

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

**FOR PUBLIC RELEASE**

SIZE APPEAL OF:

Elevator Service, Inc.,

Appellant,

Appealed From  
Size Determination No. 05-2018-040

SBA No. SIZ-5949

Decided: August 10, 2018

APPEARANCES

Shane McCall, Esq., Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq.,  
Koprince, Koprince Law, LLC, Lawrence, Kansas, for Appellant

Kevin Johnson, Little Rock, Arkansas, for JohnsonDanforth

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On May 24, 2018, the Small Business Administration (SBA) Office of Government Contracting - Area V (Area Office), issued Size Determination No. 05-2018-040, finding JohnsonDanforth, Inc. is a small business for the subject procurement. On June 8, 2018, Elevator Service, Inc. (Appellant) filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). Appellant argues the Size Determination is in error because JohnsonDanforth, Inc., the awardee of the underlying solicitation, is unusually reliant on its subcontractor in violation of the ostensible subcontractor rule due to its intention to hire the ineligible incumbent contractor's work force *en masse*. For the reasons discussed *infra*, the appeal is denied.

---

<sup>1</sup> This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to request redactions if desired. After reviewing the decision, the parties informed OHA that they had no requested redactions. Therefore, OHA now issues the entire decision for public release.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et. seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the respective size determination, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. Solicitation

On March 8, 2018, The Department of Veteran's Affairs (VA) issued Solicitation No. 36C26218R0411 (Solicitation) for the “maintenance and repair of government owned elevators.” The solicitation was completely set aside for a Service Disabled Veteran Owned Business (SDVO) and assigned NAICS code 238290, “Other Building Equipment Contractors,” with a corresponding \$15 million annual receipts size standard. The solicitation stated “the contractor shall provide full maintenance of elevators, cart elevators, dumbwaiters, and wheelchair lifts” for six particular Veterans Integrated Service Network 22 (VISN 22) locations in California. (Solicitation, at 10.) The solicitation specified that full maintenance service requires the “contractor to provide skilled trained journeyman elevator mechanics and helpers as well as supplies for regular and systematic inspection, cleaning, adjustment, and lubrication of equipment, as well as repair of equipment.” (*Id.*) The Solicitation stated “[t]he Contractor shall troubleshoot and resolve problems to restore equipment to working condition.” (*Id.*) The Solicitation also called for “on-site preventative maintenance inspections (PMI) and intervening repair services for all equipment at each healthcare facility.” (*Id.*)

The solicitation required Resident Mechanics have “technical qualifications of at least five (5) years (post apprenticeship) of successful experience, trained supervisory experience” and be “appropriately certified.” (*Id.* at 20.) The contractor was also required to “ensure that Resident Mechanics and Mechanic Helpers” doing work under the contract are certified by California to repair and maintain elevator equipment. In addition, all mechanics doing work under the contract need to have passed an examination of a nationally recognized training program or have a certificate of completion of a registered apprenticeship program. (*Id.* at 21.) The contract required that Resident Mechanics and mechanic helpers need to be on site eight hours a day, five days per week. The solicitation specified the weekly schedule for each of the six locations. (*Id.*)

### B. Proposal

JohnsonDanforth submitted a proposal to the Contracting Officer (CO) on April 2, 2018. In its proposal, JohnsonDanforth stated it had “significant experience with providing [e]levator [m]aintenance and repair services to the VA Healthcare System.” (Proposal, at 1.) JohnsonDanforth also noted the company had completed recent repair projects for the Department of Veterans Affairs in Orlando, Florida and Fayetteville, Arkansas, and that they had a multi-year service contract with the Department of Veterans Affairs in Alexandria, Virginia. (*Id.*)

Specialized Elevator is the incumbent contractor, and was named as JohnsonDanforth's "one and only key sub-contractor." JohnsonDanforth emphasized the incumbent's experience with the facility provided the opportunity to avoid a gap in service and support. (*Id.*)

JohnsonDanforth stated they would transition 4 full time employees to the project. *Id.* The proposal listed six elevator mechanics "planned for use," one assigned to each VA campus, who completed required training and were certified through the state of California, along with an apprentice for one of the mechanics. (Proposal, at 8.) The mechanics were all employed by the incumbent when the proposal was submitted.

### C. Size Protest

Appellant filed a size protest with the Area Office on April 13, 2018. Appellant argued in its protest that JohnsonDanforth is other than small, and thus ineligible for the contract award, because it would be unusually reliant on the subcontractor for performance of the contract, in violation of the ostensible subcontractor rule. (Size Protest, at 1.)

Appellant stated JohnsonDanforth "has no elevator repair and maintenance experience and consists of five total employees." (*Id.*) Appellant pointed out that JohnsonDanforth's website makes no mention of the maintenance or repair of elevators, cart elevators, dumb waiters, or wheelchair lifts. (*Id.* at 4.) Appellant also stated JohnsonDanforth "cannot possibly perform the work encompassed by the contract and will therefore simply do administrative and ministerial work while its ostensible subcontractor performs the actual work associated with this procurement." (*Id.*) Appellant further argued JohnsonDanforth only brings to the table its status as a SDVOSB, and will be reliant on its large subcontractor for "staff, management, expertise, funding, experience, preventative maintenance services, intervening repair services, and other assistance." (*Id.* at 5).

Appellant alleges JohnsonDanforth is a design-build and consulting company with only five employees, and will not perform the "primary and vital" requirements of the contract. (*Id.* at 5.) Appellant contended the primary and vital requirements of the solicitation are highly technical and specific, including "preventative maintenance inspections and intervening repair services." (*Id.* at 6.) Appellant noted the majority of the work is all on-site, and labor intensive construction, maintenance, and repair work, which Appellant alleged constitutes the primary and vital requirements of the solicitation. Appellant further emphasized JohnsonDanforth's five employees do not have the licensing, certification, or expertise to perform elevator maintenance. (*Id.* at 7.)

### D. JohnsonDanforth's Response to Area Office

On May 18, 2018, JohnsonDanforth sent a response to the Area Office to answer the Area Office's questions about management of the contract. In its response, JohnsonDanforth emphasized that a project manager from the company, with experience as a Hospital Director of Engineering, will "manage the overall scope" of the elevator service contract. (JohnsonDanforth Response to Area Office, May 18, 2018.) JohnsonDanforth indicated the President and another employee will oversee the Project Manager and attend site visits and monthly meetings in

California. (*Id.*) JohnsonDanforth stated that by providing project management they will be well over the “required self-performance labor costs.” (*Id.*)

JohnsonDanforth stated an employee of JohnsonDanforth will always have overall responsibility on the contract. An employee might not always be on-site, based on the work being performed. (*Id.*) If the work is major, a JohnsonDanforth employee will be on site, while one of the subcontractor's employees may be on site for routine maintenance. (*Id.*)

JohnsonDanforth indicated this contract would be managed in the same way it manages an HVAC contract at a VA hospital in Los Angeles in that it will hire employees through the local union and self-perform over 50 percent of the contract. (*Id.*) JohnsonDanforth stated the employees mentioned in the proposal and Area Office's email are employed by the subcontractor, through the Union, and it intends to transfer those employees to its payroll. (*Id.*) JohnsonDanforth noted it will hire the team members on the incumbent contract because they are experienced with the sites. (*Id.*) JohnsonDanforth also noted it has been in contact with the Union to have qualified candidates available if necessary. (*Id.*)

#### E. Size Determination

The Area Office issued its size determination on May 24, 2018, finding JohnsonDanforth small for the subject procurement.<sup>2</sup> The Area Office found JohnsonDanforth's average annual receipts did not exceed the \$15 million size standard for the assigned NAICS code. (Size Determination, at 1.) JohnsonDanforth's majority owner, a veteran, is required to constitute a quorum, in keeping with the requirements for SDVO set asides. (*Id.* at 2.) The Area Office noted “the solicitation did not require an extensive proposal.” (*Id.* at 5.)

In response to the ostensible subcontractor allegation by the Appellant, the Area Office noted JohnsonDanforth has completed three contracts with the VA for elevator maintenance, and is currently performing under another contract for the VA, which it used as its past performance in the proposal. (*Id.*)

The Area Office explained that while JohnsonDanforth did not have a subcontracting or teaming agreement for the procurement, it planned “to execute a [s]ubcontract [a]greement upon award and execution of the contract.” (*Id.* at 6.) The Area Office noted “JohnsonDanforth asserts that it has the ability to solely perform the contract but it has chosen to work with the incumbent subcontractor because its current experience with the elevators in these facilities benefits the government.” (*Id.*) The Area Office stated six of the employees named in the proposal “currently work for the subcontractor through the union.” (*Id.*) The Area Office reasoned “Johnson Danforth likens this elevator service contract to the way it manages its existing HVAC systems service contract at the VA hospital in Los Angeles. It has employees on-site performing the work that it hired through the local union in Los Angeles. It self-performs over fifty percent of the contract.” (*Id.* at 7.)

---

<sup>2</sup> The Size Determination was originally issued on May 22, 2018, but was reissued on May 24, 2018, after the Area Office was notified of, and corrected, errors in the original.

The Area Office found the contract is unique in that it requires “union employees that are experienced, trained, and licensed through National Elevator Industry Educational Program (NEIEP) (or equivalent) and the State of California”, and as a result “employees on the job site are from a specific pool of eligible employees.” (*Id.*)

The Area Office noted in order to conclude JohnsonDanforth was affiliated with its subcontractor under the ostensible subcontractor rule; it must find either that JohnsonDanforth is unusually reliant on its subcontractor, or that the subcontractor is performing the primary and vital contract requirements. (*Id.*) The Area Office relied on the *Dover Staffing* test to analyze whether Johnson Danforth was unusually reliant on its subcontractor.<sup>3</sup> The Area Office found that the first two factors of the four factor *Dover Staffing* test were met: 1) the subcontractor was an incumbent contractor ineligible to compete for the current contract, as it was not a small business under the NAICS code and was not a service disabled veteran owned company, and 2) JohnsonDanforth, as the prime contractor, planned “to hire the workforce of the incumbent contractor.” (*Id.* at 8.) The Area Office found, however, that the last two factors were not met: 3) JohnsonDanforth's management for the contract was not previously employed by the subcontractor, and 4) JohnsonDanforth did not lack experience and was not reliant on the subcontractor's experience to win the contract. (*Id.*) The Area Office further explained that while “several of the incumbent's employees will be given first priority to work on the contract, the fact that the pool of qualified individuals is limited to union employees that are experienced, trained, and licensed through NEIEP and the State of California lessens the significance of this factor.” (*Id.*) The Area Office also stated the hiring of incumbent employees is encouraged by Executive Order 13,495, 74 Fed. Reg. 6103 (Feb. 4, 2009) (Executive Order), and thus no longer considered a meaningful indication of unusual reliance. (*Id.*, citing *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260 (2011)). The Area Office concluded the only *Dover Staffing* factor met here was that the subcontractor was the incumbent, which it found was not significant in and of itself for a finding of unusual reliance. (Size Determination, at 8.)

Finally, the Area Office held the subcontractor would not perform the primary and vital requirements of the contract. (*Id.*) The Area Office reasoned “subcontractor's employees will be performing mainly routine elevator maintenance work.” (*Id.*) The Area Office noted the Project Manager under the contract would be a JohnsonDanforth employee and that JohnsonDanforth management will attend monthly meetings in the area and attend site visits, and thus JohnsonDanforth will be very involved in the primary and vital requirements of the contract.

---

<sup>3</sup> In *Size Appeal of Dover Staffing, Inc.*, SBA No. SIZ-5300 (2011) (*Dover Staffing*) OHA articulated a test for determining whether a prime contractor was unusually reliant duly upon its subcontractor: 1) the subcontractor (or proposed subcontractor) is the incumbent on the contract and is ineligible to compete for the instant procurement; 2) the prime contractor plans to hire the large majority of its workforce from the subcontractor; 3) the prime contractor's proposed management served with the subcontractor on the incumbent contract; and 4) the prime contractor lacks relevant experience and as a result must rely on the more experienced subcontractor to win the contract. *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-5548 (2016).

(*Id.*) Based on these findings, the Area Office concluded JohnsonDanforth was not in violation of the ostensible subcontractor rule. (*Id.* at 9.)

#### F. Appeal and Motion to Admit New Evidence

On June 8, 2018, Appellant filed a timely appeal of the Size Determination. Appellant contends JohnsonDanforth is other than small because it is unusually reliant on its proposed subcontractor, in violation of the ostensible subcontractor rule, and the Area Office erred by finding otherwise. (Appeal, at 1.) Appellant also argues the Area Office's Size Determination lacks support for its conclusions because, in part, JohnsonDanforth did not have a subcontracting or teaming agreement with its subcontractor at the time of proposal. (*Id.* at 9.)

Appellant argues JohnsonDanforth is unusually reliant on its subcontractor under OHA's *Dover Staffing* test. Appellant notes that, as the Area Office determined, JohnsonDanforth intends to subcontract with the ineligible incumbent on the contract. (*Id.*, at 10.) As such, the first prong of the *Dover Staffing* test is met.

Appellant argues the second *Dover Staffing* factor is met because “Johnson Danforth intends to hire most, if not all, of the employees needed” to perform the contract from the subcontractor. (*Id.*) The total number of employees needed under the contract ranges from six to eight, of which six currently work for the subcontractor through the union. (*Id.*, at 11.) Appellant rejects the Area Office's justification for the *en masse* hiring of the subcontractor's employees and states the analysis was flawed because: 1) the Executive Order does not apply, despite the Area Office's reliance, because the solicitation at hand was set aside under a construction NAICS code, while the Executive Order applies to service contracts, 2) the Area Office was incorrect in stating the hiring of incumbent subcontractor employees is no longer an indicia of unusual reliance, because OHA has found the Executive Order does not excuse a prime contractor's *en masse* hiring of subcontractor personnel, and 3) JohnsonDanforth will not itself hire the subcontractor personnel. (*Id.* at 11-13.) Expanding on the hire of the incumbent subcontractor's personnel, Appellant argues the Solicitation does not require that personnel hired belong to the Union, but JohnsonDanforth is using the incumbent workforce's membership in the Union as justification for its reliance. (*Id.* at 13.)

Appellant argues the third *Dover Staffing* factor is met because JohnsonDanforth's proposed management is illusory and the subcontractor will instead manage the day-to-day performance of the contract. (*Id.* at 14.) Appellant asserts the Area Office erred in focusing on the fact the project manager would be employed by JohnsonDanforth. (*Id.*) Appellant notes the proposed project manager will be based out of Little Rock, Arkansas, with duties over multiple projects, while the on-site work is in Southern California. (*Id.*) Further, the only personnel present on site are not required or expected to be JohnsonDanforth employees. (*Id.* at 15.)

Appellant argues the fourth *Dover Staffing* factor is met because, contrary to the Area Office's finding, JohnsonDanforth is reliant on its subcontractor's experience to perform the contract. (*Id.* at 16.) Appellant contends JohnsonDanforth lacks relevant experience for the contract because it has limited experience doing elevator maintenance repair at VA facilities and that experience is not at any of the facilities in California. (*Id.*) Appellant notes that

“[c]onspicuously absent from [JohnsonDanforth's] website is any discussion regarding the repair or maintenance of the specific, highly technical equipment associated with elevators, cart elevators, dumbwaiters, and wheelchair lifts.” (Appeal, at 6).

Appellant further argues the subcontractor will perform the primary and vital requirements of the solicitation. (*Id.* at 17.) In support of its contention, Appellant maintains elevator maintenance and repair services are the primary and vital requirements of the contract, although the Area Office found otherwise. Appellant states the subcontractor will provide all the employees that will perform the repair work, who are all likely to remain on the subcontractor's payroll. (*Id.* at 18.) Appellant also emphasizes that, because of the lack of a proposal or written agreement, JohnsonDanforth and its subcontractor are not bound to perform any particular tasks. JohnsonDanforth will therefore be under pressure to acquiesce to any demands of the subcontractor to perform more work or provide management, because of its lack of qualified personnel to perform the contract work and its remote location. (*Id.* at 10.)

Appellant also filed a Motion to Introduce New Evidence, the International Union of Elevator Constructors (IUEC) Local 18's (Union) webpage, which states there are “about 2200 California State licensed craftspeople installing, servicing, repairing, and modernizing” elevators, escalators, and conveyances. (Motion, at 1.) Appellant maintains this contradicts the Area Office's claim the pool of qualified employees was limited, and noted the solicitation did not even require the employees to be union members. (*Id.* at 2.) Appellant asserts “OHA should admit this evidence because it contradicts a factual assumption used by the Area Office in reaching its decision that JohnsonDanforth was not unduly reliant on its subcontractor.” (*Id.* at 1.)

Appellant argues the Area Office was incorrect in stating the candidate pool was limited, lessening the significance of the second *DoverStaffing* factor. (*Id.*) Appellant maintains the Solicitation did not require the technicians be union members, and this evidence should be admitted because it shows that the pool of qualified individuals is not limited, because it numbers in the thousands. (*Id.* at 2.)

#### G. Motion to Allow Supplemental Appeal

On June 22, 2018, after reviewing the record, Appellant filed a Motion to Allow Supplemental Appeal together with the Supplemental Appeal. On June 25, 2018, JohnsonDanforth filed an objection to the supplemental appeal.

Generally, OHA permits parties to supplement their pleadings after having an opportunity to review the Area Office files for the first time, in cases under a protective order. *E.g.*, *Size Appeal of Harbor Servs., Inc.*, SBA No. SIZ-5576 (2014). In the case at hand, certain information germane to an appeal can only be found in a challenged firm's proposal. Accordingly, Appellant's Motion to Allow Supplemental Appeal is GRANTED, and the supplemental appeal is ADMITTED.

## H. Supplemental Appeal

Appellant argues the Area Office erred in finding that six to eight employees were proposed for the contract and four would be provided by JohnsonDanforth. (Supplemental Appeal, at 2.) Appellant contends that all six proposed employees work for the subcontractor, with no accompanying assurances from JohnsonDanforth that it will employ them rather than the incumbent. (*Id.* at 2.)

Appellant further argues the Area Office erroneously relied on information given in response to the size protest. (*Id.* at 3.) Appellant notes the proposal cover letter highlights the incumbent as its subcontractor and emphasizes the subcontractor's experience at the hospitals in the solicitation. (*Id.*) Appellant reasons that because the project manager is in Arkansas, the Area Office erred in finding that JohnsonDanforth will provide all the project management or is involved in the primary and vital requirements of the contract. (*Id.* at 4.)

Finally, Appellant argues JohnsonDanforth will not perform at least 50 percent of the work, and it did not provide any evidence of the amount of work it would do, nor did it provide teaming agreements or subcontracts with its proposal.

## I. Response to Supplemental Appeal

JohnsonDanforth did not file a response to the Size Appeal, but did file an Objection to Appellant's Motion for Supplemental Appeal and response on June 25, 2018. JohnsonDanforth stated it proposed to use six to eight employees from the International Union of Elevator Constructors, not from the incumbent. (Response, at 1.) Four of these employees will be hired through the union, not the incumbent. (*Id.*) JohnsonDanforth also alleges it has several project managers on its staff, that all have significant experience in elevator repair and maintenance projects. (*Id.*) JohnsonDanforth argues their management team will provide necessary supervision as required, "which is the norm in the elevator industry." (*Id.*) JohnsonDanforth maintains it will perform half of the work on the contract and complete the primary and vital requirements. (*Id.*)

JohnsonDanforth asserts it will manage the contract, possesses the expertise to carry out the contract, will be performing over half the required work, is not unusually reliant on the subcontractor, and its proposed project manager for the contract has never worked for the incumbent subcontractor. (*Id.*) JohnsonDanforth further asserts it has been in contact with the elevator union to transition employees from the incumbent to JohnsonDanforth, and that this is standard industry practice. (*Id.*)

## III. Discussion

### A. Threshold Matters

Generally new evidence may not be submitted on appeal unless the Judge orders it *sua sponte* or a motion is filed and served establishing good cause for its submission. 13 C.F.R. § 134.308(a). *Size Appeal of Lost Creek Holdings, LLC*, SBA No. SIZ-5839, at 5 (2017). The



movant must demonstrate that the new evidence sought to be admitted “is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

In the case at hand, the Area Office stated employees under the contract must be members of The International Union of Elevator Constructors Local 18 (Union), and this fact justified JohnsonDanforth hiring incumbent employees, because there was a limited pool of eligible candidates. Appellant in turn moves to admit a print-out of the Union's webpage articulating its requirements and membership numbers. If the Area Office's assertions regarding the Union and the limited candidate pool are accurate, the Union's membership numbers are relevant to one factor in the ostensible subcontractor analysis.

OHA has held that it will not accept new evidence where the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). In this case, Appellant did not submit the Union's webpage with its size protest; however, it was not on notice that the Area Office would consider membership in the Union as justification for hiring incumbent employees until after the Size Determination was issued. *Size Appeal of Residential Enhancements, Inc.*, SBA No. SIZ-5931, at 11 (2018).

Accordingly, I GRANT Appellant's Motion to Admit New Evidence and ADMIT the printout of the Union's webpage.

#### 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 and law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

#### C. Analysis

The “ostensible subcontractor” rule provides that a subcontractor which is not a similarly situated entity to the prime contractor challenged concern, and which either is actually performing the primary and vital requirements of a contract, or upon which the prime contractor is unusually reliant, is treated as a joint venturer, and thus an affiliate, of the challenged concern. 13 C.F.R. § 121.103(h)(4). The rule seeks 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, including whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation. *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).

In considering whether a challenged concern is unusually reliant upon its ostensible subcontractor, OHA has applied the *Dover Staffing* test (*See* fn. 3, *supra*.) Here, it is undisputed that JohnsonDanforth's proposed subcontractor, Specialized Elevator, is the incumbent, and is not eligible for award. Therefore, the first factor is met. However, this is not in itself dispositive. OHA has held “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). Therefore, JohnsonDanforth's relationship with Specialized Elevator is subject to heightened scrutiny under the rule.

The second *Dover Staffing* factor is met if the prime contractor plans to hire the large majority of its workforce from the subcontractor. However, OHA has found it is not problematic for a prime contractor to hire from its subcontractor, provided that personnel are reviewed individually rather than unilaterally transferred or hired *en masse*. *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305, at 12 (2011) (“In light of widespread industry practice and the Executive Order, OHA has opined that the hiring of incumbent non-managerial personnel cannot be considered strong evidence of unusual reliance.”) The hiring of an incumbent subcontractor's employees does not in itself establish unusual reliance, particularly when the managerial personnel remain under the supervision and control of the prime contractor. *Size Appeal of J.W. Mills Management, LLC*, SBA No. SIZ-5416, at 8 (2012). The Area Office found that while the second prong of *Dover Staffing* is met by the wholesale hiring of the enumerated positions from the subcontractor, this is justified here because the contract “requires union employees that are experienced, trained, and licensed through NEIEP (or equivalent) and the State of California. Thus, the employees on the job site are from a specific pool of eligible employees.” (*Id.* at 7.)<sup>4</sup>

In this case, six employees, who represent nearly the entire labor requirement of the contract, will be hired from the incumbent subcontractor. The Area Office concedes “several of the incumbent's employees will be given first priority to work on the contract.” (*Size Determination*, at 8.) The Area Office states this is in keeping with the Executive Order's requirement for the hiring of incumbent employees. (*Id.*) JohnsonDanforth justifies the hiring by stating it will hire the employees currently on the contract because they are familiar with the specific locations, and that they “will be given the opportunity to work for JohnsonDanforth.” (JohnsonDanforth Response to Area Office.)

I find that the hiring of the six incumbent employees is not indicative of unusual reliance. OHA has previously held a prime contractor's ability to find other personnel in place of the incumbent's employees as originally anticipated by the proposal lessens its reliance on the subcontractor. *Size Appeal of Spiral Solutions & Technologies*, SBA No. SIZ-5279 (2011).

---

<sup>4</sup> I note that the Solicitation does not require the employees to be Union members, but does specify the required training, experience and licensure.

JohnsonDanforth stated it will give the named incumbent employees an opportunity to work for JohnsonDanforth, but has contacted the Union and can hire additional or alternate employees if necessary. (JohnsonDanforth Response to Area Office.) The Specialized Elevator employees will be offered employment with JohnsonDanforth, rather than be retained by a unilateral transfer without employee input, which decreases the appearance of undue reliance on the incumbent subcontractor. *See Size Appeal of Spiral Technologies*, at 29. Based on the ability for the incumbent employees to decline employment by JohnsonDanforth, rather than being transferred, along with JohnsonDanforth's dependence on the Union, rather than the incumbent, for guaranteed workforce, I find that the hiring of the incumbent's employees *en masse* is justified.

The third *Dover Staffing* factor is that the prime contractor's management for the contract was not previously employed by the subcontractor. (*Id.* at 8.) The proposed project managers are all JohnsonDanforth employees, who will have the ultimate control over the contract, not Specialized Elevator management.

The fourth factor in the *Dover Staffing* analysis considers whether the prime contractor lacks relevant experience required by the solicitation and must rely on a more experienced subcontractor to win a contract. *Size Appeal of Equity Mortgage Solutions, LLC*, SBA No. 5867 (2017); *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300, at 10-11 (2011) (“When a prime contractor relies almost totally upon the experience of other firms to establish its relevant experience, that is probative evidence it is unusually reliant upon its subcontractor to perform the contract in question.”); *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192 (2011) (holding that a protested concern's reliance on other entities to establish relevant experience is probative evidence that it is unusually reliant on a large subcontractor to perform the contract at issue).

In its proposal, JohnsonDanforth boasts its “only key sub-contractor” on the proposal is Specialized Elevator, the incumbent on the contract, and that firm is “well experienced with each of these facilities” and has “the historical knowledge and experience with these elevators at each of the hospitals.” (Proposal, at 1.) To demonstrate its own past performance, however, JohnsonDanforth states it currently provides “Elevator Maintenance Services” to a VA hospital in Louisiana and has completed three other elevator maintenance projects for VA medical centers in Florida and Arkansas, as well as an HVAC project at a VA hospital in Los Angeles. (*Id.* at 8; Response to Area Office). These previous contracts all demonstrate significant past performance, primarily of elevator service contracts at VA hospitals, all in which JohnsonDanforth acts as the prime contractor. While JohnsonDanforth highlighted Specialized Elevator's experience at the locations in the contract, JohnsonDanforth submitted ample past performance examples to establish relevant experience, which leads me to find that JohnsonDanforth did not need to rely on the incumbent to win the contract.

In sum, I find after reviewing the record that only the first *Dover Staffing* factor, that Specialized Elevator is the incumbent and is ineligible for award, is applicable here. That one factor is, as noted above, not dispositive. The other factors are not applicable here, and this weighs in favor of the Area Office's determination that JohnsonDanforth is small for the subject procurement.

I then turn to the issue of which concern is performing the contract's primary and vital requirements. The primary and vital requirements are those generally those associated with the principal purpose of the acquisition. *Size Appeal of Santa Fe Protective Services, Inc.*, SBA No. SIZ-5312, at 10 (2012) ( “Frequently, the primary and vital requirements are those which account for the bulk of the effort, or of the contract dollar value.”) In addition to the quantitative analysis into the bulk of the contract cost, it is “also appropriate to consider qualitative factors, such as the relative complexity and importance of requirements.” *Id.*, citing *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5098, at 6 (2009) (recognizing that primary and vital requirements may be “measured by either quantity or quality”); *Size Appeal of iGov Technologies, Inc.*, SBA No. SIZ-5359 (2012). Here, the primary and vital requirement of the solicitation is the elevator repair and maintenance work. The mechanic positions and their schedules of performance are outlined in the solicitation. The details of routine maintenance and repairs are set out specifically as well. This indicates the heart of the contract will be the maintenance and repair of elevators. These tasks will be executed by the individuals named in the solicitation, whom Johnson Danforth intends to hire, or alternately by qualified individuals whom JohnsonDanforth has arranged to hire through the Union. Therefore, it is JohnsonDanforth employees who will be performing the primary and vital requirements of the contract.

In conclusion, JohnsonDanforth is not unusually reliant upon Specialized Elevator, its subcontractor for this procurement. The primary and vital requirement here, elevator maintenance, will be performed by, and overseen by, JohnsonDanforth employees. I therefore find that JohnsonDanforth is small for purposes of the contract at issue. Appellant has failed to meet its burden of establishing that the size determination is based upon a clear error of fact or law.

### III. Conclusion

Appellant has failed to demonstrate that the dismissal of the size determination is clearly erroneous. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. JohnsonDanforth is an other than small concern for this procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge