LLC, Jacob's Eye Asset Development Firm, LLC, and Fresh District, LLC. (Size Determination, at 3-4.) Mr. Massey is also one of 16 equal owners in 342 Investment Club, LLC. The Area Office found Appellant affiliated with all of these entities because of common ownership and common management. (*Id.*, at 4.) The Area Office determined that Appellant, together with these affiliates, is a small business. (*Id.*, at 3-4, 12.)

The Area Office determined that four of the six subcontractors listed in Appellant's proposal, [Subcontractor 2], [Subcontractor 1], [Subcontractor 3], and [Subcontractor 4], were large businesses, and two, [Subcontractor 6] and [Subcontractor 5], were small, similarly situated entities. (*Id.*, at 9-12.)

The Area Office found “the outreach and advertising program is the activity or services [sic] needed to support the recruiting and retention effort and [are] therefore primary and vital requirements of the contract.” (*Id.*, at 8.) Appellant's proposal refers to 20 years of experience the “team” has as a whole and specifically speaks about [Subcontractor 1], who will pair with Appellant to provide and execute a national and regional advertising program. (*Id.*) The Area Office noted that the proposal identified three tasks of media outreach: local recruitment and retention activity support; national/regional advertising; and digital outreach and advertising. (*Id.*) To be able to deliver the local and national campaign, the proposal indicated that [Subcontractor 1] will process and execute the media strategy. (*Id.*) The Area Office emphasized that [Subcontractor 1] was described as a full service communication and digital marketing firm which detailed in the proposal the five ways they would approach the digital advertising campaign. (*Id.*) The Area Office found that [Subcontractor 1], a large business subcontractor, is performing the primary and vital requirements of recruiting via digital outreach and advertising and is therefore an ostensible subcontractor. (*Id.*)

The Area Office also analyzed Appellant's reliance on [Subcontractor 3] to perform the contract. (*Id.*, at 11.) The Area Office noted that [Subcontractor 3] is a large business which “will design the storefront for ANG which is a large portion of the Local Recruiting and Retention Activity.” (*Id.*) The Area Office concluded that because Appellant was dependent on this subcontractor to “meet an important contractual or solicitation requirement,” Appellant is unusually reliant on [Subcontractor 3], and thus affiliated with them based on the ostensible subcontractor rule. (*Id.*)

The Area Office also noted that it was unclear whether an employee of Appellant would be filling a key employee position, the Senior Account Manager. (*Id.*, at 7.) Additionally, it was unclear to the Area Office who would fill the second key employee position, Assistant Account Manager, as the individual listed on the organizational chart in the proposal was not employed by



the Appellant. The Area Office thus concluded that it was unclear who would be managing the contract. (*Id.*, at 7.)

The Area Office also stated that it was difficult to determine Appellant's role in performance of the contract because it did not specify the services it would provide in the technical part of the proposal. (*Id.*) Further, the Area Office found that it was unclear who would be managing the contract. (*Id.*, at 11.) As noted above, the Area Office found Appellant would be dependent on [Subcontractor 1], a large subcontractor to perform digital outreach and advertising, which are the primary and vital requirements of the contract, and constitute the majority of contract dollar value. (*Id.*)

The Area Office further found the only detail Appellant provided on its performance of the contract was provision of management and administrative support. (*Id.*, at 7.) The Area Office noted the CO requested that Appellant whether it intended to perform 50% of the work required in the PWS. (*Id.*, at 8.) The Area Office found that Appellant submitted three different percentages of the work it planned to perform, none of which supported the information in the proposal. (*Id.*, at 9.)

The Area Office found Appellant's past performance submission highlights that it has some technical expertise, but overall is unusually reliant on [Subcontractor 1] and [Subcontractor 3]. (*Id.*) The Area Office noted that of the three past performances submitted by the Appellant, one was from the Appellant; another was from [Subcontractor 4], a small subcontractor, and the third from [Subcontractor 1]. (*Id.*) The past performance from Appellant showed experience that was relevant, including mentoring students, but the value of that contract was below that of the current solicitation and the work was performed as a subcontractor. (*Id.*, at 9.)

The Area Office concluded that Appellant was unusually reliant upon [Subcontractor 1] and [Subcontractor 3] to perform the primary and vital requirements of the contract, and thus affiliated with them under the ostensible subcontractor rule, and other than small for this procurement.

#### E. Appeal

On January 10, 2018, Appellant filed the instant appeal. The Appellant argues the Area Office erred in determining it was affiliated with two large subcontractors. (Appeal, at 11).

The heart of Appellant's argument on appeal is that the primary and vital requirement of this contract is to manage the wide range of tasks required to perform the R&R services required, not to perform all the work. (*Id.*, at 14.) Appellant argues that the Area Office erred in identifying the primary and vital requirement of the procurement as the advertising and outreach program, and stated that the primary and vital requirement of the procurement was “to obtain overarching management services for the R&R.” (*Id.*, at 13, citing *Size Appeal of Tinton Falls Lodging Realty, LLC*, SBA No. SIZ-5546 (2014) and *Size Appeal of TLC Catering*, SBA No. SIZ-5172 (2010).)

Appellant contends that it will control and manage the contract. (*Id.*, at 11.) The Appellant asserts a significant portion of the cost of R&R services is the “media buy” for television and radio commercials, which is nearly [xxx], and is not a labor cost. (*Id.*, at 4.) Appellant also asserted that it has done similar work for the U.S. Army, demonstrating national, regional and local advertising experience. (*Id.*, at 5, 16.) Appellant asserts it had contingent hires ready to fill the key personnel positions, and that those hires would be Appellant's employees. (*Id.*, at 12.) Appellant's proposed Senior Account Manager, [xxx], would become Appellant's employee upon award of the contract. (*Id.*, at 12.)

In response to the claims of financial instability, Appellant notes that it was approved for a provisional credit line of [xxx], and that line of credit could be increased if an ANG task order required an increase in working capital. (*Id.*, at 7.)

Appellant argues it is not unusually reliant upon its subcontractors, pointing to the four-part test for unusual reliance. The four factors are:

- (1) Whether proposed subcontractor was the incumbent contractor, and was not itself eligible to compete for the procurement;
- (2) Whether the prime contractor planned to hire the large majority of its workforce from the subcontractor;
- (3) Whether the prime contractor's proposed management previously served with the subcontractor on the incumbent contract; and
- (3) Whether the prime contractor lacked relevant experience, and was obliged to rely upon its more experienced subcontractor to win the contract.

(*Id.*, at 15, citing *Size Appeal of Synergy Solutions, Inc.*, SBA No. SIZ-5843 (2017).)

Appellant maintains that the first three factors are not at issue here, and the Area Office did not discuss them. None of the proposed subcontractors are incumbents, and Appellant does not plan to hire any of its workforce from them. (*Id.*)

Appellant argues its past performance should not be an issue. It submitted a past performance reference showing relevant experience. The issue of whether a concern is capable of performing the required work is an issue for the CO, not the Area Office. (*Id.*, at 16, citing *Size Appeal of Paragon Tec, Inc.*, SBA No. SIZ-5290 (2011).) The Area Office gave Appellant inadequate credit for its past performance, and even if it had not, the RFP provides that an offeror with no past performance received a “Neutral Confidence Rating”. The Area Office is merely speculating that Appellant's performance was insufficient. (*Id.*)

Moreover, Appellant asserts that the Area Office arbitrarily categorized the storefront construction requirement to be an important part of the requirement in determining that Appellant was overly reliant on a large subcontractor. (*Id.*, at 17.) Appellant asserts the Area Office dismissed the management, oversight, and coordination that would be required. (*Id.*)

Appellant also pointed to its past performance to show it has the requirement experience to perform under the contract. (*Id.*, at 16.) Appellant further asserts the largest portion of the money going to [Subcontractor 1] would actually be to purchase air time, not labor. (*Id.*, at 17.)

Appellant maintains it will perform the RFP's primary and vital requirements. (*Id.*) Appellant stated that it will perform "the vast majority of work required by the Solicitation." (*Id.*, at 8.) Appellant asserts it will be participating in all aspects of the contract, its labor hours representing 72% of all labor hours, accounting for 73% of all labor costs. (*Id.*, at 18.) Appellant maintains the Area Office erred in finding CLIN 0003, Digital Outreach and advertising, the primary and vital requirement, due to a mistaken understanding of the costs associated with the work. The major cost here is [xxx] for television and radio air time, not the labor of [Subcontractor 1] personnel. The requirement with the largest portion of contract dollars is not determinative of the contract's primary and vital requirements. (*Id.*, at 18, citing *Tinton Falls*.) [Subcontractor 1] is the media buying agent, and the conduit to purchase media. [Subcontractor 1] does not plan or manage media campaigns. Appellant maintains it performs the important work, including creating message and content and identifying target audiences. (*Id.*)

#### F. OHA's Order

On January 26, 2018, OHA issued an order requesting comments from SBA's Office of General Counsel concerning the application of the exception for similarly situated entities under the ostensible subcontractor rule. OHA stated it has held that the Area Office must consider whether a prime contractor and proposed subcontractor are exempt from the ostensible subcontractor rule as similarly situated entities and, if so, the Area Office does not need to conduct further analysis under the rule for that subcontractor. (OHA's Order, at 1-2, citing *Size Appeal of The Frontline Group*, SBA No. SIZ-5860 (2017) and *Size Appeal of The Frontline Group*, SBA No. SIZ-5823 (2017).) However, OHA stated, the instant appeal is a case of first impression because OHA had not yet applied the exemption in situations where a prime contractor has multiple subcontractors of mixed status. (OHA's Order, at 2.)

#### G. SBA's Comments

On February 2, 2018, SBA filed comments on the appeal. SBA expressed the opinion that when there are multiple subcontractors with mixed status, specifically both similarly situated firms and large businesses, the large firms' percentages of work should be compared individually to that of the prime aggregated with the similarly situated concerns. (SBA's Comments, at 3.) SBA argues that because the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)) refers to an ostensible subcontractor in the singular form, there is no basis in the rule for aggregating the work performed by multiple large subcontractors. (*Id.*) If two large subcontractors are each performing 20% of the work on a contract, each concern's 20% should be compared to the aggregate of the prime and the similarly situated concerns. (*Id.*)

SBA further argues that the portion of the work performed by a small business prime contractor and those subcontractors which are similarly situated entities should be aggregated to determine compliance with the rule. The limitations on subcontracting regulation (13 C.F.R. § 125.6) provides that small business offeror must agree that it will not pay more than 50% of the

amount paid to it by the government to firms which are not similarly situated. The small business prime and its similarly situated subcontractors are aggregated to determine compliance with the rule. (*Id.*) Work performed by a similarly situated entity is considered the equivalent of work performed by the prime. (*Id.*, at 4.)

#### H. New Evidence

On January 25, 2018, Appellant filed a Motion to Admit New Evidence, seeking to enter into evidence a commitment letter from [xxx], the Appellant's proposed Senior Account Manager for Solicitation No. W9133L-17-R-0037, and a declaration from Delano Massey, Appellant's CEO, clarifying "certain facts pertinent to this protest." (Motion, at 1-2.)

### III. Discussion

#### A. Standard of Review

When filing a size appeal, the Appellant has the burden of proving, beyond a preponderance of the evidence, all elements of his appeal. 13 C.F.R. § 134.314. The applicable standard of review is whether the size determination was based on a clear error of fact or law. *Id.*, The Area Office's size determination will only be disturbed if it is the result of a clear error of fact or law, based upon the evidence in the record the Area Office had at the time it made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

#### B. Analysis

I find it appropriate to remand this matter to the Area Office because the record is incomplete and is insufficient to determine whether Appellant violated the ostensible subcontractor rule.

OHA has consistently held 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), and that an area office must analyze an alleged violation of the ostensible subcontractor rule based on "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).

Here, the solicitation clearly requires an offeror provide resumes for key personnel with its offer, and indicates such resumes would be reviewed by the SST and may contribute to a favorable evaluation. *See* Section II.A, *supra*. According to Appellant's proposal, its offer comprised four volumes as required under the solicitation, and included an appendix to the volume addressing Appellant's Technical Approach. *See* Section II.B, *supra*. Appellant's proposal directs the CO to review this appendix when evaluating its key personnel, and suggests the appendix contains resumes, commitment letters, and other important information concerning organizational structure, individual duties, responsibilities, and authorities. *Id.* However, this appendix is not included in the Area Office file.

While the solicitation states, in bold, that any additional pages beyond the maximum allotted will not be considered, the Area Office failed to obtain the proposal's appendix, or at least confirm whether the CO had received and considered the appendix in its evaluation of Appellant's offer. The Area Office attempted to obtain the missing appendix from the CO on December 13, 2017, via e-mail. (E-mail to I. Mesa Bascumbe to T. Glasglow (Dec. 13, 2017) (stating “Also need missing document for the proposal submitted by [Appellant], (Pg. 123 Volume II A) states they submitted Volume II, Appendix which includes Element 1 and 2).) However, from the e-mails provided in record, the Area Office never followed up on this request for the proposal appendix, nor did it subsequently reiterate its request. In its size determination, the Area Office suggests the CO was not forthcoming with documents pertinent to the size determination. *See* Section II.C, *supra*. It does appear the CO was reluctant to provide information on a related bid protest at the U.S. Government Accountability Office (GAO). (E-mail from T. Glasglow to I. Mesa Bascumbe (Dec. 13, 2017) (responding to the e-mail from I. Bascumbe on Dec. 13, 2017, stating “I still do not agree that you need all these documents to make your decision . . . I have clearance to give you the proposal but not the GAO protest). It also appears the CO was unresponsive to several of the Area Office's e-mails. (*See* E-mail from K. Matthews to T. Glasglow (Dec. 10, 2017); E-mail from K. Matthews to T. Glasglow (Dec. 13, 2017); *see also* E-mail from K. Matthews to T. Glasglow and T. Parker (Dec. 12, 2017).) In other instances the Area Office attempted other channels at ANG to secure necessary information, sending requests to the Contract Specialist and the Acting Director of Small Business Programs for the National Guard Bureau. (E-mail from K. Matthews to H. Shank (Dec. 6, 2017, 3:07 PM); E-mail from H. Shank to K. Matthews (Dec. 6, 2017, 3:19 PM); E-mail from T. Parker to K. Matthews (Dec. 13, 2017).) Both were responsive and cooperative, based on the correspondence. (*Id.*) The Area Office did not request the appendix from either individual, even though the Area Office did not issue its determination until December 26, 2017.

Further, it is indiscernible from the record whether Appellant is performing the majority of the work. The percentage of work attributable to each of the mixed-status subcontractors is equally indiscernible. The portions of Appellant's proposal included in the Area Office file lack any indication of the division of work, despite the solicitation's multiple requests for information on staffing and management. *See* Section II.A, II.B, *supra*. The CO requested clarification of the division of work from Appellant, to which the Appellant stated it performed the majority of the work, specifically 67.4% on average. *See* Section II.C, *supra*. However, Appellant's response does not explicate how it arrived at this number or reference the proposal for support. Later, Appellant submitted a sworn statement from its CEO, stating “[Appellant] will perform an overwhelming portion of the work . . . 72% of the labor hours, equating to 73% of the cost of labor under the solicitation.” (Declaration of D. Massey (Nov. 9, 2017); *see* Section II.C, *supra*.) Appellant also provided a second labor breakdown similar to that in its proposal, but the percentage of work shared by the subcontractors contradicts the percentages provided to the CO in Appellant's clarification. (*Id.*) In fact, Appellant later responded to the Area Office, stating it intended to perform “100% of the labor expense associated with CLIN [0005]” despite stating it would perform 92% in its clarification to the CO. (E-mail from T. Whay to K. Matthews (Dec. 13, 2017); *see* Section II.C, *supra*.)

SBA regulations state an area office will “base its formal size determination upon the record, including reasonable inferences from the record, and will state in writing the basis for its

findings and conclusions.” 13 C.F.R. § 121.1009(e). SBA regulations also state an area office should give “greater weight to specific, signed, factual evidence than to general, unsupported allegations or opinions.” *Id.*, at § 121.1009(d). OHA has held an offeror's proposal is controlling, and changes created in response to a protest may not be used to contradict an offeror's proposal. *See Size Appeals of Proactive Technologies, Inc. and Cymstar Services, LLC*, SBA No. SIZ-5772 (2016); *Size Appeal of Onopa Management Corp.*, SBA No. SIZ-5302 (2011); *see also Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815 (2017) (stating, when evaluating a similar proposal-based violation, “the best source to evaluate a concern's manufacturing operations is its own description of how it proposes to perform the contract”). OHA has often refrained from considering such information, but has distinguished post-proposal statements to the CO clarifying the proposal as permissible. *See Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5293 (2011) (stating “a response to discussion questions is not equivalent to a proposal, if that response attempts to introduce new or different information rather than merely clarifying material already contained in the proposal, citing Federal Acquisition Regulation 15.306(d).)

Here, in its size determination, the Area Office concludes that [Subcontractor 1], a large subcontractor, is performing the primary and vital requirements of the procurement. *See* Section II.D, *supra*. But, the Area Office does not describe how it resolved the contradictions between Appellant's proposal, clarification, and other statements regarding work allocation between the six subcontractors of mixed status. The record lacks any correspondence between the Area Office and the Appellant specifically requesting the Appellant clarify its inconsistent statements. The Area Office recognizes Appellant had “submitted at least 3 different percentages of work they will perform,” but merely concludes that “[n]one of these percentages supports the information in the proposal” without further discussion. (Size Determination, at 9; *see* Section II.D, *supra*.)

### C. Remand

In sum, I find it appropriate to remand this matter to the Area Office for further development of the record. *See Size Appeal of Kapsuun Group, LLC*, SBA No. SIZ-5857, at 1 (2017) (remanding because the area office “did not have the complete proposal and other necessary documents when it originally processed the size determination”); *Size Appeal of The Frontline Group.*, SBA No. SIZ-5835, at 8 (2017) (remanding because the record was insufficient to determine whether the challenged firm intended to perform the majority of the contract's primary and vital requirements); *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5291, at 6 (2011) (remanding and requesting the area office to further develop the record with regard to the challenged firm's potential affiliations). SBA regulations endow the Area Office with the responsibility to investigate the protest allegations and establish a record. 13 C.F.R. § 121.1009(b) (stating the Area Office “may make requests for additional information to the protestor, the concern whose size status is at issue and any alleged affiliates, or other parties”); *see Size Appeal of Wescott Electric Co.*, SBA No. SIZ-5691 (2015) (stating an area office is responsible for investigating the allegations presented in the protest, but not beyond those). OHA has stated an area office's failure to further develop and address clear contradictions in the record constitutes clear error. *See Size Appeal of Precision Standard, Inc.*, SBA No. SIZ-4858, at 6 (2007.)

On remand, the Area Office should obtain the referenced appendix to Volume II of Appellant's proposal, or confirm that the CO did not receive or did not consider the appendix when evaluating Appellant's bid offer. The Area Office should also obtain relevant evidence from Appellant and the CO to clarify the respective contributions of Appellant and its subcontractors toward its performance of the subject procurement. [xxx]'s resume should have been submitted to the Area Office, and should be considered here. If Appellant submitted resumes of the other personnel with its proposal, those resumes should be obtained.

Appellant is encouraged to submit comments to facilitate this review. *The Frontline Group*, SBA No. SIZ-5835, at 9 (2017) (directing the parties to submit comments during the remand process and citing *Size Appeal of Patriot Construction, Inc.*, SBA No. SIZ-5439, at 5 (2013)). Notably, if Appellant fails to produce information requested by the Area Office, the Area Office may assume that the missing information would have shown that Appellant is not a small business. 13 C.F.R. §§ 121.1008(d) and 121.1009(d); *see Size Appeal of Woodlawn Manufacturing, Ltd.*, SBA No. SIZ-5861 (2017); *Size Appeal of W&K Container, Inc.*, SBA No. SIZ-5758 (2016). The Area Office must particularly address just what portion of the work Appellant will itself perform, and not accept bare *post hoc* assertions by Appellant unsupported by the proposal.

Also, in light of this outcome, it is unnecessary to rule upon Appellant's motion to introduce new evidence on appeal. *E.g.*, *Size Appeal of Lost Creek Holdings d/b/a All-STAR Health Solutions*, SBA No. SIZ-5823 (2017); *Size Appeal of W&T Travel Services, LLC*, SBA No. SIZ-5721, at 16 (2016).

#### IV. Conclusion

Appellant has failed to demonstrate that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED, the size determination is VACATED, and the matter is REMANDED to the Area Office for further review and investigation. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge