

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

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

Jacob's Eye, LLC,

Appellant,

Appealed From
Size Determination No. 3-2018-048

SBA No. SIZ-5955

Decided: August 29, 2018

APPEARANCE

H. Todd Whay, Esq., The Whay Law Firm, McLean, Virginia, for Appellant

DECISION¹

I. Introduction and Jurisdiction

On June 1, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2018-048 concluding that Jacob's Eye, LLC (Appellant) is not a small business for the subject procurement. The Area Office found that Appellant's relationship with its subcontractors contravened the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). On appeal, Appellant maintains that the size determination is clearly erroneous and should be reversed. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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 timely filed the instant appeal on June 18, 2018.² Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for 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.

² Ordinarily, a size appeal must be filed within 15 calendar days of receipt of the size determination. 13 C.F.R. § 134.304(a). Here, Appellant received the size determination on June 1, 2018. Fifteen calendar days after June 1, 2018 was June 16, 2018. Because June 16, 2018 was

II. Background

A. The RFP

On March 2, 2017, the National Guard Bureau issued Request for Proposals (RFP) No. W9133L-17-R-0037 for Air National Guard (ANG) Recruiting and Retention (R&R) services. The RFP contemplated the award of a single indefinite-delivery indefinite-quantity (ID/IQ) contract. (RFP at 145.) Specific requirements would be defined in task orders issued after award of the base contract. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541810, Advertising Agencies, with a corresponding size standard of \$15 million annual receipts. Offers were due April 17, 2017.

The RFP's Performance Work Statement (PWS) stated that the contractor “shall provide all personnel, equipment, tools, materials, supervision, and quality control necessary” to perform the R&R services. (*Id.* at 23.) There were 11 Contract Line Item Numbers (CLINs) for each year of contract performance, corresponding generally with task areas in the PWS. For CLIN 0001, Recruiting and Retention Program, “[t]he contractor shall provide and coordinate day-to-day management of R&R program support services.” (*Id.* at 2.) Under CLIN 0002, Website & Interactive, and CLIN 0003, Digital Outreach and Advertising, “[t]he contractor shall operate, maintain, and enhance ANG internal recruiter administrative website, Admin.GoANG.com, accessible through multiple internet browsers and mobile devices.” (*Id.* at 2-3, 41-42.) In addition, the contractor will operate, maintain, and enhance ANG social media sites, and place digital advertising in “on-line environments.” (*Id.* at 41.)

For CLIN 0004, Local Recruiting and Retention, “[t]he contractor shall provide and execute a comprehensive ANG local advertising and marketing program.” (*Id.* at 3, 42-43.) The contractor was required to deliver 54 annual media plans (*i.e.*, one for each state and territory). (*Id.* at 43.) CLIN 0005, National & Regional Advertising, required the contractor to “provide and execute a comprehensive ANG national/regional advertising program.” (*Id.* at 4, 43-44.) The contractor will procure advertising in numerous mediums, including broadcast (television, radio, and movie theaters), print (magazines, publications, and newspapers), online, outdoor marketing (billboards), direct marketing (email and mail), and “new mediums.” (*Id.* at 43.)

CLIN 0006, National/Regional Event Outreach, stated that the contractor would provide a national/regional event outreach program. (*Id.* at 4, 44.) CLIN 0007, Lead Processing Program, stated “[t]he contractor shall execute a comprehensive lead processing program for ANG R&R. Inbound Call Center/Outbound Call Center/Chat Services/Social Media Outreach and Monitoring/Lead Advisory Screening/Lead Nurturing/Lead Fulfillment/Data Collection, Analytics, Research, and Reporting.” (*Id.* at 5, 44-48.) CLIN 0008, Centers of Influence, stated that the contractor would support a program for the recognition of individuals who influence applicants and unit members to join or remain in the ANG. (*Id.* at 5, 48.) CLIN 0009, Creative

a Saturday, the appeal petition was due on the next business day: Monday, June 18, 2018. 13 C.F.R. § 134.202(d)(1)(ii).

Support Services, stated that “[t]he contractor shall provide supplemental and pre and post production support which includes but is not limited to digital voice overs, creative writing, and imagery collection.” (*Id.* at 6, at 48-49.) The final two CLINs, 0010 and 0011, covered miscellaneous travel and reporting requirements.

The RFP identified a Senior Account Manager and Assistant Account Manager as key personnel. (*Id.* at 39.) These key individuals should be able to “provide market analysis, statistical analysis and presentation of program results and Information Technology (IT) infrastructure management.” (*Id.*) The Senior Account Manager is responsible for the daily operation of the tasks outlined in the PWS. (*Id.*) Offerors were required to identify and submit in writing “the names and resumes of key personnel and their alternates.” (*Id.*)

The RFP states that the award would be made “based on the best overall (i.e., best value) proposal that is determined to be the most beneficial to the Government, with appropriate consideration given to the four (4) evaluation factors: Technical Approach, Management Approach, Past Performance, and Price.” (*Id.* at 137.) The Technical Approach factor consisted of two subfactors: (i) Overall IDIQ Approach and (ii) Sample Task Order. The Management Approach factor had three subfactors: (i) Management/Staffing Plan; (ii) Key Personnel; and (iii) Quality Control Plan.

B. Proposal and Teaming Agreements

Appellant's proposal identified itself as the prime contractor and stated that Appellant would self-perform “at least 50% of the contract.” (Proposal, Vol. I, Sec. D.) The proposal did not, however, specify any particular tasks that would be self-performed by Appellant rather than delegated to subcontractors. Appellant proposed six subcontractors/teaming partners: [Subcontractor A]; [Subcontractor B]; [Subcontractor C]; [Subcontractor D]; [Subcontractor E]; and [Subcontractor F]. (*Id.*) The proposal stated that:

Our Subcontractors will provide various services for us in fulfillment of [ANG's] requirement; some, but not all are listed below:

- Military Recruitment & Retention Comprehensive Advertising & Marketing Program
- Develop and Execute 3 Annual Media Plans (California, New Mexico & Massachusetts); showcase the ability to deliver to all 54 States & Territories
- Host, Operate, Maintain and Enhance GoANG.com website tabs and pages
- Provide National/Regional & Local Events
- Procure Warehouse Fulfillment & Distribution Services
- Revitalize Recruitment Centers throughout 54 States & Territories

- Provide Inbound/Outbound Call Center & Live Chat Services
- Provide a Comprehensive Lead Processing Program

(*Id.*, Vol. II, at 122.)

The proposal specified “Task Areas of Expertise” for which each proposed subcontractor would be responsible. (*Id.*, Vol. I, Sec. D.) According to the proposal, [Subcontractor A] will focus on “Call Centers” under §§ 5.7 - 5.7.7 of the PWS. (*Id.*) [Subcontractor A] personnel 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 A] also will perform chat services on the GoANG.com website. (*Id.*) The proposal described [Subcontractor A] as “uniquely qualified to provide these services” due to its extensive experience, customizable processes, and established procedures. (*Id.*, Vol. II, at 83.)

[Subcontractor B] will be responsible for “Media Planning Management and Execution” under §§ 5.3.2(c) - 5.6 of the PWS. (*Id.*, Vol. I, Sec. D.) The proposal outlined the “[Subcontractor B] Process for Media Strategy and Execution.” (*Id.*, Vol. II, at 31.) According to the proposal, Appellant selected [Subcontractor B] as a subcontractor in order to leverage its “state by state expertise” and to deliver a campaign that “reached each state effectively.” (*Id.*, at 30-31.) [Subcontractor B] “will pull from various sources of research to help shape the best approach to the state by state ANG outreach plan.” (*Id.* at 38.) [Subcontractor B] will use broadcast media, print, online media, direct marketing, new media, and billboards to reach the target audience. (*Id.* at 79.) The proposal described [Subcontractor B] as Appellant’s “one stop shop partner” for media buying. (*Id.* at 122.) “[Subcontractor B] will connect with all media outlets for [Appellant] . . . and this relationship allows us to make media buys in the hundreds of millions before we approach a cap.” (*Id.*) The financial capability narrative reiterated that “[Subcontractor B] is a media giant with resources to support the ANG campaign . . . c” (*Id.*, Vol. I, Sec. H.)

[Subcontractor C] will be responsible for the tasks of storefront office support and storefront revitalization under § 5.8 of the PWS. (*Id.*, Vol. I, Sec. D; Vol. II at 66.) [Subcontractor C] was described in the proposal as a global practice that provides clients with design across capabilities, including design of office and retail space. (*Id.*, Vol. I, Sec. D.) [Subcontractor C’s] storefront revitalization approach is outlined in the proposal. (*Id.*, Vol. II at 66.) [Subcontractor C] will develop the interiors of ANG recruitment centers to “design attractive zones and spaces that young career seekers would desire to enter and participate within.” (*Id.*) [Subcontractor C] will also develop design elements for the space including specialty lighting, finishes, millwork, and ceiling fixtures. (*Id.* at 69.)

[Subcontractor D] is a full-service communications and digital marketing firm concentrating on website design and development. [Subcontractor D] will provide digital, IT, and web management services and work on social media campaigns under §§ 5.2 - 5.3.2 of the PWS. (*Id.*, Vol. I, Sec. D; Vol. II at 35.) According to the proposal, [Subcontractor D] is Appellant’s “small business IT/Web Portal partner.” (*Id.*, Vol. II at 122.)

The proposal stated that [Subcontractor E] will perform “Fulfillment” under PWS §§ 5.4.1(d) and (e), 5.6.1(b) and 5.9.1(b). (*Id.*, Vol. I, Sec. D.) Such services include producing print-on-demand products; procuring display materials with ANG branding; and producing and distributing recognition materials like certificates and plaques. (*Id.*, Vol. II at 65-66). Finally, [Subcontractor F], a research organization, will perform research tasks under PWS §§ 5.7.8 — 5.7.9. (*Id.*, Vol. I, Sec. D.) This includes data collection, analytics, and research associated with ANG leads. (*Id.*, Vol. II at 58-60.)

The proposal included a total price breakdown for each CLIN in the RFP. For the base year of the contract, Appellant proposed \$[XXXX] for CLIN 0001; \$[XXXX] for CLIN 0002; \$[XXXX] for CLIN 0005; \$[XXXX] for CLIN 0006; \$[XXXX] for CLIN 0007; \$[XXXX] for CLIN 0008; and \$[XXXX] for CLIN 0009. The proposed price for CLIN 0003, Digital Outreach and Advertising, was \$[XXXX], of which \$[XXXX] was attributed to “Media Buy.” The proposed price for CLIN 0004, Local Recruiting and Retention Activity Support, was \$[XXXX], with \$[XXXX] of that going to construction of storefronts and another \$[XXXX] allocated to printing, promotion items, shipping, and warehouse storage. (*Id.*, Vol. IV.)

In describing its staffing, Appellant stated: “[i]n consideration of our joint venture, collectively we have a number of full time employees and can ramp to upwards of 60 people based upon project needs.” (*Id.*, Vol. II at 75.) Appellant identified Mr. Delano Massey as its CEO. (*Id.*) The proposal also included job descriptions for the Senior Media Strategist, National/Regional Media Manager, State Specific Project Managers, Digital Strategist, and Accounting Specialist. (*Id.* at 119.) [Subcontractor B] will provide the Digital Strategist and Accounting Specialist. (*Id.*) The proposal included an organizational chart, with names of several of the employees filling management roles. (*Id.* at 121.) [XXXXXX] is identified as the proposed Senior Account Manager, one of the key personnel required in the RFP. *Id.* [XXXXXX] is listed as the Creative Account Manager.³ (*Id.*) The resumes for [XXXXXX] and [XXXXXX] indicate that both would be employed by Appellant. (*Id.*, Vol. II, Tab B.) Appellant proposed an [Subcontractor A] employee, [XXXXXX], as Call Center Director; a [Subcontractor B] employee, [XXXXXX], as Media Lead; a [Subcontractor D] employee, [XXXXXX], as Technical Lead; a [Subcontractor C] employee, [XXXXXXX], as Storefront Design & Build Lead; and a [Subcontractor E] employee, [XXXXXX], as Fulfillment Lead.⁴ (*Id.*)

For past performance, Appellant provided one reference for itself, one reference for [Subcontractor B], and one reference for [Subcontractor D]. (*Id.*, Vol. III.) The past performance

³ [XXXXXX]'s resume identifies her as [XXXXXXX], and her proposed position as Art Director.

⁴ The proposal also included several additional resumes from subcontractor employees for positions that were not listed on the organizational chart. The resume for [XXXXXX] of [Subcontractor B] indicates that she will serve as Media Manager- East Coast. [XXXXXX] of [Subcontractor D] will serve as Project Manager. [XXXXXXX], from [Subcontractor C], will be Architectural Design Manager. And, [XXXXXX], of [Subcontractor F], will serve as Integrated Project Manager. (*Id.*, Vol. II, Tab B.)

reference for Appellant was for “produc[ing] and execut[ing] mentoring camps for the Steve Harvey Foundation and U.S. Army.” (*Id.* at 1.) The [Subcontractor B] reference was for [Subcontractor B]’s work with the California Highway Patrol Recruitment Media and Marketing Campaign. (*Id.*) [Subcontractor B] used radio, television, digital applications, gaming, steaming radio and local events to conduct a recruitment campaign. According to the proposal, “[Subcontractor B] managed all production” and “provided talent.” (*Id.* at 2.) In addition, [Subcontractor B] “researched, strategized, planned, [and] purchased media with [Subcontractor B] and non [Subcontractor B] owned media statewide as well as regionally.” (*Id.* at 3.) The third past performance reference was [Subcontractor D]’s past performance with the U.S. Department of Veterans Affairs “Make the Connection” campaign.

Appellant entered into Teaming Agreements with each of its subcontractors. The Teaming Agreement between Appellant and [Subcontractor B] identified the following as responsibilities of [Subcontractor B]: “Digital Outreach and Advertising”; “Execute 54 Annual Media Plans (To Include: Broadcast, Print, Online, Outdoor, Direct & New Mediums)”; “National/Regional Advertising”; and “Social Media Outreach & Social Media Monitoring”. ([Subcontractor B] Teaming Agreement, Attach. A at 2.) The Teaming Agreement between Appellant and [Subcontractor C] identified [Subcontractor C]’s responsibilities as “Storefront Office Support (development and execution of interior design products and services) [t]o include: Storefront Revitalization Strategy to consist of interior and exterior requirements as well as exterior building signs; for no more than 50 annual functioning ANG Recruiting and Retention Offices.” ([Subcontractor C] Teaming Agreement, Attach. A at 2.) The Teaming Agreement between Appellant and [Subcontractor F] stated that [Subcontractor F] will be responsible for “Research (survey development, implementation, collection, validation & optimization) [Subcontractor F] shall oversee all aspects of surveying newly enlisted, re-enlisted airmen, recruiters, retainers, and the local market Potential Applicant Pool using LPC Integration with GoANG.com and AFRISS-TF.” ([Subcontractor F] Teaming Agreement, Attach. A at 2.)

The Teaming Agreement between Appellant and [Subcontractor D] stated that [Subcontractor D] would be responsible for: “Project Management Tool”; “Administrative Website Support Services (Operate, Maintain & Enhance)”; “GoANG.com Website Hosting, Update Programming, User Role Management, Training, User Guides, Help Function, Content Updates Across Internet Browsers & Mobile Devices, Real Time System Analytics & Reporting”; “Process Qualified Leads”; “Transfer all Lead Data Collected”; “Closely Monitor and Measure Inbound Call Center Performance”; “Reporting, Call Recordings, and Quarterly Business Reviews”; “Social Media Monitoring”; “Lead Nurturing (keeping prospects and leads engaged: automated emails, texts, phone calls and social media)”; “Lead Fulfillment”; and “Data Collection Lead Analysis”. ([Subcontractor D] Teaming Agreement, Attach. A at 2.) The teaming agreement between Appellant and [Subcontractor E] indicated that [Subcontractor E] will “Procure Warehouse & Distribute Promotional Items” and “deliver COI requested recognition materials”. ([Subcontractor E] Teaming Agreement, Attach. A at 2.) The Teaming Agreement between Appellant and [Subcontractor A] identified [Subcontractor A]’s responsibilities as “Inbound Call Center,” “Outbound Call Center,” and “Chat Services.” ([Subcontractor A] Teaming Agreement, Attach. A at 2.)

Each Teaming Agreement also listed Appellant's responsibilities, but these lists included tasks that Appellant elsewhere stated would be delegated to other subcontractors. For example, the [Subcontractor B] Teaming Agreement included "Provide Promotional Items for Local Events," "Storefront Office Support (development and execution of interior design products and services)," "Process Qualified Leads," and "Research (survey development, implementation, collection, validation & optimization)" among Appellant's responsibilities. ([Subcontractor B] Teaming Agreement, Attach. A at 1.)

C. Size Determination

On September 25, 2017, the CO awarded Contract No. W9133L-17-D-0004 to Appellant. On October 2, 2017, March Marketing, LLC, a disappointed offeror, filed a size protest against Appellant, arguing that Appellant cannot perform the primary and vital requirements of the contract and is unusually reliant on its subcontractors. On December 26, 2017, the Area Office issued Size Determination No. 3-2018-014, sustaining the protest. The Area Office found Appellant affiliated with two of its subcontractors, [Subcontractor C] and [Subcontractor B], under the ostensible subcontractor rule.

Appellant appealed Size Determination No. 3-2018-014 to OHA, and on April 5, 2018, OHA granted the appeal, vacated the size determination, and remanded the matter for further review. *Size Appeal of Jacob's Eye, LLC*, SBA No. SIZ-5895 (2018) ("*Jacob's Eye I*"). OHA explained that the record was incomplete because the Area Office did not obtain, or have access to, Appellant's entire proposal. *Id.* at 13-14. Further, "it is undiscernible from the record whether Appellant is performing the majority of the work." *Id.* at 14. OHA instructed the Area Office to review Appellant's entire proposal, and to "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." *Id.* at 16. During the *Jacob's Eye I* proceedings, the CO filed a statement with OHA that "[t]he purpose of the solicitation is to discover a technically capable contractor to provide all personnel, equipment, tools, materials, supervision, and quality control necessary to perform ANG Recruiting and Retention Services, as defined in the Performance Work Statement." (CO's Memorandum at 1.)

On June 1, 2018, the Area Office issued the instant size determination, No. 3-2018-048, again finding that Appellant is not a small business due to affiliation with its subcontractors under the ostensible subcontractor rule. The Area Office first noted that Appellant is affiliated with several other concerns through common ownership and common management. (Size Determination No. 3-2018-048 at 4-5.) However, the combined receipts of Appellant and these affiliates do not exceed the size standard. (*Id.* at 18-19.)

The Area Office next examined Appellant's compliance with the ostensible subcontractor rule. The Area Office found that Appellant's "proposal included five large business subcontractors and one small business subcontractor[]", and that none of these firms is an incumbent contractor. (*Id.* at 7.) According to the Area Office, [Subcontractor A] is a small business, whereas [Subcontractors B, C, D, E, and F] are large businesses. (*Id.* at 8.) Based on the proposal's frequent use of the word "team," the Area Office found that "the entire tenor of the proposal is that of a team," a strong indicator of unusual reliance. (*Id.*)

The Area Office found that the primary and vital contract requirements are “a full range of professional support services, advertising and marketing services . . . to support the recruiting and retention program for the ANG.” (*Id.* at 7.) [Subcontractor B] will be responsible for digital outreach and advertising, national and regional advertising, and executing annual media plans, and therefore will perform the primary and vital requirements of the contract. (*Id.* at 9.) [Subcontractor F] would perform the research aspects of the contract, which focus on surveying enlisted airmen, recruiters, and retainers and leverages the Lead Processing Center Integration and the ANG website. Thus, [Subcontractor F] also is performing primary and vital requirements of the contract. (*Id.*)

The Area Office emphasized that Appellant did not include a named employee for the key personnel position of Assistant Account Manager, but did identify a Senior Account Manager. (*Id.* at 10.) Only two of the managerial personnel in the proposal would work for Appellant, and the other nine would be subcontractor employees. (*Id.*) Further, none of Appellant's current employees would be involved in management of the contract. The Area Office concluded that Appellant will be dependent upon its subcontractors to perform the majority of the tasks in the PWS. Similar to OHA's decision in *Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR), “[t]he subcontractors and not [Appellant] [are] providing the majority of the necessary personnel, skills, expertise and experience needed to successfully perform the vital and primary functions in the PWS.” (*Id.* at 13.) The Area Office added that “[Appellant] lacks the personnel, expertise and experience to perform the primary and vital requirements in the contract and is not controlling the management and technical aspects of the contract.” (*Id.*)

Based on the past performance references in the proposal, the Area Office found that [Subcontractor B] and [Subcontractor D] would provide the experience and expertise for the contract, and that Appellant might not have been considered for award without them as subcontractors. (*Id.* at 14, citing *Size Appeal of B&M Construction, Inc.*, SBA No. SIZ-4805 (2006).)

The Area Office addressed the relative workshare of Appellant and its subcontractors, pursuant to OHA's instructions in *Jacob's Eye I*. Although Appellant claimed that it would self-perform 67.4% or 72% of labor, the Area Office found these statements “*post hoc* assertions unsupported by the proposal” which “cannot be accepted.” (*Id.* at 15.) Appellant's proposal was “unclear as to if [Appellant] proposed to provide any contract employees.” (*Id.* at 16.) Instead, the Area Office found that Appellant's two key employees represent only 6.4% of the total labor cost. (*Id.* at 15.) As a result, Appellant “is performing significantly less than 50% of the contract work or the 67.4% or 72% [Appellant] claims it will perform.” (*Id.* at 16.) Further, “the subcontractor employees will be under the employment and management control of the subcontractor[s]” and thus would not be managed by Appellant. (*Id.*)

D. Appeal

On June 18, 2018, Appellant appealed Size Determination No. 3-2018-048 to OHA. Appellant contends that the size determination is clearly erroneous should be reversed.

Appellant addresses the different workshare percentages provided to the Area Office. The first was a clarification during evaluation of proposals, which indicated that Appellant would perform 67.4% of the work required. According to Appellant, Appellant arrived at this percentage by excluding the non-labor portion of the CLINs designated for media purchases. (Appeal at 10.) The breakdown of workshare submitted to the Area Office on December 13, 2017 further separated labor and non-labor into separate categories. (*Id.* at 11.) Appellant asserts that the differences in percentages (67.4% versus 72%) occurred as the workshare became more detailed, and are not inconsistent with the proposal. (*Id.*) Appellant also complains that the size determination focused only on key personnel and managerial staff, whereas the proposal indicated that Appellant and its subcontractors would provide a much larger total workforce of 141 employees. (*Id.* at 16.)

Appellant contends the Area Office incorrectly identified the primary and vital requirements of the procurement as professional support services, advertising, and marketing services. (*Id.* at 12.) Instead, the primary purpose of the procurement is “to obtain overarching management services for the R&R”, as evidenced by ANG placing several requirements under one RFP. (*Id.* at 12-13.) Appellant contends that Appellant “will perform the functions required by § 5.1 of the PWS” and thus will perform the primary and vital requirements of the procurement. (*Id.* at 19.) Further, Appellant asserts, Appellant will meaningfully participate in each requirement. (*Id.*)

Appellant argues that the Area Office misconstrued Appellant's relationship with [Subcontractor B]. Appellant will create the messaging and content of the media campaigns, while [Subcontractor B] is “the conduit to purchase the media space, but it does not plan or manage the media campaigns.” (*Id.* at 20.)

Appellant highlights that it “has not proposed to hire any employees of its subcontractors.” (*Id.* at 14.) Further, Appellant's CEO, Mr. Massey, would be responsible for daily performance of the contract, and thus will control and supervise subcontractor personnel. (*Id.*, citing *Size Appeal of GiaCare and MedTrust JV, LLC*, SBA No. SIZ-5690, at 12 (2015).) [XXXXXX], as the Senior Account Manager, will supervise all employees and report directly to Mr. Massey. (*Id.* at 14-15.) Appellant also notes the second key employee required under the RFP, the Assistant Account Manager, will be filled by [XXXXXX] in a renamed role, Creative Account Manager. (*Id.* at 15.)

Appellant posits that the Area Office ignored the teaming agreements, which outlined Appellant's planned workshare with its subcontractors. (*Id.* at 13.) Appellant also argues that the Area Office improperly found that use of “team” language in Appellant's proposal is suggestive of undue reliance. (*Id.*, citing *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 9 (2011) and *Size Appeal of A-P-T Research, Inc.*, SBA No. SIZ-5798, at 13 (2016).)

Appellant contends that the Area Office failed to consider that no single subcontractor will perform a majority of the work, and instead treated the subcontractors as a single entity. (*Id.* at 17.) The Area Office also erred in considering Appellant's past performance, because the question of whether a contractor is capable of performing the required work is reserved solely for

the contracting officer. (*Id.* at 18.) In any event, Past Performance was the least important of the non-Price evaluation factors, so even if Appellant had inadequate past performance, this would not have effected Appellant's eligibility for award. (*Id.* at 19.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that 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 “asks, in essence, whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor.” *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 7 (2010). 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). Generally, “[w]here a concern has the ability to perform the contract, will perform the majority of the work, and will manage the contract, the concern is performing the primary and vital tasks of the contract and there is no violation of the ostensible subcontractor rule.” *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 12 (2011).

B. Analysis

Appellant has not shown clear error of fact or law in the size determination. As a result, this appeal must be denied.

OHA has explained that “[t]he initial step in an ostensible subcontractor analysis is to determine whether the prime contractor will self-perform the contract's primary and vital requirements.” *Size Appeal of Innovate Int'l Intelligence & Integration, LLC*, SBA No. SIZ-5882, at 6 (2018). The “primary and vital” requirements are those associated with the principal purpose of the acquisition. *Size Appeal of Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312, at 10 (2012); *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 17 (2011). Frequently, the primary and vital requirements are those which account for the bulk of the effort, or of the contract dollar value. *Size Appeal of Social Solutions Int'l, Inc.* SBA No. SIZ-5741, at 12 (2016); *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359, at 12 (2012). Furthermore, while not conclusive, OHA will give weight to the CO's opinion of what constitutes the primary and vital

requirements, as reflected in the assigned NAICS code or otherwise. *Size Appeal of NEIE Medical Waste Servs., LLC*, SBA No. SIZ-5547, at 8 (2014); *Size Appeal of Tinton Falls Lodging Realty, LLC*, SBA No. SIZ-5546, at 16 (2014). OHA has long held that “it is the goods or services which the procuring agency actually seeks to acquire, and not those goods or services which the contractor must perform or provide in order to deliver those goods or services, which determine what the primary and vital tasks of the contract are.” *Size Appeal of Anadarko Industries, LLC*, SBA No. SIZ-4708, at 8 (2005), *recons. denied*, SBA No. SIZ-4753 (2005) (PFR).

In the instant case, the Area Office found that the principal purpose of this procurement is to obtain Recruiting and Retention (R&R) services for the ANG. More specifically, the RFP states that the contractor will provide advertising, marketing, and related services to assist with recruiting and retaining airmen and other ANG personnel. Section II.A, *supra*. Consistent with the Area Office's analysis, the CO selected NAICS code 541810, Advertising Agencies, for this RFP. *Id.* Likewise, during the *Jacob's Eye I* proceedings, the CO commented that “[t]he purpose of the solicitation is to discover a technically capable contractor to provide all personnel, equipment, tools, materials, supervision, and quality control necessary to perform ANG Recruiting and Retention Services, as defined in the Performance Work Statement.” Section II.C, *supra*. Given this record, then, the Area Office reasonably concluded that R&R services represent the principal purpose — and the primary and vital requirements — of this procurement.

The Area Office also reasonably determined that Appellant's subcontractors, rather than Appellant itself, will perform all, or nearly all, of the primary and vital contract requirements. Indeed, Appellant's proposal specifically stated that many crucial functions would be delegated to the subcontractors, including “Military Recruitment & Retention Comprehensive Advertising & Marketing Program,” “Provide a Comprehensive Lead Processing Program,” “Host, Operate, Maintain and Enhance GoANG.com website tabs and pages,” and “Provide National/Regional & Local Events.” Section II.B, *supra*. Notably, the proposal did not identify any significant portion of the R&R services that would be self-performed by Appellant, and, other than two managerial employees who were not currently employed by Appellant, Appellant did not propose any of its own personnel to perform work on the contract. *Id.* According to the proposal and teaming agreements, [Subcontractor B] would be responsible for developing advertising and marketing campaigns, while [Subcontractor D] would provide technical support and lead processing. *Id.* These tasks would be supported by the research [Subcontractor F] would conduct, and the call center and online chat that [Subcontractor A] would perform. *Id.* Other ancillary tasks, such as redesigning storefronts producing promotional materials, also would be performed by subcontractors. *Id.* It is well-settled that “[t]he ostensible subcontractor rule is violated when a prime contractor will have no meaningful role in performing the contract's primary and vital requirements.” *Size Appeal of WG Pitts Co.*, SBA No. SIZ-5575, at 8 (2014); *Size Appeal of Four Winds Servs., Inc.*, SBA No. SIZ-5260 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR). Accordingly, the record supports the Area Office's determination that Appellant's subcontractors — particularly [Subcontractor B], [Subcontractor D], and [Subcontractor F] — will perform the primary and vital contract requirements, in violation of the ostensible subcontractor rule.

Appellant argues it will manage the effort, which, Appellant maintains, constitutes the primary and vital requirement of the procurement. The Area Office found it questionable whether Appellant would manage the contract because, although Appellant would provide the Senior Account Manager and Assistant Account Manager, much of the lower-level management apparently would be performed by the subcontractors. The proposal stated, for example, that Appellant would delegate “Media Planning Management and Execution” to [Subcontractor B]. Section II.B, *supra*. Appellant's CEO was briefly mentioned in the proposal, but the proposal did not indicate that he would have any direct role in contract management. *Id.*

In any event, even assuming that Appellant will manage the overall contract, OHA has consistently held that a prime contractor does not perform the primary and vital requirements of a contract merely by supervising its subcontractors in their performance of work. *E.g.*, *Size Appeal of Hamilton Alliance, Inc.*, SBA No. SIZ-5698 (2015); *Size Appeal of Shoreline Servs.*, SBA No. SIZ-5466 (2013). Nor can I conclude that management services themselves are the primary purpose or requirement of this procurement. As discussed above, the primary and vital contract requirements are determined from “the goods or services which the procuring agency actually seeks to acquire”, rather than the “goods or services which the contractor must perform or provide in order to deliver those goods or services”. *Anadarko*, SBA No. SIZ-4708, at 8. Here, the instant RFP does not support the notion that ANG primarily sought to acquire management services. Management represents only a small fraction of the total dollar value of this contract, and such tasks are incidental to the R&R services that ANG primarily sought to acquire.

Appellant also highlights that when, as here, there are multiple subcontractors, none of which will perform a majority of the primary and vital requirements, the prime contractor's control over contract management may be grounds to find the prime contractor is not unusually reliant on any single subcontractor. *Paragon TEC*, SBA No. SIZ-5290, at 14. Nevertheless, the problem for Appellant is that, even in situations where the prime contractor proposes to utilize multiple subcontractors, the prime contractor must self-perform at least a substantial portion of the primary and vital requirements. Thus, in *Size Appeal of Competitive Innovations, LLC*, SBA No. SIZ-5369 (2012), *recons. denied*, SBA No. SIZ-5392 (2012) (PFR), OHA found that the ostensible subcontractor rule was violated when the prime contractor would manage the contract, but would not deliver any actual instruction, the contract's primary and vital requirement. OHA explained that “[t]he key issue is not that [the prime contractor] would utilize multiple subcontractors, but that [the prime contractor] itself will have no role in performing the contract's primary and vital requirement.” *Id.* at 17. Similarly, in the case at hand, because Appellant's subcontractors will perform all or nearly all of the R&R services, management of the contract is not sufficient to establish that Appellant will perform the primary and vital contract requirements.

Appellant also argues that the Area Office improperly refused to credit labor estimates that Appellant provided to the Area Office during the course of the size reviews. These estimates, Appellant maintains, demonstrate that Appellant will self-perform between 67.4% and 73% of contract labor. I agree with the Area Office that Appellant's estimates are unpersuasive. First, the estimates are inconsistent with Appellant's proposal and teaming agreements, which seemingly indicate that Appellant will subcontract nearly all of the R&R services. Notably, there is no indication in the proposal that Appellant has, or would obtain, the workforce necessary to

self-perform a large proportion of the contract.⁵ Furthermore, for purposes of the ostensible subcontractor rule, size is determined as of the date of final proposal revisions. 13 C.F.R. § 121.404(d). As a result, “changes of approach occurring after the date of final proposals do not affect a firm's compliance with the ostensible subcontractor rule”. *Size Appeal of Greener Constr. Servs., Inc.*, SBA No. SIZ-5782, at 5 (2016). Here, at least two of Appellant's labor estimates were developed well after the date of final proposal revisions, and none of the estimates are corroborated by Appellant's actual proposal. Accordingly, Appellant has not shown that the Area Office erred in disregarding the labor estimates.

IV. Conclusion

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

KENNETH M. HYDE
Administrative Judge

⁵ As the Area Office observed, Appellant's sworn SBA Form 355 indicated that Appellant had only six total employees as of November 2017.