

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

SIZE APPEAL OF:

Kûpono Government Services, LLC

Appellant,

Appealed From
Size Determination No. 06-2018-049

SBA No. SIZ-5967

Decided: October 23, 2018

APPEARANCES

Damien C. Specht, Esq., James A. Tucker, Esq., R. Locke Bell, Esq., Morrison & Foerster, LLP, McLean, Virginia, for Appellant

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Ian P. Patterson, Esq., Shane J. McCall, Esq., Koprince Law LLC, Lawrence, Kansas, for North Wind Site Services, LLC

DECISION¹

I. Introduction and Jurisdiction

On July 20, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2018-049, concluding that Kûpono Government Services, LLC (Appellant) is not a small business for the procurement at issue. The Area Office determined that Appellant is affiliated with its subcontractor, ARES Corporation (ARES), under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied and the determination is affirmed.

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

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 August 6, 2018.² Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation, Award, and Protest

On June 23, 2017, the U.S. Department of Energy (DOE), Office of HQ Procurement Services, issued Request for Proposals (RFP) No. DE-SOL-0010843, seeking a contractor to support DOE's National Training Center (NTC). The Contracting Officer (CO) set aside the procurement for participants in the 8(a) Business Development program, and assigned North American Industry Classification System (NAICS) code 611430, Professional and Management Development Training, with a corresponding size standard of \$11 million average annual receipts. The RFP stated that DOE planned to award a single indefinite-delivery/indefinite-quantity (ID/IQ) contract. (RFP at 59.) Proposals were due August 16, 2017.

The RFP's Statement of Objectives (SOO) explained that the NTC “designs, develops, and implements state-of-the-art security and safety training programs for [DOE] federal and contractor personnel nationwide.” (*Id.*, Attach. A, at 1.) The instant procurement's “overall objective [is] to acquire a contractor to support the mission of the [NTC].” (*Id.* at 2.) More specifically, the contractor would be responsible for “developing, providing and supporting safety and security classroom and on-line training at the NTC and other locations, managing training programs, providing cyber-security and information technology support for the NTC as well as at DOE Headquarters in Washington, D.C., and maintaining the facilities and grounds.” (*Id.* at 1.) The RFP divided the contract requirements into four Contract Line Item Numbers (CLINs): CLIN 1000 “Training Mission and Support”; CLIN 2000 “Site Facilities, Safety and Security, and Business Operations”; CLIN 3000 “Strategic Partnership Program”; and CLIN 4000 “Custodial Services and Ground Maintenance.” (*Id.* at 2-13.)

Under CLIN 1000, the contractor will design new and modify existing training products; maintain a database for examining evaluation feedback; and “develop course material, training products, and training plans necessary to accomplish NTC training.” (*Id.* at 5.) The contractor will provide training development, delivery, and support in five program areas: (i) Nuclear Safety Training; (ii) Safeguards and Security (S&S) Training; (iii) Protective Force Training; (iv) Management and Instructional Technology Training; and (v) the DOE Training Institute. (*Id.*) The contractor also would be responsible for maintaining and executing a training certification program “to ensure that [NTC's] goal of providing training excellence is supported.” (*Id.* at 4.) In addition, the contractor will manage and operate “all NTC Information Technology (IT) systems,” and will provide a cyber-security program to minimize threats to NTC networks and

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 July 20, 2018. Fifteen calendar days after July 20, 2018 was August 4, 2018. Because August 4, 2018 was a Saturday, the appeal petition was due on the next business day: Monday, August 6, 2018. 13 C.F.R. § 134.202(d)(1)(ii).

computer systems. (*Id.* at 4-5.) According to the SOO, the IT functions performed by the contractor include: maintaining and managing computer hardware; network administration; staffing a computer help desk; and installing, maintaining, and updating computer software. (*Id.* at 6.)

For CLIN 2000, the contractor is responsible for operating NTC facilities, which consist of “classrooms, live fire ranges, administrative buildings and offices” as well as “a simulated DOE nuclear facility.” (*Id.* at 2, 7.) Facilities must be “maintained and possibly modified to ensure that the NTC training goals can be achieved.” (*Id.* at 7.) The contractor will develop, execute, maintain, and coordinate Range Use Agreements, Temporary Use Agreements, and Memorandum of Understanding with non-NTC users of the facilities. (*Id.*) Further, the contractor must implement: (i) a Site Environment, Safety, and Health Program; (ii) a Site Security Program; (iii) an Emergency Management Program; (iv) a Risk Assessment Program; (v) a Self-Assessment Program; and (vi) a Records Management Program. (*Id.* at 9.) In addition, “[t]he Contractor shall provide logistical services to support NTC operations, training activities and exercise events, classroom scheduling and setup, supplies, shipping and receiving, moves, and inventory.” (*Id.* at 8.) The contractor will perform facilities and equipment maintenance, personal property management, and vehicle fleet management; provide contract assurance and an integrated management system; and develop performance measures and metrics to assess NTC operations. (*Id.* at 10-11.)

The SOO stated that CLIN 3000's objectives are “generally similar to CLIN 1000,” in that “[t]he main difference between CLIN[s] 1000 and 3000 is that the Contractor shall provide specialized training support and other services for other DOE organizations and Other Government Agencies (OGA). . . .” (*Id.* at 11.) The work under CLIN 3000 occurs as directed by NTC. (*Id.*)

CLIN 4000 requires the contractor to perform custodial services and grounds maintenance at NTC. The contractor will supply the necessary personnel, management, supervision, materials, supplies and equipment “to ensure clean, well maintained and attractive grounds and facilities.” (*Id.* at 12.)

The RFP stated that the contract would be awarded “to the responsible offeror whose offer conforming to the solicitation will be the best value to the Government, price and other factors considered.” (RFP at 61.) There were five evaluation factors: (1) Technical Approach; (2) Business Management Approach; (3) Relevant Corporate Experience; (4) Past Performance; and (5) Price. (*Id.* at 63-66.)

On March 7, 2018, DOE awarded the contract to Appellant. An unsuccessful offeror, North Wind Site Services, LLC (North Wind), filed a size protest with the CO challenging Appellant's size. The protest alleged that Appellant is affiliated with Manu Kai, LLC (Manu Kai), a joint venture between Harris Corporation and Ke`aki Technologies, LLC. North Wind also contended that Appellant is affiliated with its subcontractor, ARES, under the ostensible subcontractor rule. The CO forwarded North Wind's protest to the Area Office for review.

During the course of its investigation, the Area Office informed the CO that it had “identified the technical training portion of CLIN 1000 as the primary and vital requirement of this contract. Would you agree with that assessment or would you consider the Management or IT functions of CLIN 1000 to be primary and vital as well?” (E-mail from E. Bender to R. Miller (July 19, 2018).) The CO responded:

Yes I agree. CLIN 1000 is the primary and vital requirement of the contract. In fact, CLIN 3000 is basically identical to CLIN 1000 except on who funds that portion of the work. IT functions are not primary and vital.

(E-mail from R. Miller to E. Bender (July 19, 2018).)

B. Proposal and Teaming Agreement

Appellant's proposal identified itself as the prime contractor and ARES as Appellant's sole subcontractor. The proposal stated that Appellant “understands the DOE NTC's mission-critical function of developing, maintaining, and delivering standardized health, safety, S&S, and protective force training. . . .” (Proposal, Vol. II, at 1.) Appellant “is pleased to present our proposal to support [the NTC's] mission to provide and facilitate the training necessary to maintain a fully qualified Federal and contractor workforce.” (*Id.* at viii.) According to the proposal, Appellant brings “capabilities and expertise in IT systems, site operations, and facilities management.” (*Id.* at 65.) “ARES complements [Appellant's] capabilities with their in-depth understanding of DOE nuclear facility operations, subject matter expertise in nuclear safety, safeguards and security, and protective force disciplines, and demonstrated experience in developing and delivering training in these disciplines. . . .” (*Id.* at viii-ix.) “ARES also complements [Appellant's] capabilities in the area of knowledge management, and the IT and learning management systems that are required to support it.” (*Id.* at ix.)

To manage the contract, Appellant proposed [XXXX] as General Manager (GM). (*Id.* at 1-2, 55.) [The proposed GM] is currently employed by a different company, but committed to joining Appellant if it were awarded the contract. (*Id.*, Appx. A.) As GM, [XXXX] is responsible “for all aspects of contract performance” and “executes all activities under the oversight and direction of the DOE NTC Director.” (*Id.* at 2.) [XXXXXXXXXXXXXXXXXXXXX] (*Id.* at 2-3.) The proposal explained [XXXXXXXXXXXXXXXXXXXXX]. (*Id.* at 2.) The proposal indicated that [XXXXXXXXXXXXXXXXXXXXX] would be employed by Appellant. (*Id.* at 66-67.) [XXXXXXXXXXXXXXXXXXXXX] would be ARES employees. (*Id.*)

[XXXXXXXXXX]

Appellant proposed a total price of \$[XXXX] over five years of contract performance. (*Id.*, Vol. III, at 6.) Broken down by CLIN, Appellant proposed \$[XXXX] for CLIN 1000; \$[XXXX] for CLIN 2000; \$[XXXX] for CLIN 3000; and \$[XXXX] for CLIN 4000. (*Id.*) For CLIN 1000, the proposal indicated that Appellant would be responsible for a total of [XXXX] labor hours over five years, and ARES for [XXXX] labor hours over five years. (*Id.* at 5.) ARES's CLIN 1000 labor hours were associated only with the [XXXX] group. (*Id.*) Appellant's CLIN 1000 labor hours included Appellant's labor supporting [XXXXXXXXXXXXXXXXXXXXX]. (*Id.*)

With its proposal, Appellant submitted a copy of a Teaming Agreement (TA) between itself and ARES, effective May 22, 2017. The TA stated that Appellant will be the prime contractor and ARES the subcontractor for the instant procurement. Further, “[XXXXXXXXXXXXX].” (*Id.*, Vol. I, at 19.)

C. Size Determination

On July 20, 2018, the Area Office issued Size Determination No. 06-2018-049, concluding that Appellant is not an eligible small business for the instant procurement. The Area Office found that Appellant is affiliated with ARES under the ostensible subcontractor rule.

The Area Office first explained that Appellant is majority-owned by the Alaka`ina Foundation, a Native Hawaiian Organization (NHO). (Size Determination, at 1.) Under SBA regulations, Appellant is exempt from affiliation with its NHO parent, and also is not affiliated with sister companies through common management or common ownership. (*Id.* at 4, citing 13 C.F.R. § 121.103(b)(2).) These exemptions become stronger when, as here, the underlying procurement is conducted through the 8(a) program. (*Id.*, citing 13 C.F.R. §§ 124.109(c)(2)(iii) and 124.110(b).) The Area Office concluded that Appellant's size should be examined independently “without regard to its affiliation with any other business enterprise owned by the NHO.” (*Id.* at 5.) The Area Office also found no merit to the protest allegation that Appellant is affiliated with Manu Kai.³ (*Id.*)

Next, the Area Office considered whether Appellant is affiliated with ARES under the ostensible subcontractor rule. According to the Area Office, the training requirements set forth in CLIN 1000 are the principal purpose, and the primary and vital requirements, of this contract. (*Id.* at 8.) These requirements relate directly to the mission of the NTC, and comprise the largest percentage of employee positions, labor costs, and labor hours. (*Id.*) While CLIN 1000 also includes some IT work, these functions are of ancillary importance, not primary and vital requirements. (*Id.* at 8-9.) Further, “[i]n an e-mail to [the Area Office] dated July 1[9], 2018, the contracting officer confirmed that only training, and not IT functions constitute the primary and vital requirement of the procurement.” (*Id.* at 9 n.2.) The Area Office noted that CLIN 3000 calls for the contractor to provide similar training services as CLIN 1000, but for different customers. (*Id.* at 9.)

The Area Office reviewed Appellant's proposal to ascertain whether Appellant will self-perform the primary and vital contract requirements. The Area Office found that, according to the proposal, Appellant's expertise and capabilities are in “IT systems, site operations, and facilities management” rather than training. (*Id.*) Further, of the workforce of [XX] employees Appellant proposed to support the Training Directorate, [XX] will be employees of Appellant,

³ On appeal, Appellant challenges only the ostensible subcontractor portion of the Area Office's analysis, so further discussion of the Area Office's findings pertaining to Manu Kai or other unrelated matters is unnecessary. *E.g.*, *Size Appeal of Env't'l Restoration, LLC*, SBA No. SIZ-5395, at 6-7 (2012) (when issue is not appealed, the area office's determination “remains the final decision of the SBA.”).

with [XX] other positions shared between Appellant and ARES. (*Id.*) The Area Office concluded that “[Appellant] only provides approximately [XXXXX] of the staff for the training component.” (*Id.*) The Area Office added that “[a majority] of the total contract costs for the ‘Training Directorate/CLIN 1000’ category are allocated to the [XX] positions employed by [ARES].” (*Id.*) Viewed from an hourly perspective, ARES employees will perform [XXXX] of the labor hours for the Training Directorate. (*Id.* at 10.) In sum, “while [Appellant] staffs a majority of the CLIN 1000 positions, the majority of the ‘primary and vital’ training positions, contract costs, and labor hours in CLIN 1000 will be completed by [ARES].” (*Id.*)

The Area Office found that ARES is not a small business under the size standard associated with this procurement. (*Id.* at 6, 10.) Appellant is affiliated with ARES under the ostensible subcontractor rule, thus Appellant is not a small business concern for the instant procurement.

D. Appeal

On August 6, 2018, Appellant filed the instant appeal. Appellant contends that the Area Office clearly erred in concluding that Appellant is affiliated with ARES.

Appellant asserts that the principal purpose of this procurement is “*running the NTC*, with the core requirements being: Site Facilities (including safety, security, and business operations); Training (including development, delivery, and management of training); and Custodial and Grounds Maintenance.” (Appeal at 6 (emphasis Appellant's).) According to the proposal, Appellant will self-perform the majority of the labor in each of the four CLINs, and will staff the majority of the labor categories. (*Id.* at 7.) Appellant employees will serve as [XXXXXX] and as [XXXXXXXXXX] with responsibilities across the full PWS. Appellant provided [XXXX] Corporate Experience references for itself and [XXXX] for ARES, and Appellant's references were for projects relevant to all four CLINs. (*Id.*) For Past Performance, Appellant provided [XXXX] references for itself and [XXXX] for ARES. Appellant adds that the favorable evaluation of its proposal indicates that DOE believed that Appellant had sufficient experience to perform the required work. (*Id.* at 7-8.)

Appellant next argues that the Area Office committed three errors in concluding that Appellant will not perform the primary and vital contract requirements. First, contrary to the size determination, Appellant will perform the training component of the solicitation that the Area Office found to be the primary and vital requirements. Second, because Appellant and ARES will both perform training requirements, it was clear error not to find that Appellant, the firm performing the majority of the total contract, will perform the primary and vital requirements. Third, the Area Office incorrectly determined that training functions alone are the primary and vital contract requirements. (*Id.* at 9.)

Appellant maintains that it will perform the training component of CLIN 1000 because it will provide its own employees for [XX] labor categories and [XXXX], totaling [XXXX] labor hours and \$[XXXX] in labor costs. (*Id.* at 11.) ARES also will perform training under CLIN 1000, and ARES's “total hours and related labor costs [XXXXXXXXXX].” (*Id.*) Specifically, ARES will be responsible for [XXXX] labor hours and \$[XXXX] in labor costs for training

under CLIN 1000. (*Id.*) The Area Office clearly erred, however, in determining that Appellant would not perform any of the training services. (*Id.* at 11-12.) Appellant argues that it will fill leadership roles for many of the contract objectives associated with CLIN 1000. (*Id.* at 12-13.) Other senior positions will also be staffed by Appellant, and these represent a substantial portion of the training component. “While the instructors will deliver the training, [Appellant's] personnel within the second tier of leadership will plan, develop, certify and approve training which constitutes the more critical aspects of the training services.” (*Id.* at 13.) Appellant further argues that the “training-related IT functions of CLIN 1000” should also have been deemed primary and vital functions, and had the Area Office done so, it would have concluded that Appellant is providing the majority of labor hours and labor costs. (*Id.* at 14.)

Appellant states that the Area Office should have found that Appellant will perform the same type of work as ARES, and will perform the majority of the total contract. Appellant contends that under OHA precedent, if a prime contractor and its subcontractor are performing the same type of work, the firm that performs the majority of the contract is performing the primary and vital requirements. (*Id.* at 15, citing *Size Appeal of A-P-T Research, Inc.*, SBA No. SIZ-5798, at 11 (2016).) Here, because both Appellant and ARES are performing the training functions of the solicitation, the Area Office should have focused on whether Appellant would perform the majority of the total contract. Appellant insists that it will perform the majority of the total contract, as Appellant will staff a majority of the labor categories, and will be responsible for a majority of the labor hours and labor costs. (*Id.*)

Next, Appellant disputes the Area Office's finding that only the training components of CLIN 1000 are primary and vital contract requirements. Appellant contends that the RFP called for “an operating contractor *to run an entire [Government-Owned Contractor Operated (GOCO)] facility, not simply to provide trainers.*” (*Id.* at 16 (emphasis Appellant's).) The CO likewise disagrees with the Area Office's analysis, based on a Clarification Letter from the CO. The Clarification Letter establishes that there are three core mission areas for which the contractor will be responsible: (i) Training Mission and Support; (ii) Site Facilities, Safety and Security and Business Operations; and (iii) Custodial and Grounds Maintenance. (*Id.*) The Area Office's misunderstanding of the primary and vital requirements is grounds for reversing the size determination. (*Id.* at 17.)

Appellant argues that, even aside from the Clarification Letter, the RFP clearly establishes that operation of the NTC is the primary and vital contract requirement. The RFP discusses the same core mission areas highlighted by the CO, and distributes them among the four CLINS. (*Id.* at 17-18.) Similarly, the PWS takes the three core mission areas and arranges them into task areas. (*Id.* at 18.) It therefore was “unreasonable for the Area Office to find that the facilities management requirements were not primary and vital requirements of a contract to run Government facilities.” (*Id.*) According to Appellant, the CO agrees with Appellant that the IT functions are critical to the performance of the training requirements, as the “IT systems are *essential* to the development, delivery, and evaluation of training.” (*Id.* at 19 (emphasis Appellant's).) DOE's evaluation of proposals shows the importance DOE placed on the IT requirements. (*Id.* at 19-20.) If the Area Office had found that the IT services are part of the primary and vital contract requirements, it would have found that Appellant is performing the majority of the work in all four CLINS.

E. North Wind's Response

On August 29, 2018, North Wind responded to the appeal. North Wind maintains that the Area Office correctly found that the primary and vital contract requirements are training services under CLIN 1000, and correctly concluded that ARES, not Appellant, will perform the large majority of those requirements. (Response at 3.) As such, the appeal should be denied.

North Wind argues that, based on the RFP, training services are the primary and vital contract requirements. CLIN 1000 is closely aligned with NTC's mission, and comprises the largest part of the procurement, both in dollars and hours. (*Id.*) The CO's chosen NAICS code, 611430, Professional and Management Development Training, further demonstrates that training is the primary requirement. (*Id.*) North Wind also highlights that, in e-mail correspondence with the Area Office, the CO “agreed with the Area Office's assertion that only the technical training portion of CLIN 1000 was the primary and vital requirement.” (*Id.* at 4.) In addition, Appellant's proposal suggests that Appellant itself viewed training as the primary and vital contract requirement. (*Id.*) North Wind highlights that, according to Appellant's proposal, [a majority] of labor hours and [] labor costs under CLIN 1000 are for training services. (*Id.* at 5.)

North Wind attacks the arguments raised by Appellant on appeal. First, North Wind argues, the Area Office did not misunderstand the CO's e-mail of July 19, 2018. The Area Office independently determined that training was the primary and vital contract requirement, and when asked for his opinion, the CO “provided his unqualified concurrence.” (*Id.* at 6.) The CO further stated that IT functions are not primary and vital. To now find that IT functions are primary and vital “would require not only overlooking the Solicitation's requirements but, also, ignoring the [CO's] unambiguous rejection of IT functions as being primary and vital.” (*Id.* at 7.)

Appellant's argument that running the NTC is the primary and vital requirement is also incorrect. While there are multiple requirements associated with this acquisition, “they all revolve around supporting NTC's mission — to provide the training necessary to maintain a qualified workforce in the areas of nuclear safety and safeguards and security.” (*Id.*) The work under CLINs 2000 and 4000 is ancillary to the training services, and “nothing in the overall Statement of Objectives gave any indication that facility maintenance services might actually be the primary and vital component.” (*Id.* at 8.) Appellant also fails to show that the Area Office erred by refusing to revisit its decision based on the CO's Clarification Letter, which was created well after the size determination was issued. The Clarification Letter could have been, but was not, offered to the Area Office during the size review, and therefore should not be considered now, particularly since the Clarification Letter appears inconsistent with the CO's contemporaneous remarks. (*Id.* at 9.)

Next, North Wind maintains that ARES, not Appellant, is performing the majority of the primary and vital requirements. ARES is performing the bulk of the training operations, with Appellant performing the IT and facility services. (*Id.* at 11.) Appellant's proposal stated that ARES would staff [a majority of the] positions under the Training Directorate, including [XXXXXXXXXX]. (*Id.*) Further, Appellant acknowledged in its proposal and in its appeal that ARES will provide [XXXXX] more labor hours under the Training Directorate than Appellant,

making ARES responsible for the majority of the RFP's training requirement. (*Id.* at 11-12.) Appellant's arguments to the contrary are meritless.

North Wind maintains that, contrary to Appellant's suggestions, the Area Office did not find that Appellant would play no part in the training requirements. Rather, the Area Office found, correctly, that Appellant will not perform enough of the training services, the contract's primary and vital requirements. (*Id.* at 12.) North Wind also disputes Appellant's reliance on *A-P-T Research*. North Wind argues that, in *A-P-T Research*, OHA disagreed with an area office's analysis of the contract's primary and vital requirements, but found that the prime contractor nevertheless was performing the majority of what OHA considered to be the primary and vital requirements. Thus, *A-P-T Research* did not turn on an evaluation of the entire contract, but instead on the proportion of the primary and vital requirements that would be performed by the prime contractor. (*Id.* at 14.) Because Appellant will perform substantially less of the training services than ARES, the Area Office correctly found that ARES is responsible for the primary and vital contract requirements. (*Id.* at 14-15.)

North Wind contends that the instant case is analogous to OHA's decision in *Size Appeal of Fortier & Associates, Inc.*, SBA No. SIZ-4055 (1995). There, OHA found a violation of the ostensible subcontractor rule, notwithstanding that the prime contractor would perform a majority of the total contract labor. (*Id.* at 15.) Similarly, Appellant here lacks the personnel and the expertise to perform the required training, so the Area Office correctly found that ARES is performing the majority of the primary and vital requirements.

F. New Evidence

With its appeal, Appellant moved to introduce the CO's Clarification Letter, dated July 31, 2018. There is good cause for OHA to consider the Clarification Letter, Appellant argues, because the CO “misunderstood the Area Office's question” with regard to the contract's primary and vital requirements, and wishes to clarify his response. (Motion at 1-2.) Appellant contends that the Clarification Letter is relevant to these proceedings because defining the primary and vital contract requirements is a central issue in this case. (*Id.* at 4.) The Clarification Letter does not enlarge the issues on appeal, Appellant maintains, as the CO's interpretation of the primary and vital contract requirements is discussed in the size determination. On the contrary, the letter clarifies what the CO “actually meant” in his July 19, 2018 e-mail to the Area Office. (*Id.*)

North Wind opposes Appellant's motion. According to North Wind, the Clarification Letter “is not relevant to the issues on appeal” because it was created 11 days after the size determination was issued. (Opp. at 3.) Appellant knew, or should have known, that the primary and vital contract requirements would be significant in the Area Office's analysis, and therefore should have addressed this question during the size review. (*Id.*) Furthermore, the Area Office gave the CO an opportunity to comment on the primary and vital contract requirements, which the CO “unambiguously confirmed” to be training. (*Id.* at 4.) In North Wind's view, admitting the Clarification Letter “would introduce irrelevant information, enlarge the issues on appeal, and convolute the record.” (*Id.*)

G. CO's Filing

On August 16, 2018, the CO forwarded OHA a copy of his Clarification Letter, styled as a response to the appeal. The CO's filing, however, consists only of a copy of the Clarification Letter, without addressing the merits of the appeal, and thus cannot be considered a “response” to the appeal under 13 C.F.R. § 134.309. Further, although both Appellant and North Wind assert that the Clarification Letter is new evidence, the CO's filing did not include a motion to introduce new evidence, as is required by 13 C.F.R. § 134.308(a). Accordingly, OHA will treat the CO's filing as concurrence with Appellant's motion to supplement the record, rather than as a separate motion to supplement the record or as a response to the appeal.

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 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). 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).

B. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate,

however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). OHA “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

In the instant case, I agree with North Wind that the CO's Clarification Letter is not admissible, because the CO did not provide this letter to the Area Office during the size investigation. *E.g.*, *Size Appeal of Radant MEMS, Inc.*, SBA No. SIZ-5600, at 6 (2014) (documents filed with OHA by a CO “were not previously made available to the Area Office” and therefore “cannot be utilized on appeal”). Further, although Appellant suggests that the CO misunderstood the Area Office's question concerning the primary and vital contract requirements, the CO's July 19 e-mail to the Area Office does not evince any misunderstanding, and in any event, Appellant offers no authority for the proposition that a unilateral misunderstanding may constitute “good cause” to admit new evidence on appeal. Accordingly, Appellant's motion is DENIED, and the Clarification Letter has not been considered for purposes of this decision.

C. Analysis

The Area Office in this case determined that the “primary and vital” contract requirements consist of the training portion of CLIN 1000, and that this work will be performed predominantly by Appellant's subcontractor, ARES, rather than by Appellant itself. As discussed below, Appellant has not carried its burden of proving that the size determination is clearly erroneous. Consequently, 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). Not all the requirements identified in a solicitation can be primary and vital, and the mere fact that a requirement is a substantial part of the solicitation does not make it primary and vital. *Id.* 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). It is, however, also appropriate to consider qualitative factors, such as the relative complexity and importance of requirements. *Id.*

In the instant case, the Area Office found that training is the primary and vital requirement of the contract, and several factors support the Area Office's determination. First, the RFP indicates that the principal purpose of this procurement is training. The procurement's “overall objective [is] to acquire a contractor to support the mission of the [NTC].” *See* Section II.A, *supra*. That mission is to conduct training. Specifically, the NTC “designs, develops, and implements state-of-the-art security and safety training programs for [DOE] federal and

contractor personnel nationwide.” *Id.* Much of the RFP is devoted to discussing the specialized technical training that the contractor will develop and deliver. *Id.* Further, while it is true that the RFP also calls for the contractor to perform other support services in addition to training, the RFP makes clear that these other services are incidental to the training. Thus, for example, the contractor will maintain and operate NTC facilities “to ensure that the NTC training goals can be achieved,” and will provide “logistical services” in support of training efforts. *Id.* The NAICS code assigned to this RFP is another indication that the principal purpose of the procurement is training. Under applicable regulations, a solicitation must be assigned “the single NAICS code which best describes the principal purpose of the product or service being acquired.” 13 C.F.R. § 121.402(b); *see also* Federal Acquisition Regulation 19.303(a)(2). Here, the CO assigned NAICS code 611430, “Professional and Management Development Training,” to the RFP. Section II.A, *supra*. The *NAICS Manual*⁴ describes this industry as involving “short duration courses and seminars for management and professional development.” *NAICS Manual* at 515.

As North Wind emphasizes in its response to the appeal, Appellant's proposal confirms that the principal purpose of this procurement is training. The proposal acknowledged NTC's “mission to provide and facilitate the training necessary to maintain a fully qualified Federal and contractor workforce,” and explained that Appellant planned to [XXXXXXXXXXXX] “to provide an increased focus on training/educational excellence.” Section II.B, *supra*. Moreover, based on Appellant's proposal, training represents the largest portion of contract value and contract labor. According to the proposal, CLIN 1000 — “Training Mission and Support” — constitutes [a majority] of the value of this procurement. *Id.* CLIN 1000 in turn consists primarily of training. Thus, of the [XXXX] labor hours Appellant proposed for CLIN 1000, [a majority] (*i.e.*, [XXXX] labor hours for ARES, and [XXXX] labor hours for Appellant) are associated with training. Section II.D, *supra*.

The CO's comments likewise reflect that the principal purpose of this procurement is training. Although OHA has explained that “a contract's primary and vital requirements are ascertained from the solicitation itself, and not from comments by the procuring agency,” OHA nevertheless will attach some weight to the CO's opinion of the primary and vital contract requirements. *Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5466, at 9 (2013). Here, as discussed above, the CO's choice of NAICS code indicates that the CO believed that the principal purpose of this procurement is training. *Size Appeal of Tinton Falls Lodging Realty, LLC*, SBA No. SIZ-5546, at 16 (2014). In addition, during the size review, the Area Office informed the CO of its view that “the technical training portion of CLIN 1000 [is] the primary and vital requirement of this contract,” to which the CO responded “Yes I agree.” Section II.A, *supra*. The CO then elaborated that “CLIN 1000 is the primary and vital requirement of the contract,” and stated that “IT functions are not primary and vital.” *Id.* CLIN 1000 consists of training and IT support, so if IT functions are not primary and vital, it follows that training alone is the primary and vital contract requirement.

On appeal, Appellant maintains that the Area Office should have found the entirety of CLIN 1000 to be “primary and vital.” As discussed above, though, both the RFP and Appellant's

⁴ Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States* (2017), available at <http://www.census.gov>.

proposal indicate that the principal purpose of this procurement is training, and this conclusion is bolstered by the CO's comments and his choice of NAICS code. Further, although Appellant asserts that IT functions are critical to the performance of the training requirements, Appellant has not persuasively explained why this would be the case. On the contrary, the IT services described in the RFP appear to be routine IT services, such as network administration and operating a help desk, rather than services directly integral to training. Section II.A, *supra*. Accordingly, Appellant has not proven that the Area Office clearly erred in finding that the primary and vital requirements consist only of the training aspects of CLIN 1000.

Based on this record, then, the Area Office reasonably determined that technical training is the primary and vital contract requirement. While the procurement does call for other support services in addition to training, these other support services are incidental to the technical training. Indeed, it is not evident that the other support services would still be necessary if not for the specialized technical training that the contractor will develop and deliver.

Having found that the Area Office did not err in identifying training as the primary and vital contract requirement, the remaining issue is whether Appellant or ARES is predominantly responsible for performing this work. Here again, Appellant fails to show clear error in the size determination. According to Appellant's proposal, ARES will perform a large majority of the training services. Thus, the proposal stated that, out of [XX] positions supporting the Training Directorate, [a majority] would be filled solely by ARES employees, with another [XX] positions split between Appellant and ARES. Section II.B, *supra*. Similarly, from an hourly standpoint, Appellant proposed that ARES will perform [XXXX] labor hours for training, compared with [XXXX] labor hours for Appellant. Section II.D, *supra*. Appellant argues that it will perform the "more critical aspects of the training services," but this argument is not supported by the record. Appellant's proposal stated that [XXXXXXXX] will be an ARES employee, and this individual will be responsible for "[XXXXXXXXX]." Section II.B, *supra*. In addition, ARES will fill all of the training [XXXX] positions, as well as all of the [XXXX] positions. *Id.* I therefore see no basis to conclude that Appellant will perform the more important aspects of the training. If anything, the proposal suggests that Appellant lacks the subject matter expertise to perform the training without engaging ARES as a subcontractor. Thus, the proposal stated that Appellant selected ARES as a subcontractor due to ARES's "in-depth understanding of DOE nuclear facility operations, subject matter expertise in nuclear safety, safeguards and security, and protective force disciplines, and demonstrated experience in developing and delivering training in these disciplines," whereas Appellant's own "capabilities and expertise [are] in IT systems, site operations, and facilities management." *Id.* In sum, the record supports the Area Office's conclusion that ARES, rather than Appellant, is predominantly responsible for performing the training services.

Appellant also argues that because both Appellant and ARES will perform training, but Appellant is responsible for the majority of the total contract, Appellant should be deemed to be performing the primary and vital contract requirements. This argument is meritless. It is true that OHA has recognized that, when a procurement calls for a single type of work, the firm that is performing the majority of the contract is performing the primary and vital requirements. *E.g., Size Appeal of A-P-T Research, Inc.*, SBA No. SIZ-5798, at 11 (2016). When, however, a procurement involves multiple, qualitatively-different types of work, the prime contractor must

perform the majority of the work that represents the contract's primary and vital requirements in order to comply with the ostensible subcontractor rule. The instant case thus bears similarity with OHA's decision in *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192 (2011), where OHA found that operation of a job corps center was the primary and vital contract requirement, notwithstanding that this task comprised only 23% of total contract value. Because a subcontractor would perform this primary and vital work, OHA affirmed a determination that the ostensible subcontractor rule was violated. In reaching this decision, OHA explained that “[t]he fact that the services [the subcontractor] will provide do not make up the majority of the proposal cost does not render them any less vital to contract performance.” *Alutiiq*, SBA No. SIZ-5192, at 12.

IV. Conclusion

Appellant has not shown clear error in the size determination. As a result, 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