

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

SIZE APPEAL OF:

Nationwide Pharmaceutical, LLC,

Appellant,

RE: Palisade Strategies, LLC

Appealed From  
Size Determination No. 06-2019-042

SBA No. SIZ-6027

Decided: September 12, 2019

APPEARANCES

Matthew T. Schoonover, Esq., Ian P. Patterson, Esq., John M. Mattox II, Esq., Haley E. Claxton, Esq., Koprince Law, LLC, Lawrence, Kansas, for Appellant

David S. Black, Esq., Gregory R. Hallmark, Esq., Amy L. Fuentes, Esq., Holland & Knight, LLP, Tysons, Virginia, for Palisade Strategies, LLC

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On May 21, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2019-42 concluding that Palisade Strategies, LLC (Palisade) is a small business under the size standard associated with the subject procurement. The Area Office found that Palisade is not affiliated with its SBA-approved mentor, Heritage Health Solutions, Inc. (Heritage), under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Nationwide Pharmaceutical, LLC (Appellant), which had previously protested Palisade's size, maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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<sup>1</sup> This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties 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 within fifteen days of receiving the size determination. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. Solicitation

On March 13, 2019, the U.S. Department of Veterans Affairs (VA) issued Request for Quotations (RFQ) No. 36C25719Q0430 for “Pharmacy Benefit Management First-Fill and/or Emergency prescription fill services.” (RFQ at 1.) According to the RFQ's Statement of Work (SOW), the purpose of the procurement is to fill initial prescriptions (up to 10 days in duration, or up to 14 days for antibiotics) for eligible patients in the Central Texas Veterans Health Care System (CTVHCS). (*Id.* at 4.) The contractor will support this objective by performing “pharmacy benefit management services.” (*Id.* at 4, 12, 44.) The SOW explained that patients are issued prescriptions by authorized VA medical practitioners. (*Id.*) The contractor will ensure that such prescriptions can be filled at multiple pharmacies within a 5-mile radius of Community Based Outpatient Clinics (CBOCs) identified in the RFQ. (*Id.*) Patients must receive counseling from a registered pharmacist for each prescription filled. (*Id.* at 5-6.) Any prescriptions that are not issued by an authorized VA medical provider, or that are not for VA-approved medications, should not be filled and will not be reimbursed by VA. (*Id.* at 4.)

The RFQ contemplated the award of a three-year Blanket Purchase Agreement (BPA) with a “Master Dollar Limit” of \$350,000. (*Id.* at 12-13.) Based on historical data, 1,503 prescriptions are filled annually through the BPA. (*Id.* at 4.)

The RFQ indicated that VA would evaluate quotations based on three factors: Technical, Past Performance, and Price. (*Id.* at 25, 44-45.) Under the Technical factor, VA would consider whether the offeror proposed a “rational approach” to performing pharmacy benefit management services, as well as the offeror's “[d]emonstrated ability to maintain and provide a business relationship with the contract pharmacies used to fill prescription requests as specified in the [SOW].” (*Id.* at 44.)

The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned North American Industry Classification System (NAICS) code 524292, Third Party Administration of Insurance and Pension Funds, with a corresponding size standard of \$32.5 million average annual receipts. Quotations were due March 22, 2019. Appellant and Palisade submitted timely quotations. No revised quotations were requested. On April 10, 2019, the CO notified Appellant that Palisade had been awarded the BPA.

## B. Quotation

Palisade's quotation identified itself as the prime contractor and Heritage as Palisade's sole subcontractor. (Quotation at 10.) Heritage is also Palisade's SBA-approved mentor under the All-Small Mentor-Protégé Program (ASMPP). (*Id.*)

The quotation described Palisade as a “pharmacy benefit management and consulting company that improves patient care and reduces costs for the federal government.” (*Id.*) Heritage is “a premier provider of integrated health care solutions,” which “provides pharmacy first-fill prescription services for [VA], serving more than 700,000 veterans at 700 medical facilities nationwide.” (*Id.*)

The quotation asserted that Palisade “will fill prescriptions for VA patients seen at pharmacies within a five (5) mile radius of the CBOCs. Our [XX].” (*Id.* at 14.) Palisade has [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX]. (*Id.* at 11.) [XXXXXXX] will provide the required counseling to patients [XXXXXXXXXXXXXXXXXXXXXXXXXXXX]. (*Id.* at 16.) The “[XXXXXXXXXX]” will work [XX]. (*Id.* at 11.) In addition, “our in-house [XXXXXXXXXX]” is available to assist with [XXXXXXXXXXXXXXXXXXXX]. (*Id.* at 11, 17.)

With regard to “Our VA Experience,” the quotation stated that the Palisade/Heritage teaming arrangement is advantageous for VA, because Heritage has been providing pharmacy services to VA since 2005. (*Id.* at 25.) “This teaming agreement provides the VA with a contractor who understands the unique health care challenges that the VA faces, particularly with urgent medications.” (*Id.*) Furthermore, Heritage holds various pharmacy benefit management technical certifications and accreditations. (*Id.* at 26.)

Under past performance, the quotation highlighted that Palisade and Heritage are parties to an SBA-approved Mentor-Protégé Agreement (MPA). (*Id.* at 27.) “Heritage — as the mentor in this arrangement — will perform critical aspects of the contract's requirements.” (*Id.*) The quotation provided [XXXX] examples of past performance for Heritage, and [XXX] for Palisade. (*Id.* at 27-28.)

## C. Area Office Proceedings

### 1. Protest

On April 17, 2019, Appellant filed a size protest alleging that Palisade is affiliated with its subcontractor, Heritage, through the ostensible subcontractor rule. Appellant asserted that Palisade is an “extremely small government contractor with next to no federal government contract experience.” (Protest at 1.) Further, Palisade lacks the necessary staff, equipment, and capability to perform the required work, and must rely upon Heritage to perform the primary and vital contract requirements. (*Id.*) Heritage is a large business, so the combined receipts of Palisade and Heritage exceed the size standard applicable to the RFQ. (*Id.*)

Appellant acknowledged that Heritage is not the incumbent contractor, but alleged that the remaining factors outlined by OHA in *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011) and its progeny suggest affiliation under the ostensible subcontractor rule. (*Id.* at 6.) Heritage is a large business ineligible to compete for the instant procurement, and “Palisade will have to rely on Heritage to provide the staffing necessary to perform the contract.” (*Id.* at 6-7.) Appellant predicted that Palisade “will undoubtedly rely on Heritage” for past performance, as Palisade itself has little experience performing pharmacy dispensing and management services. (*Id.* at 7.)

Appellant argued that the MPA between Palisade and Heritage does not insulate the concerns from a finding of affiliation. (*Id.* at 8.) Palisade and Heritage did not form a joint venture for the instant RFQ, and the assistance provided by Heritage to Palisade is “not the type of assistance anticipated by [ASMPP] regulations.” (*Id.* at 9.)

The CO forwarded the protest to the Area Office for review, but commented:

This requirement does not require the awarded company to have their own facility or staff at each location. It merely requires them to have arrangements with the local pharmacy chains such as Walgreens or CVS to allow patients to pick up their prescriptions at those locations where the VA does not have their own pharmacy to dispense first-time or emergency-fill prescriptions. The awarded contractor is a liaison to work with the pharmacies and the insurance companies.

(E-mail from J. Martinez to R. DuCote (Apr. 18, 2019).)

## 2. Protest Response

On May 6, 2019, Palisade responded to the protest. Palisade explained that it entered into an MPA with Heritage on December 12, 2018, and SBA approved the MPA on February 22, 2019. (Protest Response at 3-5.) Palisade reviewed the contents of the MPA, asserting that “[t]he MPA expressly contemplates that Heritage will provide technical services to Palisade under subcontracts awarded by Palisade to Heritage.” (*Id.* at 5, emphasis Palisade's.) Palisade and Heritage are negotiating a subcontract for the instant procurement, but in the meantime have reached an “agreement in principle” as to the work each party will perform. (*Id.* at 5-6.) Following a “short ramp-up period,” Palisade expects to “employ [XXXXXXXX] of the employees required to execute the contract by [XXXXXXXXXXXXXXXX].” (*Id.* at 6.)

Palisade argued that the assistance Palisade will receive from Heritage is within scope of the MPA. SBA regulations make clear that a mentor-protégé arrangement may, but need not, take the form of a joint venture. (*Id.* at 9.) Under the MPA, Heritage may provide technical assistance to Palisade as a subcontractor, and such obligations will continue even if the MPA is later terminated. (*Id.*) Because Heritage and Palisade are an SBA-approved mentor and protégé, the assistance provided by Heritage “cannot be considered in an affiliation analysis.” (*Id.* at 10, citing 13 C.F.R. § 125.9(d)(4).)





[XX  
XX  
XX]

(Id. § 6.)

According to the MOU, Heritage will “provide assistance” to Palisade in the following areas:

[XX  
XX]

(Id. § 7.)

The MOU stated that, after a brief transition period, “Palisade will perform [a] majority of non-pharmacy work required by the contract (roughly [XX] percent).” (Id. § 8.) Given the “extremely low volume of VA claims anticipated per month (125),” neither Palisade nor Heritage will devote significant labor to the contract. (Id.) Indeed, “[o]n an hours basis, the contract is not likely to require [XXXXXXXXXXXXXXXX].” (Id.) Palisade will complete [more than 50]% of the work ([XXXXXXXXXXXX]), and Heritage will complete the remaining [XX]% of the work ([XXXXXXXXXXXX]). (Id.) Palisade anticipates that [XXXXXXXXXXXXXXXXXXXX], and “does not intend to hire any current or former employees of Heritage” to perform the instant contract. (Id. §§ 8-9.)

D. Size Determination

On May 21, 2019, the Area Office issued Size Determination No. 06-2019-042, denying Appellant's protest.

The Area Office first found that Palisade itself is a small business. Palisade is wholly-owned by Mr. Brown, who is also CEO of the company. (Size Determination at 4.) Mr. Brown has the power to control Palisade based on his ownership interest. Mr. Brown owns 100% of another concern, TBSA 30, LLC, but that concern has no receipts. (Id. at 4, 9.) Palisade's own receipts do not exceed the size standard. (Id. at 9.) The Area Office found that Palisade and Heritage are parties to an MPA, which SBA approved on February 22, 2019. (Id. at 4.)

Turning to the ostensible subcontractor allegations, the Area Office determined that the contractor's primary duties in this procurement are to “manage relationships between community pharmacies; contract with community pharmacies to provide prescription services to VA patients; manage the billing and accounting services for CBOCs; and prov[ide] periodic prescription reports to the VA.” (Id. at 5.) These activities are the primary and vital contract requirements. (Id. at 9.)

The Area Office found that, at the time of quotation submission, Palisade and Heritage were an SBA-approved mentor and protégé. (Id. at 7.) The quotation identified Palisade as the prime contractor and as “the party responsible for mandatory tasks and associated deliverables





party would perform (issued *before* they were hit with allegations of their ostensible subcontractor relationship), there is little reason to believe Palisade will actually do much work.” (*Id.* at 12, emphasis Appellant's.) Although the size determination alluded to an oral agreement between Palisade and Heritage, the Area Office did not verify whether the oral agreement is consistent with Palisade's quotation for the instant procurement. Further, Mr. Brown's declaration was prepared only in response to Appellant's protest. Reliance on Mr. Brown's declaration therefore “effectively changed the size determination date” from the date the quotation was submitted to the date of his declaration. (*Id.*) Appellant contends the Area Office gave too much weight to Mr. Brown's declaration without verifying whether the declaration was corroborated by the quotation or other contemporaneous documents. (*Id.* at 12-13.)

The circumstances of this procurement suggest that Palisade is unusually reliant on Heritage. [XXXXXXXXXXXXXXXXXXXX] for the procurement, has no pharmacy-related experience, and will perform only administrative tasks. (*Id.* at 14.) The RFQ calls for multiple pharmacists, which can only be provided by Heritage. (*Id.*) Thus, Palisade will be completely dependent on Heritage to complete the work.

Lastly, the Area Office placed too great an emphasis on the MPA by concluding that “any technical and management assistance provided to [Palisade] would be under the scope of their MPA.” (*Id.* at 15, quoting Size Determination at 9.) The MPA contained no specific provision addressing the instant procurement. Rather, the MPA offered “vague assurances of assistance in [XX].” (*Id.*, emphasis Appellant's). Only assistance specifically described in the MPA is exempt from a finding of affiliation. (*Id.* at 16, citing 13 C.F.R. § 125.9(d)(4).) Further, an MPA does not enable a mentor and protégé to circumvent the ostensible subcontractor rule. (*Id.* at 16-17.)

#### F. Palisade's Response

On June 21, 2019, Palisade responded to the appeal. Palisade contends that Appellant's arguments are based largely on a misunderstanding of the RFQ. Further, the Area Office correctly found that Palisade's arrangement with Heritage falls within the scope of the MPA, and therefore cannot form the basis for a finding of affiliation. (Response at 1-2.)

Palisade argues that the RFQ “centers on maintaining contractual relationships with a network of pharmacies and not on the actual dispensing of medication.” (*Id.* at 1.) The Area Office reached this conclusion based on its review of the RFQ, and the CO likewise conveyed this point to the Area Office, highlighting that the primary and vital contract requirements are to coordinate with local pharmacy chains. (*Id.* at 3-5.) OHA has recognized that it is appropriate to give weight to the CO's opinion of the primary and vital contract requirements.

Palisade maintains that the RFQ “calls for the contractor to *manage* pharmacy benefits, not the staffing of pharmacists to dispense medications.” (*Id.* at 5, emphasis Palisade's.) The RFQ repeatedly described the required work as “Pharmacy Benefit Management Services.” (*Id.*) Specifically, the contractor will coordinate with approved pharmacies to ensure they fill prescriptions within the constraints imposed by the contract; invoice the VA for prescriptions filled, confirming that VA is not charged for prescriptions from non-authorized practitioners or

for non-approved medications; track data; and conduct quality control. (*Id.* at 6.) Contrary to Appellant's suggestions, the contractor need not provide its own team of pharmacists or operate its own pharmacies. (*Id.* at 7.)

Palisade's proposed approach was consistent with the requirements outlined in the RFQ, and by selecting Palisade for award, the VA found Palisade's quotation to be responsive. (*Id.*) The Area Office correctly analyzed the primary and vital contract requirements and its determination should be affirmed. (*Id.* at 7-8.)

The Area Office also correctly found that Palisade will self-perform the primary and vital requirements of the contract. Appellant offers no explanation for its contention that [XXXXXX XXXXXXXXXXXXXXXXXXXX] is inadequate to complete the required work. (*Id.* at 10.) Rather, this premise apparently is rooted in Appellant's flawed view that the solicitation requires the contractor to staff the CBOC locations with pharmacists. (*Id.*) Further, the services that will be performed by Heritage are not the primary and vital contract requirements. (*Id.* at 11.) Even if Appellant were correct that the RFQ does require the contractor to provide teams of pharmacists at various clinics, Heritage will not provide pharmacists for this contract. "The crux of [Appellant's] appeal is thus factually incorrect." (*Id.*)

The MOU and Mr. Brown's declaration describe the respective roles and responsibilities of Palisade and Heritage, and memorialize an oral agreement between the parties reached prior to the submission of quotations. (*Id.* at 12.) The Area Office's reliance on the declaration and MOU did not effectively change the date to determine size; the declaration and MOU merely documented an oral understanding that Palisade and Heritage reached before quotation submission and which formed the basis for Palisade's quotation. (*Id.* at 13.) OHA has held that a declaration submitted in response to a size protest may be relied upon and may be given substantial evidentiary weight. (*Id.* at 14, citing *Size Appeal of U.S. Army Corps of Engineers*, SBA No. SIZ-5915 (2018).) Appellant can point to nothing in the record that contradicts the allocation of responsibilities between Palisade and Heritage described in the declaration and MOU. (*Id.*)

Palisade insists that it is not unusually reliant on Heritage. With regard to the *DoverStaffing* line of cases, the Area Office correctly noted that Heritage is not the incumbent contractor. Further, Palisade does not plan to hire the majority of its workforce or managerial personnel from Heritage, as [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX]. (*Id.* at 16.) Although Palisade did utilize Heritage's past performance in its quotation, this is insufficient to establish unusual reliance. (*Id.*)

Palisade maintains that Appellant largely abandons the *DoverStaffing* factors in favor of a "totality of the circumstances" analysis. (*Id.*) Appellant's arguments, though, again are premised on Appellant's "mischaracterization of the solicitation as requiring the contractor to staff 'multiple, state-licensed pharmacists at five locations.'" (*Id.*) The true requirements are centered on pharmacy benefit management services that Palisade will self-perform. (*Id.* at 17.)

Palisade emphasizes that "[t]he law is clear that 'no determination of affiliation or control may be found between a protégé firm and its mentor based solely on the mentor-protégé

agreement or any *assistance provided pursuant to the agreement.*” (*Id.*, quoting 13 C.F.R. § 125.9(d)(4) (emphasis added by Palisade).) Because the assistance that Heritage will provide Palisade is within scope of their MPA, no affiliation can arise on this basis. (*Id.* at 18.) Although SBA regulations state that affiliation may be found between a mentor and protégé for reasons other than assistance provided under an MPA, Appellant here “does not point to any such ‘other reasons.’” (*Id.* at 19-20.) Palisade also observes that SBA amended its regulations in 2016 to clarify that a subcontract from a protégé to a mentor may be considered a form of developmental assistance. (*Id.* at 20, citing 81 Fed. Reg. 48,557, 48,567 (July 25, 2016).)

### G. Supplemental Appeal

On June 28, 2019, after reviewing the record under the terms of an OHA protective order, Appellant supplemented its appeal. Appellant argues that the Area Office (1) improperly disregarded Palisade's “contradictory explanations of its proposed employees”; (2) incorrectly concluded that Palisade would self-perform the primary and vital contract requirements and is not unduly reliant on Heritage; and (3) misread the MPA as shielding Palisade and Heritage from affiliation. (Supp. Appeal at 1-2.)

Appellant observes that the Area Office found that [XXXXXXXX]. However, both Palisade's response to the protest and Mr. Brown's declaration indicated that Palisade would hire additional employees to perform the contract. (*Id.* at 3.) The MOU “attempts to explain away” these assertions by claiming that [XXXXXXXXXXXX] is required to perform the contract. (*Id.* at 4.) The Area Office erred by disregarding the protest response and declaration, without explaining “how it reconciled two entirely contradictory sets of fact.” (*Id.* at 5.)

Appellant next argues that, rather than focusing on Palisade's quotation, the Area Office improperly relied upon Palisade's protest response, Mr. Brown's declaration, and the MOU, all of which were created after the quotation was submitted. (*Id.* at 6.) Further, there are inconsistencies between these documents and other evidence in the record. The MOU suggests that utilizing Heritage as a subcontractor is assistance contemplated by the MPA, but the only mention of such an arrangement in the MPA is in the termination provision, not as a specific means of assistance. (*Id.*) The MOU also contradicts the protest response and Mr. Brown's declaration with regard to whether Palisade will hire additional personnel. (*Id.* at 7.) Additionally, the quotation does not discuss the work split agreed upon by Palisade and Heritage. (*Id.*)

Appellant renews its arguments that Palisade is unusually reliant upon Heritage. Although Heritage is not the incumbent contractor, the *DoverStaffing* factors still serve as useful guidelines for considering unusual reliance. (*Id.* at 8.) Heritage would not have been eligible to compete for this procurement but is capable of performing the work, so the first *DoverStaffing* factor “weighs in favor” of finding unusual reliance. (*Id.* at 8-9.) Palisade's protest response, Mr. Brown's declaration, and Palisade's quotation all indicate that Palisade will staff the contract with more than [XXXXXX]. According to Appellant, although the source of this labor is unclear, “it is entirely possible” that Palisade intended to hire or utilize a majority this workforce from Heritage. (*Id.* at 9.) Appellant highlights that the quotation referred to an “[XXXXXXX]” and a “[XXXXXXX],” which presumably will be provided by Heritage. (*Id.* at 9-10.) Further, Heritage

holds the applicable pharmacy benefit management technical certifications and accreditations. (*Id.* at 10-11.)

Appellant contends that the quotation represents Heritage as “the *de facto* prime contractor” by emphasizing Heritage's proven record of past performance, without mention of any services provided by Palisade. (*Id.* at 11.) Palisade relied entirely upon the past performance of Heritage in its quotation, a fact which the Area Office noted in the size determination.

Appellant alleges that, even accepting the Area Office's view of the primary and vital contract requirements, Palisade's quotation does not explain how, or if, Palisade will perform this work. In Appellant's view, “offering [XXXXXXXXXXXXXXXX], Palisade simply cannot do the substantive work required.” (*Id.* at 13.) Rather, Palisade must “rely on Heritage's [XXXXXXXXXX] and [XXXXXXXXXX] to perform these functions.” (*Id.*) In addition, Palisade admitted in its quotation that Heritage will perform “critical aspects” of the procurement. (*Id.*)

Lastly, Appellant contends that the assistance to be provided by Heritage here is “above and beyond” what is permitted by the MPA. (*Id.* at 14.) The MPA anticipated that Palisade and Heritage would form a joint venture, rather than a subcontracting arrangement. (*Id.* at 14-15.) The only mention of Heritage potentially serving as Palisade's subcontractor was “buried in a boilerplate termination provision, which refers generally to *any* contractual obligations Heritage might have to Palisade.” (*Id.* at 16, emphasis Appellant's.) The provision cited by the Area Office that speaks to technical assistance being provided by Heritage was intended to refer to a joint venture, which the parties here did not form. The Area Office committed clear error of fact and law when it misinterpreted the MPA.

#### H. Supplemental Response

On July 5, 2019, Palisade responded to the supplemental appeal. Palisade contends the Area Office did not err by considering documents which complemented and clarified the quotation with regard to the specific tasks to be performed by Palisade and Heritage. Further, the Area Office correctly determined that Palisade will self-perform the primary and vital contract requirements, and that the assistance Heritage will provide is within scope of the MPA. (Supp. Response at 1-2.)

Palisade asserts that, in its haste to respond to Appellant's protest before the deadline specified by the Area Office, Palisade's protest response “imprecisely described its arrangement with Heritage.” (*Id.* at 4.) The MOU clarified that Palisade's comments regarding expected hiring “did not reflect the parties' intention with respect to *this* contract specifically.” (*Id.*, emphasis Palisade's.) Rather, [XXXXXX] would be required to perform the roles and responsibilities allocated to Palisade for the instant contract, and this work would be performed by [XXXXXX]. The MOU further confirmed that Palisade would not hire any current or former employees of Heritage to perform the contract. (*Id.*) The Area Office could not properly have ignored Palisade's clarification and instead relied solely on Palisade's initial protest response. (*Id.* at 5.)

Palisade maintains that the MOU, the response to the size protest, and Mr. Brown's declaration are fully consistent with Palisade's quotation and the MPA. The MPA contemplates

that Heritage may provide management and technical assistance to Palisade as a subcontractor. (*Id.* at 6.) The quotation did not address whether additional staff would be hired, so the MOU is consistent with the quotation. Similarly, statements about work split in the MOU, declaration, and protest response are consistent with the quotation.

Palisade argues that Appellant's attempts to apply the *DoverStaffing* factors to the instant case are unavailing. (*Id.* at 7.) The first *DoverStaffing* factor does not apply because Heritage is not the incumbent contractor, and it is hardly unusual for a small business to engage a large business as a subcontractor. (*Id.* at 8.) The second and third *DoverStaffing* factors also do not apply, as “*the record expressly shows that Palisade will not hire any personnel from Heritage.*” (*Id.* at 8, emphasis Palisade's.) Indeed, Appellant has not even alleged that the third *DoverStaffing* factor is met here. (*Id.* at 11.) As for the fourth factor, the Area Office considered that the quotation utilized Heritage's past performance, but correctly concluded that this is not by itself sufficient to find unusual reliance. (*Id.* at 11-12.)

Palisade asserts that the [XXXXXXXXXX] and [XXXXXXXXXXXX] will not perform any, let alone a majority, of the primary and vital contract requirements. (*Id.* at 9-10.) Further, the fact that Heritage holds relevant certifications and accreditations is immaterial, as these were not required by the RFQ. According to Palisade, the certifications and accreditations are no more than “‘nice to have’ resume-boosters; they do not establish that only Heritage can ‘do the needed work’ of the contract.” (*Id.* at 11.)

Palisade argues that the MOU and declaration described the primary and vital tasks that will be completed by Palisade, as well as the work split between Palisade and Heritage. Appellant's contention that Heritage will perform the primary and vital requirements is thus “spurious and disproven.” (*Id.* at 13.) The fact that [XXXXXXXXXX] will work on the contract does not render Palisade unable to complete the primary and vital requirements, as there is a “low volume of work” which requires only “[XXXXXXXXXXXX] — a fact [Appellant] does not dispute.” (*Id.*) In addition, the statement in the quotation that Heritage will perform “critical” aspects of the contract does not demonstrate that Heritage is performing any primary and vital requirements. (*Id.* at 14.)

Palisade contends that there is no requirement that an MPA address the specific procurement at issue in order for the participants to receive protection from affiliation under SBA regulations. (*Id.* at 16, citing 74 Fed. Reg. 55,694, 55,709 (Oct. 28, 2009).) The MPA here contemplated that Heritage will provide Palisade technical and management assistance, and SBA regulations make clear that such assistance may include subcontracts from the protégé to the mentor. (*Id.* at 17-19, citing 13 C.F.R. § 125.9(a).) The Area Office did not err in finding that the management and technical assistance provided by Heritage is within the scope of the MPA. (*Id.* at 17-18.)

### 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 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). Essentially, the rule asks, “whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor.” *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 7 (2010). To ascertain whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, an area office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). Generally, “[w]here a concern has the ability to perform the contract, will perform the majority of the work, and will manage the contract, the concern is performing the primary and vital tasks of the contract and there is no violation of the ostensible subcontractor rule.” *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 12 (2011).

#### B. Analysis

OHA has explained that “[t]he initial step in an ostensible subcontractor analysis is to determine whether the prime contractor will self-perform the contract's primary and vital requirements.” *Size Appeal of Innovate Int'l Intelligence & Integration, LLC*, SBA No. SIZ-5882, at 6 (2018). The “primary and vital” requirements are those associated with the principal purpose of the acquisition. *Size Appeal of Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312, at 10 (2012); *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 17 (2011). Frequently, the primary and vital requirements account for the bulk of the effort, or of the contract dollar value. *Size Appeal of Social Solutions Int'l, Inc.* SBA No. SIZ-5741, at 12 (2016); *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359, at 12 (2012). Furthermore, “while not conclusive, OHA will give weight to the CO's opinion of what constitutes the primary and vital requirements, as reflected in the assigned NAICS code or otherwise.” *Size Appeal of Jacob's Eye, LLC*, SBA No. SIZ-5955, at 10 (2018); *see also Size Appeal of NEIE Medical Waste Servs., LLC*, SBA No. SIZ-5547, at 8 (2014); *Size Appeal of Tinton Falls Lodging Realty, LLC*, SBA No. SIZ-5546, at 16 (2014).

In the instant case, the Area Office appropriately found that the primary and vital contract requirements are to “manage relationships between community pharmacies; contract with community pharmacies to provide prescription services to VA patients; manage the billing and

accounting services for CBOCs; and prov[ide] periodic prescription reports to the VA.” Section II.D, *supra*. While it is true, as Appellant emphasizes, that the RFQ stated that the ultimate purpose of the procurement is to facilitate the delivery of medications to patients, the RFQ also made clear that the contractor would contribute to this objective by performing “pharmacy benefit management services.” Section II.A, *supra*. Thus, the RFQ did not indicate that the contractor itself would dispense medications, and instead stated that quotations would be evaluated, in part, based on the offeror’s “ability to maintain and provide a business relationship with the contract pharmacies used to fill prescription requests.” *Id*. Similarly, the CO informed the Area Office that the contractor will function as a “liaison” between VA and local pharmacies, highlighting that the contractor is not required to provide its own pharmacists, and need only make “arrangements with the local pharmacy chains such as Walgreens or CVS to allow patients to pick up their prescriptions.” Section II.C.1, *supra*. The NAICS code assigned to the RFQ further supports the Area Office’s conclusion that the procurement here is predominantly administrative in nature. 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). According to the *NAICS Manual*,<sup>2</sup> the NAICS code selected for the instant procurement — 524292, Third Party Administration of Insurance and Pension Funds — pertains to “claims processing and other administrative services” and is not part of the health care sector. *NAICS Manual* at 444. I therefore see no error in the Area Office’s assessment of the primary and vital contract requirements.

The Area Office also could reasonably find that Palisade will self-perform the primary and vital requirements. Palisade’s quotation identified itself as the prime contractor and Heritage as Palisade’s sole subcontractor, but did not otherwise address the respective roles and responsibilities of the two companies. Section II.B, *supra*. These matters are discussed, however, in Mr. Brown’s declaration and in the MOU. Sections II.C.4 and II.C.5, *supra*. Although Appellant complains that these latter documents were created after the date to determine size (*i.e.*, after the date of quotation submission), OHA has recognized that information post-dating a proposal may properly be considered by an area office, so long as the information clarifies or explains the contents of the proposal and does not contradict it. *Size Appeal of Inquiries, Inc.*, SBA No. SIZ-6008, at 23 n.5 (2019); *see also Size Appeal of U.S. Army Corps of Engineers*, SBA No. SIZ-5915, at 8 (2018); *Size Appeal of Kaiyuh Servs., LLC*, SBA No. SIZ-5581 (2014). Here, Mr. Brown’s declaration and the MOU do not conflict with Palisade’s quotation, and both documents purport to describe an oral understanding between Palisade and Heritage which existed at the time of quotation submission. Sections II.C.4 and II.C.5, *supra*. Accordingly, the Area Office could properly review such documents in determining whether Palisade will self-perform the primary and vital contract requirements.

According to Mr. Brown’s declaration and the MOU, Palisade will manage the contract and will self-perform a large majority of the work, to include [XXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX]. Sections II.C.4 and II.C.5, *supra*. Meanwhile, Heritage will assist Palisade by providing “[XXXXXXXXXXXXXXXXXXXX

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<sup>2</sup> Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2017)*, available at <http://www.census.gov>.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXX],” supporting Palisade with [XXXXXXX] and providing [XXXXXXXXXXXXXXXXXXXXXXXXXXXXX]. *Id.* The declaration and the MOU do not contravene Palisade's quotation, which was silent as to any specific division of responsibilities between Palisade and Heritage. Based on the information provided in the declaration and the MOU, then, the Area Office correctly found that Palisade will self-perform the primary and vital contract requirements.

Appellant also argues that Palisade will be unusually reliant upon Heritage based on OHA's decision in *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011) and its progeny. This line of cases has identified “four key factors” that contribute to findings of unusual reliance: (1) the proposed subcontractor is the incumbent contractor and is ineligible to compete for the procurement; (2) the prime contractor plans to hire the large majority of its workforce from the subcontractor; (3) the prime contractor's proposed management previously served with the subcontractor on the incumbent contract; and (4) the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract. *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850, at 15 (2017); *Size Appeal of Charitar Realty*, SBA No. SIZ-5806, at 13 (2017); *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716, at 12 (2016). When these factors are present, violation of the ostensible subcontractor rule is more likely to be found if the proposed subcontractor will perform 40% or more of the contract. *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5785, at 10 (2016).

Appellant's argument fails here because three of the four *DoverStaffing* factors are not present. The first factor is not met because the proposed subcontractor, Heritage, is not the incumbent contractor. *E.g.*, *Size Appeal of A-Team Realty, Inc.*, SBA No. SIZ-5935, at 10 (2018). Likewise, the second and third factors plainly are not met, as there is no indication that Palisade will hire any personnel (whether managerial or non-managerial) from Heritage. Heritage also is not responsible for performing 40% or more of the contract work. The fourth *DoverStaffing* factor does appear to be met, and the Area Office noted that Palisade's quotation relied [XXX] upon Heritage for past performance. Section II.D, *supra*. Nevertheless, OHA has repeatedly held that this factor alone is not sufficient to establish unusual reliance. *Size Appeal of Milani Constr., LLC*, SBA No. SIZ-5898, at 7 (2018); *Size Appeal of Innovate Int'l Intelligence & Integration, LLC*, SBA No. SIZ-5882, at 7 (2018); *Size Appeal of GiaCare and MedTrust JV, LLC*, SBA No. SIZ-5690, at 12-13 (2015); *Size Appeal of Logistics & Tech. Servs., Inc.*, SBA No. SIZ-5482, at 8 (2013).

Appellant also posits that Palisade must rely upon Heritage to perform this contract because [XXXXXXXXXXXXXXXXXXXXX] cannot complete all of Palisade's responsibilities on this contract. This argument, though, is premised on the notion that the RFQ requires the contractor to furnish multiple pharmacists to dispense medications. As discussed above, it is clear from the RFQ and the CO's remarks that the contractor here will not provide a team of pharmacists but instead will merely coordinate with local pharmacies and handle associated administrative duties. Further, according to the RFQ, this procurement is a relatively modest effort with a maximum contract value of \$350,000 over three years and only 1,503 prescriptions processed annually. Section II.A, *supra*. It therefore is plausible that [XXXXXXXXXX] could perform this work. Appellant points to statements in, for example, Palisade's protest response indicating that



Palisade anticipated hiring additional staff. Palisade reasonably explains, however, that such comments did not pertain specifically to the instant procurement, and that the MOU subsequently clarified that [XXXXXXXXXXXXXXXXXXXXXXXXXXXX]. Accordingly, Appellant has not established that Palisade must rely on additional subcontractor staff to perform the required work.

Lastly, Appellant has not shown that the Area Office erred in concluding that the assistance Heritage will provide Palisade is within scope of their SBA-approved MPA. The MPA states that Heritage may provide a wide variety of technical and management assistance to Palisade, including [XXXXXXXXXXXXXXXXXXXXXXXXXXXX]. Section II.C.3, *supra*. The assistance Heritage will provide Palisade on the instant procurement can reasonably be viewed as falling within these broad categories. Contrary to Appellant's suggestions, the MPA does not specify that management and technical assistance must only occur in the context of a joint venture. Further, although it is possible to find affiliation between an SBA-approved mentor and protégé based on reasons other than the relationship itself or assistance permitted under the MPA, Appellant here has not identified independent grounds for affiliation. Accordingly, the Area Office appropriately found that the assistance Heritage will provide Palisade is within the scope of their SBA-approved MPA, and therefore cannot form the basis for a finding of affiliation. *See* 13 C.F.R. §§ 125.9(d)(4) and 121.103(b)(6).

#### IV. Conclusion

Appellant has failed to establish that the size determination is clearly erroneous. Accordingly, I DENY the instant appeal, and AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge