

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

SIZE APPEAL OF:

Inquiries, Inc.,

Appellant,

RE: iWorks Corporation

Appealed From
Size Determination No. 02-2019-029

SBA No. SIZ-6008

Decided: June 3, 2019

APPEARANCES

Craig Holman, Esq., Michael Samuels, Esq., Arnold & Porter Kaye Scholer, LLP,
Washington, D.C., for the Appellant

Kathryn Flood, Esq., Jonathan Williams, Esq., Samuel Finnerty, Esq., Patrick Rothwell,
Esq., PilieroMazza, Washington, D.C., for iWorks Corporation

DECISION¹

I. Introduction and Jurisdiction

On February 28, 2019, the Small Business Administration (SBA) Office of Government Contracting - Area II (Area Office), issued Size Determination No. 02-2019-029, finding iWorks Corporation (iWorks) a small business for the underlying procurement. On March 15, 2019, Inquiries, Inc. (Appellant) filed the instant appeal with the SBA Office of Hearings and Appeals (OHA). Appellant argues the Area Office erred in finding iWorks small under the applicable size standard and as such, the determination should be reversed or remanded to the Area Office for reconsideration. For the reasons discussed *infra*, the appeal is denied.

¹ This decision was originally issued under a protective order. OHA received one or more 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 its size appeal. 13 C.F.R. § 134.304(a)(1).² Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation

On November 30, 2018, the Defense Security Service (DSS) issued Solicitation No. HS0021-19-R-003, seeking a contractor to provide Personnel Security Support Services to the Defense Vetting Directorate for the Vetting Risk Operations Center (VROC) and Consolidated Adjudications Facility (CAF). (Solicitation, at 2.) The solicitation was set aside for small businesses. (*Id.*, at 33.) The Contracting Officer (CO) assigned the contract North American Industrial Classification System (NAICS) Code, 561611, Investigation Services, with a corresponding \$20.5 million average annual receipts size standard. (*Id.*, at 35, 50, 76.)

The Performance Work Statement (PWS) indicated the contractor would “provide all personnel supervision, and other items and non-personal services necessary to perform Personnel Security Support Services.” (*Id.*, at 10.) More specifically, the solicitation noted, “[t]he contractor shall be responsible for providing operational support to assist in the personnel clearance oversight and management . . . and support the holistic vetting and adjudication mission.” (*Id.*, at 12.) Key personnel for the contract are the Program Manager, Task Lead(s), and Quality Assurance lead(s). (*Id.*, at 17.)

Offerors were instructed to include a Proposal Summary, Past Performance Synopsis, Technical Capability summary, with resumes for key personnel, and a price proposal. (*Id.*, at 75.) Synopses for major subcontractor past performance could be submitted. (*Id.*)

The Solicitation indicated the contract would be awarded to the offeror whose proposal was the best value after an evaluation of past performance, technical capability and price. (*Id.*, at 38.) DSS indicated the award would not be based solely on the lowest price, but rather superior quality past performance of relevant contracts would be analyzed, along with contract price. (*Id.*) The proposals would first be ranked by price. (*Id.*, at 39.) Next, the Source Selection Evaluation Board (SSEB) would evaluate the Technical Capability for the lowest priced proposal on a pass/fail basis. (*Id.*) If the technical capability portion was acceptable, then the SSEB would evaluate the past performance for relevancy (from “not relevant” to “very relevant”) and the contractor would be given a confidence rating from “no confidence” to “substantial confidence.” (*Id.*, at 40.) If no relevant past performance was available a contractor would be given a neutral “unknown confidence” rating. (*Id.*) Offers were due December 14, 2018. (*Id.*, at 1.)

² The Appeal would have been due on January 2, 2019, but OHA notified parties, via its website and online submission system, that filings due during the Government Shutdown were to be filed by close of business on the first day OHA returned from the shutdown, January 28, 2019. Thus, the Appeal was timely filed.

B. Proposal

On December 14, 2018, iWorks submitted its proposal to DSS. (Proposal, Vol. I, at 1.) iWorks noted it would be working in partnership with Celerity Government Solutions, LLC, dba Xcelerate Solutions (Xcelerate) as a major subcontractor and Absolute Business Systems, Corp. (ABSC) as a subcontractor. (*Id.*)

For its past performance summary, iWorks listed two security support services contracts for which it served as the prime subcontractor, one of which Xcelerate also served as a subcontractor. iWorks listed two security support service contracts Xcelerate performed as a prime contractor, and one security support services contract for Absolute Business Systems. (Proposal, Vol. II, at 6-7.)

In its Technical Proposal, iWorks boasted it had been supporting the Department of Defense's (DoD) Security, Suitability, and Credential (SSC) mission since 2013. (Proposal, Vol. III, at 2.) iWorks laid out its extensive SSC experience, with the Vetting Risk Operation Center (VROC) and supporting Continuous Evaluation operations at DSS. (*Id.*) iWorks notes it has teamed with Xcelerate and ABSC for the contract, and Xcelerate is the current incumbent on the contract. (*Id.*) iWorks set forth how "Team iWorks" intended to perform the various aspects of the contract, and the experience it had in various areas of performance. Specifically, iWorks included a table entitled, Basis of Estimate and Labor Category Mix, where each Functional Program Area was listed, along with a position name, whether the position would be filled by iWorks as the prime contractor, or one of the two subcontractors, and how many of each position would be filled, and in which location. (*Id.*, at 44-45, Table 4.2-2.)

iWorks, as the prime, would provide the DoD Consolidated Adjudications Facility (CAF) Site Lead, Quality Assurance (QA) Lead, Team Lead, [XX] (Senior Personnel Security Admins (SPSA's), and [XX] Personnel Security Admins (PSA's). (*Id.*) A new ITI Analyst Team Lead and ITI CI Analyst would be new hires, filled by a subcontractor and serve at the Vetting Risk Operations Center (VROC). (*Id.*) A Program Manager, Program Management Analyst, Site Lead-Lifecycle Vetting, QA Lead-Lifecycle Vetting, [XX] Team Leads-Lifecycle Vetting, [X] CE Site Lead, [X] CE QA Lead, [XX] CE Team Leads, [XX] Security Analysts, and [XX] Security Assistants would be filled by current staff from the subcontractor, and serve at VROC. (*Id.*) iWorks explained that in addition to its detailed staffing plan, it had "a pipeline of qualified candidates, including current employees performing on similar project in the same domain and geographic area, as well as a recruitment and retention plan designed to rapidly fill any open staffing needs of the VROC/DoD CAF Support program." (*Id.*, at 41.)

iWorks also included an Organizational Chart in its proposal, which set forth the individuals who would fill management positions. (*Id.*, at 43, Table 4.3.1-1.) Resumes for each of the individuals were also included. The proposed Contract Program Manager is an iWorks employee. (*Id.*) The Contract Program Manager's responsibility is described as the single interface with the CO, who would be responsible for program financial and contractual performance and reporting. (Proposal, Vol. III, at 43, Table 4.3.1-1.) The proposed Program Manager, Site Leads, and QA Leads are all Xcelerate employees. (*Id.*)

C. Size Protest

On January 10, 2019, DSS notified Appellant, an unsuccessful offeror, that iWorks was the apparent awardee for the solicitation. On January 17, 2019, Appellant filed a size protest with the CO, alleging iWorks did not meet the \$20.5 million size standard and was ineligible for the award. (Size Protest, at 1.) Appellant contended iWorks was ineligible for the procurement based on its affiliation with an ostensible subcontractor, Xcelerate, the large business incumbent on the solicitation. (*Id.*) Appellant alleged Xcelerate would perform the primary and vital requirements of the solicitation because iWorks lacks the experience necessary for the contract. (*Id.*) Appellant also argued iWorks apparently exceeds the size standard based on public information regarding its revenue over three years. Appellant also noted iWorks routinely teams with Xcelerate and refers to the entity as a partner, and thus should be considered an affiliate for size purposes. (*Id.*)

Appellant argued that Xcelerate is iWork's ostensible subcontractor because Xcelerate will perform the primary and vital aspects of the contract and iWorks will be unusually reliant on Xcelerate to provide services under the contract. (*Id.*, at 5.) Appellant points out Xcelerate is the proposed subcontractor and also the ineligible incumbent on the procurement. (*Id.*) Appellant contends Xcelerate will supply the large majority of the workforce necessary for the contract, and the proposed management all served with the subcontractor on the incumbent contract. (*Id.*, at 6.) Appellant argues iWorks does not have the necessary experience to perform the solicited work, based on publicly available information showing iWorks to be an IT consulting company rather than an investigation services company. (*Id.*)

Appellant further notes iWorks is affiliated with Xcelerate because it recently relocated its primary office next to Xcelerate. (*Id.*) iWorks's website lists Xcelerate as a teaming partner. (*Id.*, at 7.) Appellant insists the companies share employees because two employees recently moved from Xcelerate to iWorks. (*Id.*) Xcelerate is a large business based on its System for Award Management (SAM) profile and is heavily involved in the investigative services field. (*Id.*) Appellant alleges that given iWorks's lack of experience it depends on Xcelerate, a large business incumbent on the contract, for experience and proposal preparation. (*Id.*, citing *Size Appeal of Wichita Tribal Enterprises, LLC*, SBA No. SIZ-5390 (2012) and *Size Appeal of Equity Mortgage Solutions*, SBA No. SIZ-5867 (2017).) Appellant further argues Xcelerate will perform the primary and vital requirements of the contract, since it has no experience in the fields necessary and would only perform administrative tasks. (*Id.*, at 8, citing *Size Appeal of AI Procurement, LLC*, SBA No. SIZ-5121 (2010).) iWorks, Appellant insists, also relies on Xcelerate for the past performance in its proposal, which OHA has found to be a dominant factor in evaluating ostensible subcontractor relationships. (*Id.*, at 9, citing *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192 (2011).)

Appellant contends iWorks also exceeds the \$20.5 million average annual receipts size standard associated with the assigned NAICS code, 561611. (*Id.*) Appellant notes public information suggests iWorks does not qualify as small for the procurement, as iWorks made over \$15 million in 2014, and had an annual growth rate of over 86%. (*Id.*, at 10.) Appellant argues that if this growth had continued at a fraction of that number iWorks would have exceeded the size standard during the 2015-2017 period for determining size. (*Id.*, at 10-11.)

Appellant's final argument for affiliation is iWorks and Xcelerate are affiliated based on "frequent business dealings." (*Id.*, at 10.) Appellant notes the two entities have a history of teaming and working together for Federal contracts, which could give rise to a finding of affiliation, particularly where a small business depends on a large business for a substantial portion of its income. (*Id.*, at 11 citing *Size Appeal of David Boland, Inc.*, SBA No. SIZ-4965 (2008).) Additionally, iWorks refers to Xcelerate as a teaming partner on its website and has recently relocated its primary office directly next to Xcelerate's office. (*Id.*)

D. Response to Protest

1. Response

iWorks promptly filed a response to the size protest, along with supporting documents, including those requested by the Area Office in its January 31, 2019 notice. iWorks asserts first that it is a qualified, independent small business not affiliated with Xcelerate. (Protest Response, at 2.) iWorks also insists it will perform the primary and vital requirements of the solicitation and manage contract performance. (*Id.*) iWorks categorizes its relationship with Xcelerate as having a "very limited history, contrary to [Appellant's] suggestion." iWorks acknowledges only one affiliation, [Affiliated Entity]. (*Id.*)

iWorks asserts it is "well known throughout the government and industry as Personal Vetting (PV) subject matter experts" with more than eight years of corporate contract experience. (*Id.*, at 6.) iWorks describes itself as a graduate of SBA's 8(a) program, who has supported DoD's SSC mission since 2013 when it developed the Case Adjudication Tracking System. (*Id.*)

iWorks denies that Xcelerate is an ostensible subcontractor. iWorks asserts iWorks will perform 51% of the primary and vital contract work and its personnel will fill the Contracts Management position, having overall project responsibility, and it will provide the Program Manager, and [XX] additional management position, for a [majority of the total] management positions. (*Id.*, at 7.) iWorks argues the primary and vital requirement of the contract is to provide personnel support services for vetting and adjudication. (*Id.*) iWorks refers to the specific tasks described in the Performance Work Statement and notes case processing tasks have the greatest anticipated case volume based on estimated quantities, and the next closest case volume is lifecycle end-to-end vetting. (*Id.*, at 8.) iWorks also notes adjudicative review and processing work is the heart of the process, thus the most critical work. (*Id.*) iWorks insists it is solely responsible for providing personnel for these tasks, except for two positions that will be filled by ABSC. (*Id.*, at 9.) iWorks contends its personnel will fill [a majority of] total positions, including [a majority of] management positions and [a majority of] key personnel slots. (*Id.*)

Further, iWorks denies it is unduly reliant on Xcelerate. (*Id.*, at 10.) iWorks insists it does not lack relevant experience to perform the contract and did not rely on Xcelerate to win the contract. (*Id.*) iWorks contends the Solicitation is a brand-new contract, combining several prior projects, so Xcelerate could not be the incumbent. (*Id.*) To support its assertion iWorks has the relevant experience, iWorks includes a list of eight personnel vetting contracts for which it served as prime or subcontractor from 2011 to 2019. (*Id.*, at 11.) Given its extensive relevant experience, iWorks argues, it was not unduly reliant on Xcelerate's past performance to win the

contract. (*Id.*, at 13.) iWorks stresses offerors were required to provide up to five past performance references for contracts similar to those sought in the solicitation, and DSS recognized a small business may not have all the required experience. (*Id.*) iWorks points out two of the five past performances it submitted were from iWorks, two from Xcelerate, and one from ABSC. (*Id.*) This was permitted by the solicitation and an appropriate way to show each entity's experience, iWorks argues. (*Id.*)

iWorks notes the unique nature of the contract anticipates a limited pool of qualified labor, meaning the project will likely require a prime contractor to capture incumbent staff when the contract is won. (*Id.*, at 14.) iWorks likens this to the facts in *Size Appeal of C&C International Computers and Consultants, Inc.*, SBA No. SIZ-5082 (2009), where OHA held that the specialized services in the solicitation demanded unique personnel who had been working on existing contracts consolidated for the solicitation. (*Id.*, at 15.) iWorks also notes OHA has found hiring key personnel from a subcontractor in and of itself is not a violation of the ostensible subcontractor rule. (*Id.*, citing *Size Appeal of Hanks Brandon, LLC*, SBA No. SIZ-5692 (2015).) iWorks argues the contracting staffing requirements were part of the technical evaluation, which was a pass/fail factor in the evaluation, which sets a low bar and should not be a significant factor for analysis. (*Id.*, at 16.)

iWorks also argues it is not unduly reliant on Xcelerate because iWorks will control contract performance, as iWorks's Chief Operating Officer will serve as the Contract Program Manager with overarching authority over the contract. (*Id.*) Further, iWorks' Senior Vice President will “serve as a resource for overarching Subject Matter Expert.” (*Id.*) iWorks asserts OHA has held there is no undue influence when a subcontractor contributes managerial personnel, so long as the prime contractor maintains exclusive control of the contract. (*Id.*, at 17, citing *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305 (2011) and *Size Appeal of A-P-T Research, Inc.*, SBA No. SIZ-5798 (2016).)

Finally, in disputing the ostensible subcontractor argument, iWorks argues there is no incumbent contractor for this procurement because this is a new contract where DSS has combined multiple predecessor efforts into a single procurement. (*Id.*)

iWorks goes on to argue it is not affiliated with Xcelerate for any other reason. (*Id.*, at 18.) iWorks describes Appellant's arguments regarding affiliation as “pure and erroneous speculation.” (*Id.*) iWorks concedes that it has worked with Xcelerate in the past and both companies participated in a charity golf tournament in 2017, but this is not sufficient to create affiliation. (*Id.*, at 19.) iWorks explains it has worked from the same office since 2013, and its decision to lease the office again in 2017 was based on business judgment. (*Id.*) iWorks notes the two entities work in offices in separate ten-story office buildings, each with dozens of other tenants. (*Id.*) iWorks goes on to emphasize iWorks and Xcelerate do not have any common investments, family members, shareholders, or economic interest, and the two have never shared employees, facilities, nor equipment. (*Id.*, at 20.) iWorks maintains none of its owners has ever had ownership interest in Xcelerate or vice versa, and neither has provided loans or financial assistance to the other. (*Id.*) iWorks has derived no revenues from Xcelerate over the past three fiscal years and has only used Xcelerate as a subcontractor on one other occasion. (*Id.*)

Lastly, iWorks insists that together with its one acknowledged affiliate, [Affiliated Entity], it is a small business. (*Id.*) iWorks refers to the tax returns from 2015, 2016, and 2017, which were submitted to the Area Office, to show that its average annual receipts were well below the \$20.5 million threshold. (*Id.*) iWorks points out it was involved in two different joint ventures in the relevant period but denies affiliation with those entities. It used a consulting service in 2015 but denies affiliation with that company.

2. Documents Included with Response

With its response, iWorks provided the Area Office declarations from managerial employees; an SBA Form 355; IRS forms; iWorks' financial statements and tax returns for 2015, 2016, and 2017; [Affiliated Entity]'s tax returns for 2015, 2016, and 2017; tax returns from the company with which it consulted in 2015; tax returns from both joint venture partners; Articles of Incorporation and Bylaws; all volumes of iWorks' proposal; teaming agreements with both Xcelerate and ABSC for the solicitation; commercial leases for both of its offices; and a street view of both iWorks and Xcelerate's offices.

E. Size Determination

The Area Office concluded iWorks is a small business concern for the applicable size standard. The Area Office noted the protestor made three allegations: 1) that iWorks is in violation of the ostensible subcontractor rule; 2) iWorks is large based on its own receipts; and 3) iWorks is generally affiliated with Xcelerate due to routine teaming. (Size Determination, at 2.)

The Area Office addressed the ostensible subcontractor allegations first. The Area Office notes in its response, iWorks does not dispute Xcelerate is not a small business, therefore the Area Office found Xcelerate is not a similarly situated entity, and thus the ostensible subcontractor rule found at 13 C.F.R. § 125.1 applies to the analysis. (*Id.*, at 3.) The Area Office concluded that although the contract combines two previously separate requirements, Xcelerate “is an incumbent for the instant solicitation in the sense that a majority of current incumbent employees to be retained are currently Xcelerate employees.” (*Id.*, at 4.) The Area Office notes that while Xcelerate was small when it began performing the incumbent contract, it grew to be other than small during its performance. (*Id.*)

The Area Office reviewed the solicitation's mission and performance objectives and materials from the CO and found the primary and vital requirement of the contract is “processing security clearances and related matters.” (*Id.*) The Area Office explained that iWorks' CEO indicated in his statement to the Area Office that all of the key employees it is to provide will be hired from Xcelerate, but this is due to the specificity of the key personnel requirements. (*Id.*) The Area Office contacted the CO and the CO responded that hiring the key personnel from an incumbent is not unusual in these types of contracts, and by doing so iWorks was able to guarantee the key personnel would be acceptable and meet the government's requirements. (*Id.*, at 5.) The CO further assured the Area Office it considered those proposed key employees to be iWorks employees, even though they worked for Xcelerate beforehand, and the previous incumbent before that. (*Id.*) The CO described these employees to the Area Office as individuals who accept employment with whichever firm is awarded the contract, rather than employees of

incumbents. (*Id.*, at 6.) The Area Office also emphasized iWorks provided information to support its assertion the employees it intended to hire were the best choice, and not hired because iWorks lacked expertise. (*Id.*) Further, the Area Office noted iWorks has previously management incumbent employees for other contracts. (*Id.*) By providing two past performance references for itself, as well as two for Xcelerate, the Area Office concluded iWorks provided as much experience for itself as its alleged ostensible subcontractor. (*Id.*)

The Area Office noted OHA has long recognized it is a common practice in government services contracts for successor companies to hire employees from the incumbent. (*Id.*, citing *Size Appeal of Human Learning Systems, LLC*, SBA No. SIZ-5785 (2016).) The Area Office also conceded OHA has recognized an *en masse* hiring of incumbent workforce and management personnel from an alleged ostensible subcontractor could be grounds to find unusual reliance upon the alleged ostensible subcontractor. (*Id.*, citing *Size Appeal of Wichita Tribal Enterprises, LLC*, SBA No. SIZ-5390 (2012).) The Area Office likened the facts to *Human Learning Systems*, where OHA found that when the challenged concern is a well-established company in the respective field and has an extensive record of performing similar work comparable in magnitude, the plan to hire incumbent's managerial employees is insufficient to establish unusual reliance. (*Id.*) The Area Office found that because of iWorks' information regarding its experience, the experience of its chief Operating Officer, Senior Vice President and Vice President in handling security clearances and personal vetting, along with the past performance it included in its proposal, the facts here are similar to those in *Human Learning Systems*, and therefore not iWorks is not unusually reliant on Xcelerate for either personnel or expertise, despite intending to hire the incumbent managerial personnel. (*Id.*, at 7.)

Next, the Area Office addressed Appellant's assertion iWorks and Xcelerate were affiliated based on prior teaming on contracts. (*Id.*, at 8.) The Area Office considered the relationships between the two entities and noted they worked together on two subcontracts, and on one occasion iWorks provided recruiting services to Xcelerate via an arms-length transaction. (*Id.*) The Area Office found no overlap of ownership, management, family members, or interest between the firms, and that iWorks derived 0% of its revenue from Xcelerate over the three-year measuring period. (*Id.*) For these reasons, the Area Office determined Xcelerate and iWorks are not affiliates as defined in 13 C.F.R. § 121.103(a)(1)-(a)(2).

Finally, the Area Office found that based on the tax returns from iWorks for itself and its affiliate for 2015, 2016, and 2017, the three-year average of iWorks's annual receipts fell below the \$20.5 million size standard for this solicitation. (*Id.*, at 8-9, citing 13 C.F.R. § 121.404(a)(1) and 13 C.F.R. § 121.104.)

F. Appeal

On March 15, 2019, Appellant filed a timely appeal of the size determination, arguing the Area Office improperly found iWorks small for the applicable size protest, and requested OHA reverse the Area Office's finding. (Appeal, at 1.) Appellant argues iWorks is not a small business for the subject procurement because: 1) iWorks will perform less than 50% of the cost of the contract and is therefore usually reliant on the large business incumbent and ostensible subcontractor, Xcelerate and another subcontractor; 2) iWorks is affiliated with Xcelerate, based

on the ostensible subcontractor rule; 3) iWorks and Xcelerate are affiliated based on frequent business dealings; and 4) iWorks's revenue exceeds the applicable size standard. (*Id.*)

Appellant argues iWorks failed to propose that it would perform more than 50% of the work, as required by FAR 52.219-14, and as such it is unduly reliant on Xcelerate and its second subcontractor. (*Id.*, at 7.) Appellant deduced this from the Area Office's size determination, that because iWorks gave past performance references for both subcontractors, each was performing more than 25% of the contract work, thus adding up to 50% of more of the contract being performed by subcontractors. (*Id.*, at 8.) Appellant also alleges that because the Area Office did not consider this, logically the Area Office did not closely examine the teaming agreement, particularly because it is mentioned just once in passing. (*Id.*, at 9.) Appellant insists the Area Office erred by not concluding the scope and percentage of work to be performed by iWorks renders it unusually reliant on subcontractors. (*Id.*) Appellant also contends because iWorks provided two of the five past performances, with Xcelerate making up another two, iWorks relied on Xcelerate's experience for past performance; a critical factor in an ostensible subcontractor affiliation analysis. (*Id.*, at 10 citing *TKC Tech. Solutions, LLC*, SBA No. SIZ-4783 (2006).)

Next, Appellant notes iWorks intends to hire a large majority of its workforce from the subcontractor, who was an incumbent on the contract, and plans to hire management personnel from the incumbent. (*Id.*, at 11 citing *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017).) Appellant alleges iWorks will provide barely 50% of the personnel for the contract, and the key personnel will be hired from Xcelerate. (*Id.*, at 12). Although the Area Office does not identify how many of the positions iWorks plans to fill will be Xcelerate employees, Appellant argues, it is likely the large majority will be from Xcelerate “given iWorks lack of experience in this area.” (*Id.*) Appellant also takes issue with the Area Office's conclusion that Xcelerate's cross-over employees would become iWorks' employees and insists, “[t]his is not the legal standard.” (*Id.*, citing *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850 (2017).) Appellant disagrees with the Area Office's rationale that government services contracts anticipate successor companies hiring incumbent employees. (*Id.*, at 13.) Appellant insists OHA did not intend to allow a prime contractor to rely on an incumbent for contract performance. (*Id.*, citing *Size Appeal of Wichita Tribal Enterprises, LLC*, SBA No. SIZ-5390 (2012).)

Appellant further notes that iWorks does not have an extensive record of performing the work required under the solicitation that would liken the situation to that in *Human Learning Systems*. (*Id.*) Appellant differentiates the case at hand because Appellant insists there is no evidence iWorks management holds a key role and will oversee performance of the contract, and there is no indication from the Area Office that the CO relied on iWorks' experience in evaluating the proposal. (*Id.*, at 15.) In comparison, Appellant points out, Xcelerate has a long history of providing the services sought in the procurement. (*Id.*) Appellant argues iWorks mostly lists IT support services and products on its website, indicating a lack of relevant experience. (*Id.*, at 16.)

Appellant goes on to argue iWorks and Xcelerate enjoy an extensive relationship, which requires a finding of “general affiliation.” (*Id.*, at 17.) Appellant contends the Area Office “failed to meaningfully assess the multiple relationships between iWorks and Xcelerate for purposes of

general affiliation and ignored the information provided by Inquiries in its initial size protest.” (*Id.*) Appellant insists iWorks' website demonstrates a long history of the two working together. (*Id.*, at 18.)

Finally, Appellant notes iWorks fails against the applicable size standard because public information suggests iWorks has grown in the relevant time frame. (*Id.*, at 19.) Appellant notes iWorks reported over \$15 million in revenue in 2014, and that it had grown over 86% over the previous five years. (*Id.*) Appellant surmises if iWorks grew a fraction of that rate it would have eclipsed the \$20.5 million size standard already. (*Id.*)

G. Response

On April 2, 2019, iWorks filed a timely response to the appeal. iWorks insists Appellant failed to meet the heavy burden of demonstrating the Area Office made a clear error of fact or law in its size determination and insists the Area Office properly investigated the allegations and weighed the evidence in its finding. (Response, at 1.) iWorks argues Appellant's challenge of the size determination is outside the purview of a size protest. (*Id.*) iWorks maintains Appellant failed to assert a challenge to the Area Office's determination and has thus waived any right to appeal the determination of the primary and vital contract requirements and those aspects of the size determination that find iWorks will perform those requirements. (*Id.*, at 2.)

First, iWorks contends Appellant's argument regarding limitation on subcontracting is both inaccurate and outside the purview of a size appeal. (*Id.*, at 8.) iWorks insists the argument regarding limitations on subcontracting is a matter of contractor responsibility, beyond OHA's jurisdiction. (*Id.*, citing *Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5466 (2013).) iWorks also note it will perform at least 51% of the contract, as the Area Office determined.

Next, iWorks asserts the Area Office properly found Xcelerate is not iWorks' ostensible subcontractor. (*Id.*, at 10.) iWorks argues it will perform the primary and vital requirements of the contract and is not unduly reliant on either or its subcontractors for personnel or experience. (*Id.*)

iWorks argues Appellant failed to challenge the Area Office's determination of the primary and vital requirements in its appeal and failed to include a specific challenge to the Area Office's determination that iWorks will perform the primary and vital contract requirements, and thus should not be considered by OHA. (*Id.*, at 11 citing *Size Appeal of Alutiiq Diversified Servs., Inc.*, SBA No. SIZ-5318 (2012).) iWorks submits that regardless, the Area Office properly determined the primary and vital requirement of the solicitation was “processing security clearances and related matter.” (*Id.*) The Proposal and Protest Response, iWorks contends, both confirm iWorks “will perform 51% of the personnel services in support of the holistic vetting and adjudication mission.” (*Id.*, at 11-12.) iWorks insists its effort will fall squarely under the processing of security clearances and related matters, and will go beyond what Appellant described as “ancillary IT support for administrative tasks.” (*Id.*, at 12.) iWorks maintains it will provide personnel who will perform Program Management, vetting, support, case processing, and workload control. (*Id.*) This work falls under the primary and vital requirements of the contract, iWorks argues. (*Id.*)

iWorks goes on to argue it is not unduly reliant on Xcelerate either for personnel and expertise or past performance, and that the Area Office was correct in its determination. (*Id.*, at 13.) iWorks notes it has an “extensive history” of performing work similar to the work to be performed under the instant contract. (*Id.*, at 14.) iWorks also asserts Appellant's reliance on *Size Appeal of Dover Staffing* and *Size Appeal of Wichita Tribal Enters., LLC*, is misplaced, because the facts at hand are distinguishable. (*Id.*, at 15.) iWorks argues those cases involved prime contractors who hired the incumbent subcontractors' managerial and other employees *en masse* but lacked relevant experience and past performance and instead needed to rely on the incumbent subcontractor to win the contract. (*Id.*) iWorks likens the instant case to *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5785 (2016) where OHA found, despite the prime contractor's plan to hire incumbent management and supervisory staff, there was no violation of the ostensible subcontractor rule because the prime contractor had extensive experience in the field and would oversee the contract. (*Id.*, at 15-16.) iWorks also cited to *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436 (2013), where OHA found that although the prime contractor proposed the incumbent as a subcontractor and intended to hire the incumbent's managerial employees, there was no unusual reliance because the prime contractor was well-established in the field and had performed similar work. (*Id.*, at 16.) iWorks argues its COO, Senior Vice President, and Vice President have experience in security clearances, personnel vetting, and IT work, and the company's Chief Operating Officer, who will have overarching authority over the contract, has extensive experience in managing similar contracts. (*Id.*) iWorks' Chief Operating Officer was selected by the Professional Services Council to be its National Industrial Security Program Policy Advisory Committee representative, based on his experience in the personnel vetting and SSC industry. (*Id.*, at 17, fn. 2.) iWorks also emphasizes it developed the consolidated Case Adjudication Tracking (CATS) program, which “is now integrated into DISS Enterprise, as it replaced five legacy DoD systems. (*Id.*) iWorks notes it has performed four contracts under the applicable NAICS code, and that [XX]% of its annual revenues for [XXXX] were related to PV work. (*Id.*) iWorks submitted eight examples of past performance to the Area Office in response to the protest, beyond the past performance iWorks submitted in the proposal. (*Id.*)

iWorks goes on to argue it will not simply hire employees who worked for Xcelerate but will hire personnel that worked on all the existing programs that are being consolidated into the instant solicitation. (*Id.*) iWorks also characterizes the work at issue as specialized and claims Appellant ignores the common practice of hiring incumbent personnel by successor contracts. (*Id.*) Incumbent capture, iWorks contends, was utilized in the prior transitions from incumbent to successors contractors due to the limited pool of qualified individuals performing work in the applicable field. (*Id.*, at 19.) iWorks further asserts it is not only hiring from Xcelerate, but will hire from other companies working on the existing contracts being consolidated into the solicitation, including GAP Solutions and Inquiries. (*Id.*, at 20.) iWorks states the only reason it will hire key personnel from Xcelerate is because the specific requirements of the contract, and because those employees were the best choice, not for a lack of expertise on the part of iWorks. (*Id.*) iWorks insists its COO will maintain overall responsibility for the contract and function as the single interfacing with the contracting authority and will take responsibility for financial and contractual performance. (*Id.*) iWorks claims it will employ the current Program Manager as the Program Manager for the contract. (*Id.*, at 21.) iWorks argues OHA has held there is no unusual reliance upon by a subcontractor who contributes managerial personnel when the proposal makes

clear the prime contractor will maintain exclusive control over the contract. (*Id.* citing *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305 (2011).)

iWorks contends it is not unduly reliant on Xcelerate's past performance to win the contract because iWorks has extensive experience as a PV Subject Matter Expert with experience in the SSC work contemplated by the solicitation. (*Id.*, at 22.) iWorks pointed to the two relevant past performances it included in the solicitation and noted because it had two of its own relevant projects it was not unusually reliant on its subcontractors to satisfy the past performance evaluation factor. (*Id.*, citing *Size Appeal of C&C Int'l Computers and Consultants, Inc.*, SBA No. SIZ-5082 (2009).)

iWorks asserts the Area Office correctly concluded iWorks and Xcelerate are not affiliated for any other reason, and Appellant's conclusion the Area Office did not meaningfully assess the relationship between the two entities is erroneous. (*Id.*, at 23.) Appellant does not even allege the Area Office committed clear error in its general affiliation conclusion, the burden of proof required in 13 C.F.R. § 134.314, iWorks argues. (*Id.*) iWorks points to various parts of the size determination to show the Area Office reviewed information provided both from iWorks and from Appellant. (*Id.*, at 24.) iWorks insists the Area Office did not need to mention each piece of evidence Appellant submitted. (*Id.*, at 25 citing *Size Appeal of Ipkeys Techs., LLC*, SBA No. SIZ-5353 (2012).) Appellant's information would have no bearing on iWorks and Xcelerate's affiliation, and the Area Office did not err in failing to address the references to iWorks' website that indicate a relationship nor the "misplaced notion" iWorks relocated its office next to Xcelerate, iWorks maintains. (*Id.*, at 26.) iWorks notes that although its website indicates it worked with Xcelerate in the past and attended the same charity golf tournament with Xcelerate in 2017, there is no identity of interest. (*Id.*) iWorks notes it has operated from the same primary office in 2013. From 2013 to 2017, iWorks occupied Suite 140 of the building in McLean, Virginia, but relocated to Suite 220 in 2017 after consulting with a realtor and viewing other offices in the area. (*Id.*, at 27.) iWorks concedes it is in an office building next to the building which houses Xcelerate's primary office, but the two buildings are separate ten-story office buildings, each with dozens of other tenants. (*Id.*) iWorks argues the Area Office properly concluded iWorks and Xcelerate are not affiliated because they do not share common management or ownership, iWorks has not derived revenue from Xcelerate in the past three relevant fiscal years, and the companies' prior contractual relationships were not substantial. (*Id.*)

Finally, iWorks argues the Area Office properly concluded iWorks is a small business, even when including iWorks' acknowledged affiliate. (*Id.*, at 28.) iWorks describes Appellant's assertion that iWorks exceeds the average annual receipts threshold for the contract as having no basis in fact. (*Id.*) Once more, iWorks insists, Appellant fails to assert the Area Office committed clear error in calculating iWorks' size. (*Id.*) The Area Office relied on iWorks' tax returns over unsupported allegations, which is the proper standard. (*Id.*, at 29, citing *Size Appeal of Stellar Innovations & Sols., Inc.*, SBA No. SIZ-5851 (2017) and 13 C.F.R. § 121.104(a).)

H. Appellant's Motion to Supplement Appeal and Supplemental Appeal

On April 2, 2019, after reviewing the Area Office file, Appellant filed a timely Motion to file Supplemental Appeal and its Supplemental Appeal. OHA routinely permits a party to

supplement its pleadings after its attorney has viewed file material for the first time under an OHA protective order. *E.g., Size Appeal of Spinnaker Joint Venture, LLC*, SBA No. SIZ-5964, at 8 (2018). Appellant's motion to supplement its appeal therefore is GRANTED.

First, Appellant argues iWorks' proposal violates the ostensible subcontractor rule because it allegedly shows iWorks plans to subcontract over 50% of the solicited work to large businesses. (Supplemental Appeal, at 1.) Appellant points out the proposal show iWorks will perform only 51 of 121 positions, with the large business filling the others. (*Id.*, citing Proposal, Tech. Vol., at 41-42.) Appellant insists the proposal and teaming agreements establish Xcelerate will perform the critical aspects of the work and have primary responsibility of the incumbent VROC work. (*Id.*, citing Teaming Agreement, at 8.) Appellant argues iWorks' CEO's declaration is contradictory because in it he asserts iWorks will perform [a majority of] positions. (*Id.*) Appellant points out that while the proposal indicates Xcelerate's Program Manager will be employed by iWorks, the proposal indicates Xcelerate will employ him, and there is no letter of commitment from the Program Manager to work for iWorks. (*Id.*, at 2.)

Appellant argues iWorks will rely on Xcelerate, its ostensible subcontractor, because iWorks lacks the experience and personnel to perform the contract. (*Id.*) Appellant insists iWorks is merely a proxy for Xcelerate, and iWorks will hire its personnel from Xcelerate, Appellant, or Appellant's current subcontractor, and admittedly plans to hire all of the key personnel from Xcelerate. (*Id.*) Appellant further argues Xcelerate and iWorks enjoy a longstanding business relationship which demonstrates affiliation. (*Id.*) Appellant points out iWorks holds a 2018 subcontract with Xcelerate, despite claiming it received none of its revenues from Xcelerate. (*Id.*) Moreover, Appellant maintains, iWorks' proposal touts it has worked side-by-side with Xcelerate. (*Id.*, at 3.)

Appellant asserts the Area Office erred by relying on iWorks' *post hoc* assertions over the proposal, which Appellant claims are "contradicted by contemporaneous documents." (*Id.*, at 7, citing *Size Appeal of Speegle Constr., Inc.*, SBA No. SIZ-5147 (2010); *Size Appeal of CWU Inc., et al.*, SBA No. SIZ-5118 (2010); *Size Appeal of Earthcare Solutions, Inc.*, SBA No. SIZ-5183 (2011); and *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071 (2009).)

Appellant states iWorks violates the ostensible subcontractor rule because it proposed to subcontract more than 50% of the work, including primary and vital requirements, to large businesses. (*Id.*) Appellant insists iWorks proposes to assign primary responsibility for critical aspect of the procurement to Xcelerate, and that the Area Office missed these violations in relying on iWorks' *post hoc* declarations instead. (*Id.*, at 8.) Appellant notes that while SBA does not enforce limits on subcontracting, it looks to whether proposed levels of subcontracting exceed specified limits as part of an ostensible subcontractor analysis. (*Id.*, citing *Size Appeal of Bering Straits Logistics Servs., LLC*, SBA No. SIZ-5277 (2011); *Size Appeal of Al Procurement, LLC*, SBA No. SIZ-5121 (2010); and *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006).) Appellant maintains FAR 52.219-14, Limitation on Subcontracting, applies to the case and hand, as well as 13 C.F.R. § 125.6, which both limit the work a prime contractor may subcontract to entities who are not similarly situated. (*Id.*, at 9.) Appellant emphasizes iWorks' proposal and teaming agreement demonstrate iWorks will subcontract the primary and vital solicitation requirements to Xcelerate and more than 50% of the work to Xcelerate and ABSC.

(*Id.*) Appellant asserts iWorks will fill about 40% of the contract positions and Xcelerate will handle the VROC. (*Id.*, at 10.) Appellant argues the technical proposal indicates iWorks will subcontract the Program Manager position, all VROC positions, and a majority of senior positions. (*Id.*) iWorks will employ [XX] positions and subcontract [XX] positions, which are mostly senior and mid/senior positions, Appellant emphasizes. (*Id.*) iWorks will employ [a majority of] mid-level positions. (*Id.*) Appellant claims iWorks offered the Area Office a revised version of the subcontracting chart, which the Area Office did not notice. (*Id.*)

Appellant argues iWorks' proposal and teaming agreements evidence iWorks' intent to subcontract the majority of solicited work, including the primary and vital requirements, most senior positions, and the project manager position. (*Id.*, at 11.) Appellant insists the Area Office erred in missing “these plain indications of an ostensible subcontractor violation and accepting iWorks' contradicted *post hoc* declarations.” (*Id.*) Appellant contends iWorks' “inability to provide any personnel for this contract effort or demonstrate a record of performing similar work of comparable magnitude provide further evidence of undue reliance on its ostensible subcontractor, Xcelerate.” (*Id.*) Appellant notes iWorks intends to hire key employees from the ineligible large business incumbent, who is the subcontractor, which is similar to ostensible subcontractor cases where OHA has closely examined the relationship between a prime and subcontractor and found undue reliance. (*Id.*, at 12, citing *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017).) Appellant points out the technical proposal shows all project personnel will be incumbent employees or new hires. (*Id.*)

Appellant argues the Area Office credited iWorks with filling [a majority of] positions, which it insists contradicts the technical proposal. (*Id.*) Appellant asserts iWorks even declared iWorks will hire its Program Manager and key personnel from Xcelerate. (*Id.*, at 13.) Appellant argues that although iWorks contends the inability to provide managerial personnel for the effort is typical of business in the sector, and the Area Office similarly adopted the CO's categorization of the incumbent employees as iWorks employees, OHA precedent renders the ostensible subcontractor rule violated and iWorks and Xcelerate affiliated for the purposes of this procurement. (*Id.*, citing *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850 (2017).) Appellant maintains the Area Office's reliance on *Size Appeal of Human Learning Systems* is incorrect, because none of the factors from *Human Learning* exist in the case at hand, and iWorks will not perform the primary and vital functions of the contract, will not manage the contract, and will not perform the majority of the work. (*Id.*, at 15.)

Appellant also takes issue with the Area Office's conclusion iWorks has an extensive record of performing similar work of comparable magnitude. (*Id.*) Appellant states one contract which iWorks uses to demonstrate experience was for a much smaller amount, and another contract iWorks relies on is one on which iWorks performed as a subcontractor to Xcelerate. (*Id.*) Appellant further argues the Area Office focused on the expertise of iWorks' COO, when there is no evidence the COO will perform material work on the contract. (*Id.*, at 16.) Appellant categorizes the Area Office's finding as being based on the *post hoc* declaration of iWorks' CEO. (*Id.*) Appellant maintains while the Senior Vice President is mentioned in the proposal as being available to assist as needed, he was not bid on the contract, nor was the Vice President, which the Area Office concludes has relevant experience, mentioned in the proposal. (*Id.*) Appellant describes the entirety of the team as coming from other companies. (*Id.*)

Finally, Appellant argues the “continuing business relationship between iWorks and Xcelerate demonstrates the type of ongoing contractual relationships and dependence which establishes affiliation between the two firms.” (*Id.*, at 17.) Appellant maintains iWorks' statements to the Area Office indicating it had only limited contractual relationships are belied by iWorks' proposal. (*Id.*) Appellant notes iWorks' proposal states iWorks has worked “side-by-side” with Xcelerate on the contract mission, while iWorks' submission to the Area Office suggests a distant relationship. (*Id.*) Appellant insists the Area Office downplayed the two subcontracts between iWorks and Xcelerate, which Appellant maintains demonstrate affiliation between the two companies. (*Id.*, at 18.) Appellant also insists that because iWorks performed a subcontract with Xcelerate in 2018, it calls into question the veracity of iWorks' declaration it received 0% of its revenues from Xcelerate in the previous three fiscal years. (*Id.*)

Lastly, Appellant argues iWorks has submitted contradictory statements regarding the location of its primary office. (*Id.*, at 19.) Appellant states that while iWorks claims to have a primary office in McLean, Virginia, iWorks' System for Award Management (SAM) registration and its SBA Form 355 all indicate its main office is in Reston, Virginia. (*Id.*) Thus, iWorks relocated to McLean to be next to Xcelerate, Appellant contends. (*Id.*)

I. Response to the Supplemental Appeal

On April 4, 2019, iWorks submitted a Response to Appellant's Supplemental Appeal.³ iWorks requests OHA dismiss the Appeal and Supplemental Appeal and affirm the size determination, arguing Appellant merely disagrees with the Size Determination and “has failed to raise cognizable challenges or demonstrate the Area Office committed a clear error of fact or law.” (Response to Supp. Appeal, at 3.)

First, iWorks argues Appellant misreads iWorks' proposal, which iWorks insists indicates it will perform the primary and vital contract requirements and at least 51 % of the project. (*Id.*) Appellant, iWorks contends, is raising improper and untimely issues. (*Id.*) iWorks insists Appellant's challenge to iWorks' compliance with the limitations on subcontracting is not a valid basis for appeal. (*Id.*, citing *Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5466 (2013).) iWorks also notes Appellant did not timely appeal the Area Office's determination of the primary and vital requirements of the contract nor did it offer a “full and specific statement as to why the Area Office erred in finding that iWorks will perform the primary and vital requirements.” (*Id.*, at 4.) iWorks states Appellant did not challenge those aspects of the size determination and cannot do so now via a supplement to its appeal. (*Id.*, citing *Size Appeal of Alutiiq Diversified Servs., LLC*, SBA No. SIZ-5318 (2012).)

iWorks maintains its proposal provided the level of detail required by the solicitation to satisfy the pass/fail staffing requirement and the proposal confirmed that iWorks will perform at least 51% of the work, and even if Appellant had timely raised this issue, its arguments are

³ On April 4, 2019, I issued an order instructing iWorks to file its response, if any, to Appellant's Supplemental Appeal by April 9, 2019 since Appellant's Supplemental Appeal was filed on the close of record.

incorrect and to not establish reversible error on the part of the Area Office. (*Id.*) iWorks insists its proposal and teaming agreement demonstrate it will perform the majority of the work, in compliance with limitation on subcontracting, and that iWorks will perform the primary and vital contract requirements. (*Id.*) iWorks agrees with the Area Office's determination that the primary and vital requirements are the entire project, rather than a single task, and as such iWorks will perform the primary and vital requirements by performing the majority of the work. (*Id.*, citing *Size Appeal of A-P-T Research, Inc.*, SBA No. SIZ-5798 (2016).)

iWorks argues Appellant's reliance on the proposed labor mix table in the proposal is misguided, as iWorks argues the table does not indicate the party identified is the exclusive source of labor for the designated work area, in fact, the proposal states the labor mix indicates the primary task area team members would perform. (*Id.*, at 5.) iWorks categorizes this as hosing the "primary" responsibilities rather than "exclusive" staffing. (*Id.*) Further, iWorks contends the level of detail in the proposal regarding staffing and the flexibility it afforded, were consistent with the solicitation and the procuring agency's direction. (*Id.*) iWorks notes the solicitation did not require a detailed breakdown of staffing for every position, and also asserts in the Solicitation's Questions and Answers, the procuring agency confirmed letters of commitment were not needed for employees currently working for any member of the team, and the government was not focused on evaluating for whom personnel performing on the contract would work. (*Id.*, at 6, citing Solicitation at 79, 80, and Solicitation Q&A Nos. 45 and 73.) In fact, iWorks argues, DSS explained it intended to focus on the overall ability of the team to deliver, rather than for whom positions would work. (*Id.*, citing Solicitation Q&A No. 73.) iWorks points out the Solicitation did not require a detailed staffing breakdown because price and experience played more significant roles in evaluation, whereas staffing under technical capability would be judged on a "pass/fail" basis. (*Id.*, citing Solicitation, at 86.)

iWorks argues the terms of its teaming agreements confirm it will perform 51% of the contract and be in overall control of the contract. (*Id.*, at 7.) Moreover, iWorks states, the Area Office properly relied on the COO's declaration because it was in line with the workshares identified in the proposal. (*Id.*) iWorks maintains OHA has recognized information post-dating the proposal may be properly considered by the Area Office to clarify information in the proposal, particularly where the information explains that already in the proposal or gives additional details. (*Id.*, at 8, citing *Size Appeal of Kaiyuh Servs., LLC*, SBA No. SIZ-5581 (2014); *Size Appeal of Jacob's Eye, LLC*, SBA No. SIZ-5895 (2018); and *Size Appeal of Tipton Falls Lodging Realty, LLC*, SBA No. SIZ-5546 (2014).) iWorks insists its declarations clarify information found in the proposal, including the COO's statement regarding the security analyst positions clarifies information included in the proposal, which did not require significant details regarding the division of staffing by prime and subcontractors. (*Id.*, at 9.)

iWorks argues it is not unusually reliant on Xcelerate because it has experience of its own to perform the contract and did not rely on Xcelerate to win the contract, thus *Size Appeal of Dover Staffing* and *Size Appeal of Wichita Tribal Enters., LLC*, are inapposite. (*Id.*, at 10.) iWorks notes the second and third factor of the ostensible subcontractor analysis set for in *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716 (2016), are not present here because iWorks allegedly does not plan to hire a large majority of its workforce from Xcelerate and argues there is no one incumbent for the new, combined contract. (*Id.*) iWorks insists it won the

contract based on its own past performance, for which it included two of its own previous projects it notes were similar in scope and magnitude to the subject work, and past performance happened to be the most important evaluation factor. (*Id.*, at 11, citing Solicitation, at 82-84.) iWorks describes Appellant's focus on the magnitude of iWorks' past performance as misplaced because the procuring agency stated in its Q&A response that it expected the magnitude of past performance would not match the effort of the subject effort because the scope of the new solicitation is a combination of several efforts. (*Id.*, citing Solicitation Q&A No. 46.)

iWorks counters Appellant's assertion that iWorks did not meet the four-factor *Human Learning Systems* test, and notes that iWorks meets the test and further there is nothing in that test which provides a small prime contractor must have performed contracts with the same or similar contract value to avoid an ostensible subcontractor finding. (*Id.*, at 12.) iWorks insists the record is “replete with evidence demonstrating that iWorks has the experience needed for the contract.” (*Id.*, at 13.) iWorks points to the experience of its officers and its past performance references to argue it was not unusually reliant on Xcelerate to win the contract. (*Id.*) iWorks argues the procuring agency did not require the prime contractor to give a specific number of its own past performance examples, but iWorks included two of its own in the proposal. (*Id.*, at 13-14.)

iWorks goes on to assert it has extensive experience in the SSC (security, suitability, and credentialing) field for many years, and it developed the CATS program, which replaced five legacy DoD systems, and is now widely used. (*Id.*, at 14.) iWorks insists it has performed four other contracts classified under NIACS Code 561611, and other contracts under related codes for management and consulting. (*Id.*) iWorks also disputes that its COO's declaration is inaccurate. (*Id.*)

iWorks describes Appellant's argument that iWorks is unusually reliant on Xcelerate for personnel as incorrect, because both the proposal and the COO's declaration indicate iWorks will provide the majority of staffing. (*Id.*, at 15-16.) iWorks asserts the current Program Manager from Xcelerate accepted a contingent offer of employment with iWorks, which was in line with DSS's response to the Q&A which indicated the proposal need not identify where the Program Manager would work, and in line with the teaming agreement between iWorks and Xcelerate. (*Id.*, at 16, citing Solicitation Q&A No. 73.) iWorks also disputes Appellant's claim that all the personnel working for iWorks will be hired from Xcelerate. (*Id.*, at 17.) iWorks insists it will hire incumbent personnel from multiple firms and hire from the general labor pool. (*Id.*) iWorks argues it will not hire Xcelerate personnel *en masse* because it has a meaningful onboarding and recruiting process which means that candidates, including incumbents, will undergo a “comprehensive screening and skills assessment process, in-person interview with the Project Manager or Site Lead, submission of two supervisory professional references, and verification of active clearances” rather than an immediate wholesale transfer of personnel. (*Id.*, at 17.)

iWorks likens the facts at hand to those in OHA's decision, *Size Appeal of Elevator Services, Inc.*, SBA No. SIZ-5949 (2018), because there is a specific pool of uniquely skilled personnel who have worked in the program for many years across contractors, similar to the limited pool of licensed and skilled candidates available in *Elevator Services*. (*Id.*, at 18.) iWorks asserts its onboarding plan is reasonable and consistent with industry practice, particularly

because the work contemplated is specialized and should be staffed by the personnel who have been working on the programs for years, moving from one incumbent to another. (*Id.*, at 19.) iWorks maintains the main consideration is that iWorks is not new to the work and has the relevant experience to perform the project and will manage the entire project. (*Id.*, at 20.)

Similarly, iWorks argues it is not unusually reliant on Xcelerate for managerial positions, and OHA has held that so long as key personnel hired from the incumbent subcontractor remain under the supervision and control of the prime, there is no ostensible subcontractor violation. (*Id.*, citing *Size Appeal of GiaCare and MedTrust JV, LLC*, SBA No. SIZ-5690 (2015).) iWorks points out it will fill [a majority of] management positions, and that iWorks COO will be the Contract Program Manager with overarching authority over the contract. (*Id.*, at 20-21.)

Finally, iWorks contends the Area Office correctly found that iWorks and Xcelerate are not affiliated for other reasons. (*Id.*, at 21.) iWorks repeats its argument that it shares no common management or ownership with Xcelerate, has not derived revenue from Xcelerate during the relevant period and the companies' contractual relationships prior to this proposal were not substantial. (*Id.*, at 22.) iWorks notes that it has worked “side-by-side” with Xcelerate in that it has worked on separate but related incumbent contracts that are being combined in this one solicitation, and argues it set this out in the proposal. (*Id.*, at 22-23.) iWorks states the two entities have worked closely together under separate but related personnel security support services contracts. (*Id.*, at 23.) iWorks points out OHA has repeatedly held the use of teaming language in a proposal does not indicate affiliation. (*Id.*, at 23, citing *In the Matter of Paragon Tec., Inc.*, SBA No. SIZ-5290 (2011).)

Appellant errs in concluding the subcontracts between iWorks and Xcelerate demonstrate affiliation, iWorks argues. (*Id.*, at 24.) iWorks insists because iWorks subcontracted work to Xcelerate, there can be no finding of economic dependence because Xcelerate, rather than iWorks, is the subcontractor. (*Id.*) iWorks notes identity of interest affiliation based on economic dependence is only found when a challenged concern depends on another for a high percentage of its revenues. (*Id.*, citing *Size Appeal of Rockwell, Med., Inc.*, SBA No. SIZ-5559 (2014); 13 C.F.R. § 121.103 (f)(2).) Moreover, iWorks argues to the extent Appellant alleges iWorks lacks the technical capability or past performance to perform the contract, OHA does not have jurisdiction to address those allegations. (*Id.*, citing *Size Appeal of HX5, LLC*, SBA No. SIZ-5331 (2012).) Similarly, iWorks contends Appellant's reliance on the 2018 subcontract between Xcelerate and iWorks to show affiliation between the two is misplaced. (*Id.*, at 25.) iWorks states the subcontract is irrelevant because it was performed outside the three-year period of measurement (2015-2017). (*Id.*, citing 13 C.F.R. § 121.404.)

iWorks insists Appellant is incorrect in its conclusion iWorks lists an incorrect primary office, and that this argument is not supported by the record and otherwise irrelevant. (*Id.*, at 25-26.) iWorks states its website lists the McLean office as its primary office, while the SAM profile mentions the McLean office but does not distinguish it as a primary office. (*Id.*) There is no inconsistency in the COO's statement that the McLean office has been iWorks' primary office since 2013, and even assuming there was an inconsistency it would have no bearing on the affiliation analysis as the physical proximity between Xcelerate and iWorks' offices are not a basis for affiliation. (*Id.*, citing 13 C.F.R. § 121.103.)

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

The “ostensible subcontractor” rule states that a subcontractor that is not a similarly situated entity which performs the primary and vital requirements of a contract or is a subcontractor upon which the prime contractor is unusually reliant. 13 C.F.R. § 121.103(h)(4). A prime contractor and its ostensible subcontractor are treated as joint venturers for size determinations. *Id.* 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).

B. Analysis

Appellant insists iWorks and Xcelerate are affiliated based on their common business dealings and office proximity, and affiliated based on the ostensible subcontractor rule, and that the Area Office erred in finding iWorks not affiliated with Xcelerate, and small for the instant procurement.⁴ The arguments will be addressed in turn.

1. iWorks and Xcelerate “General” Affiliation

Appellant insists iWorks and Xcelerate are affiliated based on what it deemed “general affiliation.” To support its argument, Appellant insists the two entities have common contracts

⁴ Appellant initially insisted iWorks must be other than small based on average annual receipts but abandoned that argument in its Supplemental Appeal. I therefore need not consider it. *Size Appeal of Vazquez Commercial Contracting, LLC*, SBA No. SIZ-5803, at 11 (2017). Even if I were to consider it, I would find no reason to disturb the Area Office's conclusion that iWorks was small for the procurement based on iWorks's and its acknowledged affiliate's combined annual receipts. The Area Office properly relied on iWorks' tax returns over unsupported allegations. *Size Appeal of Stellar Innovations & Sols., Inc.*, SBA No. SIZ-5851 (2017) and 13 C.F.R. § 121.104(a).

Appellant also insists iWorks's proposal does not comply with the limits on subcontracting set forth in FAR 52.219-14. OHA has held the limitations on subcontracting are matter of contractor responsibility, and thus beyond OHA's jurisdiction. *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466, at 10 (2013); *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5421, at 3 (2012).

(insinuating iWorks must rely upon Xcelerate financially), the two have offices in close proximity to each other, iWorks refers to Xcelerate on its website, and iWorks notes in the proposal it has worked “side-by-side” with Xcelerate. iWorks denies it received any revenues from Xcelerate during the relevant time period, 2015-2017, rationalizes its references to Xcelerate both in the proposal and online, and classifies the proximity of the two businesses as coincidental.

SBA regulations states entities are affiliates of each other when one has the power to control the other or a third party controls or has the power to control both. 13 C.F.R. § 121.103. Some of the factors considered are ownership, management, previous relationships with or ties to another concern, and contractual relationships. (*Id.*) Affiliation may arise among two or more individuals or entities which have “identical business or economic interests.” 13 C.F.R. § 121.103(f). There is a rebuttable presumption that firms share an identity of interest if the concern in question derived 70% or more of its receipts from another concern over the previous three fiscal years. 13 C.F.R. § 121.103(f)(2).

I agree with the Area Office that none of the factors for a finding of affiliation are met, based on the record. While iWorks has admittedly worked with Xcelerate on two other projects, this is not sufficient to establish an identity of interest. No evidence was presented to show iWorks relies on Xcelerate for 70% of its income or receives any other financial support from Xcelerate. The Area Office found there was no common management, common ownership, nor were there common employees between iWorks and Xcelerate, a finding Appellant did not rebut. The proximity of Xcelerate and iWorks' offices is unpersuasive, and irrelevant to the analysis absent evidence the two work in the same office or one entity leases office space from the other. Finally, OHA has consistently held the references to “team” in a proposal do not support a finding of affiliation. *Size Appeal of A-P-T Research, Inc.*, SBA No. SIZ-5798, at 13 (2016); *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436, at 16 (2013).

2. Ostensible Subcontractor 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).

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 *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 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). 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).

The first factor of the *Dover Staffing* is arguably met in the case at hand. Although the solicitation is an aggregate of at least two projects, Appellant intends to hire the incumbent on one of those projects. The Area Office concluded Xcelerate was the incumbent on the contract and framed its analysis based on the *Dover Staffing* test.

The second factor of the test may be met on its face, because a large portion of iWorks' workforce will be staffed by incumbent employees. This factor is not dispositive, however, because OHA has held that hiring the incumbent workforce alone is not problematic so long as the personnel to be hired from incumbent are reviewed individually rather than a unilateral transfer of employees or hiring *en masse*. *Size Appeal of Elevator Service, Inc.*, SBA No. SIZ-5949, at 9-10 (2018); *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305, at 12 (2011). Moreover, a wholesale hiring of incumbent employees from a subcontractor is justified when the pool of eligible employees is small or limited. *Elevator Service*, at 10 (2018). The contracting officer stated the pool of employees with requisite clearance and experience is small, and that the employees are generally incumbent employees who remain on the job as the prime contractors change command. With that said, 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). iWorks indicated it has a plan for staffing in the event it needs to supply more employees, including a recruiting program and reassigning iWorks employees working on nearby relevant projects. (iWorks Proposal Vol. III, Technical Proposal, at 41.)

Appellant insists the third *Dover Staffing* factor is met because management personnel will be hired from the incumbent. OHA has held that even when key personnel will be hired from an incumbent, so long as the individual will become the prime contractor's employee and will remain under the supervision and control of the prime contractor, there is no ostensible subcontractor violation. *Size Appeal of A-Team Realty, Inc.*, SBA No. SIZ-5935, at 10 (2018). iWorks states the Program Manager will work for iWorks, rather than Xcelerate. iWorks will have the ultimate authority over the contract. (Response, at 16.)⁵ In response to the protest, the

⁵ The Area Office did not err in relying upon Appellant's submissions, because they did not conflict with the Proposal, but rather clarify and explain information already contained in it. *Size Appeal of Kaiyuh Services, LLC*, SBA No. SIZ-5581, at 7 (2014).

Program Manager, [Proposed Program Manager], sent a signed declaration to the Area Office stating while he is currently an employee with Xcelerate, he intends to serve as a Program Manager on the contract for iWorks, if iWorks is awarded the contract. ([Proposed Program Manager] Declaration, Feb. 6, 2019.) [Proposed Program Manager] also noted he worked on the previous contract for the entity Xcelerate replaced, and then for Xcelerate when Xcelerate was awarded the incumbent contract. (*Id.*) OHA has held a challenged concern's intention to hire the incumbent as its subcontractor and hire incumbent managerial employees is insufficient to establish unusual reliance when the challenged concern is also a well-established company in the field with an extensive record of performing similar work of comparable magnitude. *Size Appeal of Human Learning Systems, LLC*, SBA No. SIZ-5785, at 10 (2016). By all accounts, iWorks is well-established in the field, having performed other contracts in the personnel vetting field, with similar clients, and in fact, created the software currently in use on the incumbent contract.

Finally, 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 Dover Staffing, 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.) Appellant insists this is the case for iWorks and points to iWorks' inclusion of Xcelerate's past performance on the proposal. This argument fails for several reasons. First, iWorks included two past performance references for itself, along with two for iWorks, and one for ABSC. This was permitted under the solicitation. Solicitation, at 35. Further, as iWorks points out, past performance was not the most important factor, and only graded after proposals were sorted by price, and considered along with the technical approach, so there is no indication Xcelerate's past performances won the contract, or that iWorks would have been ineligible for the award without utilizing Xcelerate's past performance references. *Size Appeal of Emergent, Inc.*, SBA No. SIZ-5875, at 9 (2017); *Size Appeal of J.W. Mills Mgmt., LLC*, SBA No. SIZ-5416, at 9 (2012).

Appellant insists iWorks' past performance examples do not reach the monetary level of this solicitation. Not only did the procuring agency recognize the size of previous past performances not matter (the solicitation required similar contracts), OHA has addressed similar arguments and noted that whether an awardee is capable of performing a contract is the province of the CO, not the Area Office, and cannot be a basis of an affiliation finding under the ostensible subcontractor rule. *Size Appeal of Synergy Solutions, Inc.*, SBA No. SIZ-5843, at 17 (2017); *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279 (2011); *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228 (2011); *Size Appeal of Loyal Source Government Services, LLC*, SBA No. SIZ-5662 (2015).

In sum, I agree with the Area Office that iWorks does not run afoul of the ostensible subcontractor rule by teaming with Xcelerate, the large business incumbent on a predecessor contract based on the *Dover Staffing* analysis.

I then turn to the issue of whether iWorks is performing the primary and vital requirements of the contract. 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). Based on the solicitation's mission and performance objective and information from the CO, the Area Office concluded the primary and vital component of the contract is "processing security clearances and related matters." *Size Determination*, at 4. This conclusion is supported by the record, because the solicitation generally states the contractor is to provide Personnel Security Support Services, and the assigned NAICS code is for Investigation Services.

The Area Office concluded iWorks would perform the primary and vital contract requirement because the incumbent employees it intended to hire would be iWorks' employees, thus iWorks would perform the contract. Appellant did not argue in its Appeal that the primary and vital requirement, "processing security clearances and related matters," was anything other than what the Area Office concluded, despite having access to the solicitation and the *Size Determination*.

The Area Office noted iWorks intended to perform 51% of the work on the contract, despite Appellant's insistence otherwise. I find no reason to disrupt the Area Office's conclusion. The solicitation did not require a breakdown of work percentage, so iWorks did not supply one with its proposal. Instead, iWorks submitted a staffing plan with its technical proposal and further explained the breakdown in its response to the protest. iWorks noted its employees will fill [a majority of] "direct billed management positions." (*Decl.*, at 5.) One of these positions is the Program Manager who, based on his affidavit to the Area Office, will transfer from Xcelerate to iWorks, just as he changed employment from a previous incumbent to Xcelerate. (*Id.*) [XX] management positions will be filled by iWorks employees and [X] will be filled by an ABSC employee. (*Id.*) iWorks' staffing plan in the proposal lists [XX] total employees, [a majority] of whom it indicates will be filled by "current staff." (*Proposal*, Vol. III, at 41-42.) The Program Manager who intends to work for iWorks rather than Xcelerate on the new contract was listed on the chart as "current staff." (*Id.*) This indicates iWorks labelled the employees "current staff" but will be hiring the employees themselves after a vetting process. (*Id.*, at 38.) Based on information from the CO, it is expected that current employees will transition from one employer to another based on the contract award. Despite Appellant's reliance thereon, the staffing chart is not an adequate evidence that iWorks will not perform 51% of the contract. The staffing chart further demonstrates iWorks employees will be performing the primary and vital contract requirement. The Area Office correctly concluded iWorks is not unusually reliant on Xcelerate to perform the primary and vital contract requirements, nor will it rely on another entity to perform the majority of the contract.

IV. Conclusion

Appellant has not demonstrated the Area Office erred in finding iWorks small for the instant solicitation. Accordingly, the size determination is AFFIRMED, and the appeal is

DENIED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge