

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

SIZE APPEAL OF:

NorthWind-CDM Smith Advantage JV,
LLC

Appellant,

RE: Changeis, Inc.

Appealed From
Size Determination No. 2-2020-005

SBA No. SIZ-6053

Decided: May 11, 2020

APPEARANCES

Joshua A. Mullen, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC,
Nashville, Tennessee, for Appellant

Katherine S. Nucci, Esq., Thompson Coburn, LLP, Washington, D.C., for Changeis, Inc.

Victoria M. Schmitt, Esq., U.S. Department of Transportation, John A. Volpe National
Transportation Systems Center, Cambridge, Massachusetts

DECISION¹

I. Introduction and Jurisdiction

On January 15, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2020-005 concluding that Changeis, Inc. (Changeis) is a small business under the size standard associated with the subject procurement. The Area Office found that Changeis is not affiliated with its proposed subcontractor, DIGITALiBiz, Inc. (iBiz), under the “ostensible subcontractor” rule, 13 C.F.R. § 121.103(h)(4). On appeal, NorthWind-CDM Smith Advantage JV, LLC (Appellant), which had previously protested Changeis' size, maintains that the size determination is clearly

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand it. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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

II. Background

A. Solicitation

On April 19, 2019, the U.S. Department of Transportation (DOT), John A. Volpe National Transportation Systems Center (Volpe Center), issued Request for Proposals (RFP) No. 6913G619R200032 for Support for Communications and Operations Research Analysis (SCOAR). The RFP contemplated the award of two indefinite-delivery/indefinite-quantity (ID/IQ) contracts, one providing Comprehensive Technical Support Services (CTSS), and the other providing Independent Technical Support Services (ITSS). (RFP at 6, 12.) The Contracting Officer (CO) set aside the procurement entirely for participants in the 8(a) Business Development program, and assigned North American Industry Classification System (NAICS) code 514990, All Other Professional, Scientific and Technical Services, with a corresponding size standard of \$15 million average annual receipts. Proposals were due May 29, 2019. (Amendment 0002 at 1.)

The RFP explained that the Volpe Center, located in Cambridge, Massachusetts, develops innovative solutions to complex transportation-related challenges. (RFP at 12-13.) To support the Volpe Center, the contractor(s) “must bring a strong knowledge of and experience in transportation systems and functions” and must “provide a workforce with capabilities and experience relating to existing technologies and methodologies that address current transportation systems issues, as well as cutting edge technologies and methodologies that show promise in transforming the future of the transportation systems enterprise.” (*Id.* at 14.)

The RFP stated that the CTSS work was associated with Contract Line Item Number (CLIN) 0100, whereas the ITSS work was associated with CLIN 0200.² Specific services would be defined in task orders issued after award of the base contract, but the scope of the CTSS contract would include: writing and editing; graphics; web design and technology delivery support; communications strategy development and stakeholder engagement; conference planning and logistics; education, learning, and training support; financial and administrative

² Both the CTSS and ITSS contracts ultimately were awarded to Changeis. While this appeal was pending, the CO informed OHA that Appellant had submitted a proposal only for the CTSS contract but not for the ITSS contract. On March 18, 2020, Appellant acknowledged that it lacked standing to challenge the award of the ITSS contract to Changeis, because Appellant did not compete for that award. 13 C.F.R. § 121.1001(a)(2)(i). Accordingly, this decision pertains only to the CTSS portion of the SCOAR procurement, and no further discussion of the ITSS work or CLIN 0200 is required.

program support; printing and production support; system analysis and policy impacts; industry analysis; system operational performance; technological advances; strategic framework; program evaluation; engineering support; business process reengineering; and data science and analysis. (*Id.* at 13-21.)

The RFP indicated that proposals would be evaluated based on six evaluation factors: (1) Technical Understanding (Written and Oral), (2) Management Approach (Written and Oral), (3) Staffing (Written), (4) Transition (Written and Oral), (5) Contract Past Performance (Written), and (6) Cost/Price. (*Id.* at 111-113, 117-118.) For the Staffing factor, offerors were instructed to submit a staffing plan to address the required work. The staffing plan was to discuss “proposed skill mix and team composition, as well as the Offeror's ability to meet staffing and re-staffing requirements.” (*Id.* at 112.) In addition, the staffing plan would contain “a matrix that maps functions identified in the [Statement of Work (SOW)] to specific technical staff, including the person's name, title, company affiliation, degree(s), professional license(s) or certification(s), years of relevant experience, and planned use for SOW task areas.” (*Id.* at 100.)

For the Transition factor, offerors were to provide a draft Transition Plan that would include the resume of the proposed Transition Manager and an approach to successfully transitioning work from the incumbent contractor. (*Id.* at 100-101.) The RFP identified iBiz as the incumbent prime contractor. (*Id.* at 8.) Offerors were instructed to address risk mitigation during transition, “including retention of percentage of incumbent staff for continuity.” (*Id.* at 101.) The RFP stated that DOT planned to issue approximately 140 task orders during the transition period. (*Id.* at 24.)

For the Past Performance factor, offerors were instructed to submit past performance information for the offeror and any proposed major subcontractors. (*Id.* at 101.) Offerors were to provide a list of the five most relevant contracts that the offeror and/or its proposed major subcontractors are currently performing or have completed within the past 3 years, with a value of at least \$1 million. (*Id.*)

The RFP included DOT's estimates of the labor hours and labor categories necessary to perform the required work. (*Id.* at 10, 93-94.) For CLIN 0100, DOT estimated 274,060 hours for each full year of contract performance, and a total of 1,096,240 hours over the life of the contract. (*Id.*)

B. Proposal

Changeis' proposal stated that Changeis is an 8(a) small business with “[f]ive years of experience supporting Volpe Center contracts.” (Proposal, Vol. II at 1.) For the instant procurement, Changeis “partnered with [iBiz] and [XXXX] to provide Volpe with the right mix of skills and understanding required to successfully execute across all SCOAR CLIN 0100 subareas. Together, this partnership is Team Changeis.” (*Id.*)

The proposal described iBiz as “the successful incumbent on [the predecessor Communications and Operations Research Analysis (CORA)] contract, delivering more than

1,600 individual jobs under CORA.” (*Id.*) As for [XXXX], the proposal stated that [XXXX] brings “[XXXXXXXXXXXXXXXXX].” (*Id.*)

The proposal stated that Changeis' staffing plan would be “based on 100% retention of incumbent staff,” as well as the “proactive transition of specialized subcontracts” to mitigate any disruption. (Proposal, Vol. I, at 18.) Changeis and its proposed subcontractors already employ [a majority] of the incumbent personnel. (*Id.*) The remaining [XX]% of the incumbent workforce is employed by [CORA Subcontractor], a subcontractor to iBiz. (Proposal, Vol. II, at 29.) The proposal explained that, based on the incumbent personnel already employed by Changeis and its proposed subcontractors, as well as the efforts to recruit incumbent [CORA Subcontractor] personnel, “Changeis is confident that 100 percent of CLIN 0100 staffing requirements will be filled at contract start.” (*Id.*) Further, all incumbent technical leadership had signed contingent employment offers to transition to Team Changeis, upon award. (Proposal, Vol. I, at 18.) Changeis included letters of intent from the proposed managerial personnel. (*Id.* at 19-23.)

The proposal stated that, in preparing its proposal, Changeis determined that the majority of the labor categories listed in the RFP were the same as those used under the predecessor CORA contract. (*Id.* at 62.) However, the level of effort (LOE) described in the instant RFP exceeds the LOE under CORA. (*Id.* at 63.)

A diagram in Changeis' proposal outlined its proposed technical leadership. (Proposal, Vol. II, at 21.) The diagram identified Changeis' President, Ms. Urvashi Malhotra, as overseeing the work, and Mr. Varun Malhotra as Changeis' Executive Vice President and SCOAR Transition Manager. The proposed Program Manager (PM), [XXXX], is currently employed by iBiz but had agreed to “become a Changeis employee.” (*Id.*) The PM's key responsibilities would include ensuring that task order projects are on time and within budget, and meet quality standards. (*Id.*) The PM provides on-site planning, direction, and supervision across the contract. (*Id.*) The PM will be the primary interface with DOT Volpe Center leadership to understand technical/strategic direction and aligning Team Changeis' resources/solutions with Volpe Center priorities. (*Id.*) Furthermore, the PM reports to and coordinates with Changeis' leadership. (*Id.*)

The proposal stated that, over the life of the contract, Changeis will provide “more than 51%” of the LOE, with iBiz “[less than 40%]” and the remaining spread across [XXXX] and specialized subcontractors, as necessary. (*Id.* at 33.) At the outset of the contract, [a majority of] full time equivalents (FTEs) would be employed by Changeis, [XX] FTEs would be employed by iBiz, and [XX] FTEs would be employed by [XXXX] and other subcontractors, for a total of 102.25 FTEs. (*Id.* at 32.) Changeis noted that there are currently 156 individuals, equating to 102 FTEs, working on the incumbent CORA contract. (*Id.*)

For Past Performance, Changeis provided three examples of its own past performance and two for iBiz. The three Changeis contracts were valued at: \$4,219,270.64; \$9,742,446.86; and \$1,972,047.62, respectively. (*Id.* at 77-82.) Each of the two iBiz contracts had a value exceeding \$100 million. (*Id.* at 82-86.)

C. Protest

On September 9, 2019, the CO announced that Changeis was the apparent awardee of the CTSS contract. On September 16, 2019, Appellant filed a timely size protest challenging Changeis' size. The CO forwarded the protest to the Area Office for review.

In its protest, Appellant alleged that Changeis intends to use the incumbent contractor, iBiz, as its primary subcontractor for this procurement, in contravention of the ostensible subcontractor rule. (Protest at 2.) According to Appellant, DOT erred in selecting Changeis for award, because Changeis is not small due to its affiliation with iBiz. (*Id.* at 3.)

Appellant observed that iBiz is the incumbent contractor for CORA. (*Id.* at 4.) Further, DOT issued a sole-source bridge contract identified as “CORA-II” to iBiz to ensure continuity of essential communications and services beyond the CORA expiration of September 30, 2019, and to allow a successful transition period for the follow-on SCOAR contracts. (*Id.*) Appellant highlighted that iBiz is not an 8(a) participant, nor is iBiz small under the size standard associated with the SCOAR procurement. (*Id.*)

Appellant argued that OHA has identified “four key factors” that contribute to a finding of unusual reliance, including whether the prime contractor plans to hire the large majority of its workforce from the subcontractor; whether the prime contractor's proposed management previously served with the subcontractor on the incumbent contract; and whether the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract. (*Id.*, citing *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017).) Appellant alleged that these factors all are present in the instant case. (*Id.*)

Citing publicly-available sources, Appellant contended that Changeis does not have the relevant and deep experience required for it to independently perform the CTSS contract. (*Id.* at 5.) While Changeis claims on its website to have done work with the Volpe Center, that work has been “limited to inventory management and capital investment analysis.” (*Id.*) Without the involvement of iBiz, Appellant alleged, Changeis does not have the necessary experience to cover all the multidisciplinary, multimodal transportation needs of DOT's operating administrations and external organizations. (*Id.*)

D. Area Office's Investigation

On October 14, 2019, Changeis responded to the protest, and submitted its proposal, its completed SBA Form 355, financial records, and other documents. Changeis maintained that Appellant's protest is meritless, as there is no violation of the “ostensible subcontractor” rule. (Protest Response at 2.)

Changeis acknowledged that iBiz is the incumbent CORA prime contractor and that iBiz would not have been eligible to compete as a prime contractor for the SCOAR procurement. (*Id.*) The mere fact that the proposed subcontractor is the incumbent prime contractor, though, is not sufficient to show violation of the ostensible subcontractor rule. (*Id.* at 10, citing *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436 (2013).)

Changeis explained that its proposal shows the intent for Changeis and iBiz to employ the majority of the incumbent workforce, most of whom are highly-skilled professionals and many of whom have worked at the Volpe Center for many years. (*Id.* at 11.) Changeis compared the instant case to *Size Appeal of Inquiries, Inc.*, SBA No. SIZ-6008 (2019). (*Id.*) In *Inquiries*, OHA commented that “hiring the incumbent workforce alone is not problematic so long as the personnel to be hired from the incumbent are reviewed individually rather than a unilateral transfer of employees or hiring *en masse*.” (*Id.*, quoting *Inquiries*, SBA No. SIZ-6008, at 23.) In this case, Changeis did not, and will not, hire *en masse* or unilaterally transfer incumbent personnel. (*Id.*)

Before the proposal was submitted, Changeis executives met with personnel working on the incumbent CORA contract for iBiz and [CORA Subcontractor]. (*Id.*) Changeis assessed the resumes and qualifications of the incumbent employees, made individual employment offers, and obtained commitment letters from those personnel Changeis has hired or will hire. (*Id.*) Changeis took these actions because: (1) certain language in the RFP evidenced DOT's desire or expectation that the successful contractor would propose and plan to hire incumbent personnel to ensure continuity; (2) the RFP's estimated labor hours indicated that approximately 145 FTEs will be required to perform the contract, but the incumbent staffing was only approximately 90-100 FTEs, thereby necessitating a need to move proactively to secure the necessary personnel in anticipation of contract award; (3) Changeis knew that the labor market for qualified individuals in the Cambridge, Massachusetts area was tight; and (4) it is common practice to hire the incumbent qualified and available workforce. (*Id.*)

Changeis acknowledged that it will hire managerial personnel who have worked for iBiz under the incumbent contract, including the current CORA Task Order Manager who will serve as Changeis' PM on the CTSS contract; however, as discussed in the *Inquiries* decision, “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.” (*Id.* at 12, quoting *Inquiries*, SBA No. SIZ-6008, at 23.) The proposed PM, [XXXX], signed a letter of commitment to become a Changeis employee, and will be subject to the supervision and control of Ms. Malhotra, Changeis' owner and President, and Mr. Malhotra, Changeis' Executive Vice President and Transition Manager. (*Id.*) Because Changeis retains ultimate control over its employees, including those hired from iBiz, and over contractual decision-making, the fact that Changeis proposed to hire some managerial personnel from iBiz does not demonstrate unusual reliance. (*Id.*)

Changeis noted that its proposal reflects that it has experience performing many, if not most, of the categories of technical work described in the RFP. (*Id.* at 13.) Changeis has been in business since 2009, has an established track record with DOT and other federal agencies, and has been highly-regarded and respected by its DOT customers including those at the Volpe Center. (*Id.*) Changeis' proposal included three Past Performance references for itself, and two for iBiz. (*Id.*) Changeis also offered the Area Office a list of eleven other prime contracts awarded to Changeis “that have relevancy to the SCOAR task areas.” (Protest Response, Attach. K., at 4-5.)

Changeis concluded that Appellant's allegations are largely speculative. Given the ID/IQ nature of the contract and the wide-ranging technical areas of work to be performed under future task orders, it is difficult if not impossible to pinpoint the “primary and vital” contract requirements. (Protest Response at 14.) Changeis maintained that even if the two largest categories of work, Communications and Operations Research, were deemed to constitute the “primary and vital” requirements, the proposal demonstrates that it will be Changeis personnel who will manage and perform the majority of work in those categories. (*Id.*)

Changeis submitted a description of its relationship with iBiz. (Protest Response, Attach. I.) Particularly, Changeis and iBiz have no common investments, family members, or shareholders, and the two companies have never shared employees, facilities, or equipment. (*Id.*) None of Changeis' owners have ever had ownership interest in iBiz or *vice versa*, and neither has provided loans or financial assistance to the other. (*Id.*) At the time of the proposal, Changeis had been a subcontractor to iBiz on two contracts (one completed and one active) involving a single FTE for work at the FAA. (*Id.*) Changeis submitted the Teaming Agreement between Changeis and iBiz related to the SCOAR proposal effort. (*Id.*)

In response to question 18 of the SBA Form 355, Changeis explained that iBiz assisted with the preparation of the proposal by providing sections of the technical proposal related to iBiz' workshare areas, providing personnel resumes as appropriate, and drafting write-ups describing the two Past Performance references for iBiz. (*Id.*)

Changeis and iBiz executed a Teaming Agreement for the SCOAR procurement. The Teaming Agreement identified Changeis as the prime contractor and iBiz as the subcontractor, and stated:

8 1.1. The Prime Contractor [Changeis] shall take principal charge of preparing and submitting the Proposal in response to the Program and performing the work entailed in the resulting prime contract (“Prime Contract”). Subcontractor [iBiz] will manage and lead the development of the technical proposal solution working directly with the Prime Contractor Capture Manager. Subcontractor shall provide appropriate and high-quality personnel and use its best efforts to prepare those technical portions of the Proposal relating to, and perform the work entailed in, the areas described in Exhibit A, subject to the direction of the Prime Contractor. Subcontractor shall assist in such additional responsibilities assigned by Prime Contractor by mutual agreement between the Parties. In addition, the Subcontractor agrees to provide the products and services necessary for successfully supporting any benchmark, test, or other demonstration of its products or services called for by the Program.

(Protest Response, Attach. J-8, at 1.)

The Teaming Agreement further stated:

8 1.5. The Prime Contractor will keep the Subcontractor fully advised of any change that may affect the Subcontractor's area of responsibility. The Prime Contractor, however, shall have the right to determine the final contents of the Proposal. If requested by the Prime Contractor, the Subcontractor will ensure the availability of appropriate high quality management and technical personnel to assist the Prime Contractor in any discussions and negotiation with the Customer. However, except as otherwise directed by the Prime Contractor, all communications with the customer concerning the Program shall be through Prime Contractor.

(*Id.* at 2.)

With regard to the distribution of work between the two companies, the Teaming Agreement stated:

Changeis shall provide a minimum of [XX]% of the direct labor in terms of Revenue exclusive of Changeis passthrough or indirect rate application, and fee to iBiz with the interaction of achieving a goal of [less than 40%]. iBiz will be provided at least one Senior Manager (named key personnel — Department Manager) role throughout the lift of the contract as well as Hours from the PMO CLIN for HR support for oversight of iBiz personnel. The final, remaining positions that are directed to iBiz will be determined after contract award. It is recognized that Changeis, as required by [Federal Acquisition Regulation (FAR)] Clause 52.219-14, Limitations on Subcontracting, will be required to perform more than 50% of the work and that due to this restriction and actual workloads, the exact work may fluctuate from time to time.

(*Id.* at 8.)

E. Size Determination

On January 15, 2020, the Area Office issued Size Determination No. 2-2020-005 concluding that Changeis is a small business for the instant procurement.

The Area Office first explained that Appellant alleged only that Changeis is in violation of the ostensible subcontractor rule. The Area Office declined to explore additional issues beyond those raised in the protest. (Size Determination at 1-2.)

Next, the Area Office considered whether the prime contractor, Changeis, will self-perform the “primary and vital” requirements of the contract. (*Id.*, at 3-4.) The CO indicated that the primary and vital contract requirements are to:

Provide support for communications and operations research analysis in the following sub-areas: writing and editing, graphics, web design and technology

delivery support, communications and strategy development and stakeholder engagement, conference planning and logistics, education, learning, and training support, financial and administrative program support, system analysis and policy impacts, industry analysis, system operational performance, technological advances, strategic framework, program evaluation, engineering support, business process reengineering, and data science and analysis.

(*Id.* at 4, quoting CO's statement.) The Area Office reviewed the RFP and agreed with the CO that the RFP contemplated “a wide-ranging set of requirements under the umbrella of ‘communications and operations.’” (*Id.*)

The Area Office assessed the staffing plan in Changeis' proposal, noting that Changeis will provide at least 51% of the LOE and that the remainder of the staff will be from iBiz, and other subcontractors as necessary. (*Id.*, at 5.) A review of the specific personnel named in the proposal confirmed this conclusion. (*Id.*) Further, the PM and other managerial personnel will be Changeis employees, and they will operate under the oversight of Changeis executives. (*Id.*) Consequently, the Area Office found, Changeis will perform the majority of the primary and vital contract requirements. (*Id.*)

Turning to the question of unusual reliance, the Area Office observed that OHA case law has identified “four key factors” that may be suggestive of unusual reliance. (*Id.*) The first factor is present, as iBiz is the incumbent prime contractor and is ineligible to compete for the SCOAR procurement due to being neither an 8(a) firm nor small. (*Id.*) However, “OHA has repeatedly explained that engaging the incumbent as a subcontractor leads to heightened scrutiny of the arrangement, but is not a *per se* violation.” (*Id.* at 6, quoting *Size Appeal of InGenesis*, SBA No. SIZ-5436, at 16 (2013).) Therefore, while not a *per se* violation, this case warrants heightened scrutiny. (*Id.*)

With regard to the second factor, the hiring of the workforce from the subcontractor, the Area Office took notice of Executive Order No. 13,495, Nondisplacement of Qualified Workers Under Service Contracts, which encourages contractors to offer a right of first refusal of employment to qualified incumbent non-managerial employees. (*Id.*) OHA has consistently explained that “the Executive Order does not apply to managerial personnel, and does not mandate that a successor contractor will rely upon the incumbent for its entire workforce.” (*Id.*)

The Area Office noted Changeis' assertion that it had interviewed and made offers to incumbent personnel, “many of whom are professionals that have worked at the Volpe Center under contracts preceding the CORA incumbent contract held by iBiz.” (*Id.* at 7.) The Area Office also considered that Changeis had “assessed the resumes and qualifications of incumbents, made individual employment offers, and obtained commitment letters from those personnel it has hired or will hire” and that some of the individuals interviewed and hired were iBiz employees while others were employees of iBiz's primary subcontractor, [CORA Subcontractor]. (*Id.*)

The Area Office reasoned that “as many of the current incumbent employees held their positions prior to iBiz acquiring the contract there is no reason to believe that these employees

will be less Changeis employees than they have been iBiz or [CORA Subcontractor] [] employees as they were hired by those firms from prior incumbent firms. Further, not all of the employees to be provided by Changeis will be hired from iBiz and [CORA Subcontractor] [] nor is iBiz Changeis' only subcontractor.” (*Id.*)

Based on these considerations, the Area Office found that employees hired by Changeis from the incumbent workforce will not have been hired *en masse*, but rather that they were assessed individually by Changeis management, and that there is no reason to believe that the employees will not be under the control of Changeis. (*Id.*) Although the second factor is present to an extent, the Area Office found that it is “mitigated by Changeis' control over the proposal and hiring processes, as well as [Changeis'] provision of other employees and subcontractors,” and thus is not indicative of undue reliance. (*Id.*)

The Area Office assessed the third factor and found that the instant RFP did not define which employees are “key employees.” (*Id.* at 8.) The Area Office disagreed with Appellant's allegation that “Changeis intends to use iBiz's key management and workforce to perform the requirements of the SCOAR contract.” (*Id.*) The Area Office instead determined that “all but [XXX] of the management positions” will be filled by Changeis employees. (*Id.*) Additionally, the contract will be overseen by Changeis' President and Executive Vice President, who have no connection with iBiz. (*Id.*) Although Changeis will hire several of the managerial personnel on the instant contract from iBiz, these same personnel were previously hired by iBiz from the prior incumbent, and these employees will report to Changeis management above them. (*Id.*)

The Area Office found that all managerial will report either to a higher-level Changeis employee or directly to Changeis' management and will be under the control of Changeis' management. (*Id.*) Consequently, although the third factor is present to some extent, it is mitigated by Changeis' control and is not indicative of unusual reliance. (*Id.*)

Finally, the Area Office rejected the allegation that Changeis lacks relevant experience and relied upon iBiz to win the contract, given that three of the five past performance references in Changeis' proposal were from Changeis itself. (*Id.*) Changeis separately provided a list of other relevant prime contracts with its response to the protest, as Attachment K. (*Id.*) The Area Office noted that six of those contracts are with DOT and FAA and the other five are for similar services for the U.S. Department of Homeland, Federal Emergency Management Agency, Department of Commerce, and National Oceanic and Atmospheric Administration. (*Id.* at 8-9.)

The Area Office reviewed Changeis' average annual receipts and found that Changeis is a small business under the size standard assigned to this procurement. (*Id.* at 9-10.) As Changeis is not affiliated with iBiz, Changeis is eligible for the instant award.

F. Appeal

On January 30, 2020, Appellant filed the instant appeal. Appellant contends that the Area Office did not apply the requisite “heightened scrutiny” standard and did not consider “all aspects” of the relationship between Changeis and iBiz. (Appeal at 3.) Further, Changeis failed

to prove that it did not violate the ostensible subcontractor rule, and thus, the Area Office erred in concluding that the concerns were not affiliated pursuant to 13 C.F.R. § 121.103(h)(4). (*Id.*)

Appellant argues that the Area Office did not evaluate all aspects of the relationship between the prime and subcontractor, and made no mention of any subcontracts, teaming agreements, and other agreements between Changeis and iBiz. (*Id.* at 4.) Changeis was required to have submitted such documents in response to the protest, and it would have been clear error for the Area Office to disregard this information. (*Id.*) Appellant reasons that “the [s]ize [d]etermination confirms that the Area Office clearly erred in not considering these documents because it does not reference them anywhere in the determination.” (*Id.*)

Appellant argues that the size determination did not describe the work that each party would perform, except to identify the percentages of work that each would complete. (*Id.*) Therefore, the size determination did not address the most important aspects of the relationship between Changeis and iBiz and did not utilize the “heightened scrutiny” standard that applies when an incumbent is proposed as a subcontractor. (*Id.*)

Appellant asserts that the Area Office did not evaluate all the facts relevant to the ostensible subcontractor relationship, incorrectly applied OHA case law to the relevant facts, and relied heavily on Executive Order 13,495, which was revoked before the size determination was issued. (*Id.*) Therefore, the size determination should be reversed and OHA should conclude Changeis violated the ostensible subcontractor rule and is affiliated with iBiz. (*Id.*) Alternatively, Appellant asks OHA to remand the determination and direct the Area Office to evaluate all aspects of the relationship between Changeis and iBiz under a heightened scrutiny standard, including review of any subcontracts, teaming agreements, or other agreements that govern the relationship between Changeis and iBiz. (*Id.*)

Next, Appellant contends that the Area Office clearly erred when it found Changeis is not unusually reliant upon iBiz, and when it did not evaluate these requirements with heightened scrutiny. (*Id.* at 5.) Appellant reviews the “four key factors” that contribute to a finding of unusual reliance under OHA case law. (*Id.*) Further, it is not necessary that all four factors be present for unusual reliance to be found. (*Id.*, citing *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850 (2017).) In *Automation*, OHA found ostensible subcontractor affiliation when just three of the four factors were present. (*Id.*)

Appellant argues that all of the four key factors are present in the instant case. The first factor is met because the proposed subcontractor, iBiz, is the incumbent CORA prime contractor and is ineligible to compete for the instant procurement. (*Id.*) Appellant reiterates that because Changeis is using the incumbent as its primary subcontractor, the Area Office should have applied “heightened scrutiny” to the relationship between iBiz and Changeis when evaluating whether Changeis proved that it was not using an ostensible subcontractor. (*Id.*) In Appellant's view, there is no indication that the Area Office actually did apply this standard. (*Id.*)

Turning to the second factor, Appellant contends that Changeis plans to hire the large majority of its workforce from iBiz. (*Id.* at 6.) Indeed, the Area Office acknowledged in its determination that the second factor was “present,” but the Area Office erred when it did not find

an ostensible subcontractor relationship. (*Id.*) According to Appellant, the Area Office based its analysis under this factor largely on Executive Order 13,495, which was rescinded on October 31, 2019. (*Id.*) Specifically, Executive Order 13,897, issued on October 31, 2019, revoked Executive Order 13,495. (*Id.*) When the size determination was issued on January 15, 2020, Executive Order 13,495 was no longer in effect and should not have served as a basis of the Area Office's size determination. (*Id.*) The Area Office's reliance on a defunct Executive Order is a clear error of law. (*Id.*)

Appellant claims the Area Office's consideration of Executive Order 13,495 also was flawed because it did not address the positions previously held by Changeis personnel at iBiz. (*Id.*) Even when Executive Order 13,495 was in effect, it applied only to non-managerial personnel. (*Id.*) However, the Area Office's analysis of the second factor did not discuss whether the persons hired by Changeis were previously managers or supervisors at iBiz. (*Id.*) Such matters should have been detailed in the analysis, and the Area Office's failure to do so shows that the Area Office did not consider this issue with the heightened scrutiny required. (*Id.*)

Appellant states the Area Office clearly erred when considering whether *en masse* hiring occurred, because the Area Office seemingly exempted those employees that “have worked at the Volpe Center under contracts preceding the CORA incumbent contract held by iBiz.” (*Id.* at 7.) Appellant asserts that an employee is not excluded from the analysis under this factor simply because he or she worked for the Government or for a prior contractor before working for the incumbent contractor. (*Id.*) Further, the Area Office's analysis does not address how many Changeis employees, or what percentage of them, are coming from iBiz. (*Id.*) The Area Office merely stated, in conclusion fashion, that “not all of the employees to be provided by Changeis” will be hired from iBiz and [CORA Subcontractor]. (*Id.*)

Appellant alleges that the third factor is met because most, if not all, of Changeis' proposed management previously served with iBiz on the incumbent CORA contract. (*Id.*) Appellant cites to *Automation* and argues that the size determination, again, conceded this factor is “present.” (*Id.*) The Area Office's lack of investigation of these facts and its failure to explore the agreements between Changeis and iBiz again show that the Area Office failed to investigate “all aspects” of the relationship as required by 13 C.F.R. § 121.103(h)(4), and failed to apply the required heightened scrutiny. (*Id.* at 8.)

Appellant then contends that the Area Office placed too much weight on the finding that Changeis will perform at least 51% of the total work under the contract, when OHA has previously recognized that a concern may contravene the ostensible subcontractor rule even if it complies with the limitations on subcontracting. (*Id.*) Particularly, Appellant alleges, the size determination failed to consider how much work will iBiz perform, who controls the Task Order Management Team, or how that team works internally and the roles of the different managers. (*Id.*) The Area Office's failure to address such issues is error and does not comply with the requirement to evaluate “all aspects” of the relationship between the prime contractor and subcontractor. (*Id.* at 9.)

For the fourth factor, Appellant renews its contentions that Changeis lacks relevant experience and must have relied upon its more experienced subcontractor, iBiz, to win the

contract. (*Id.* at 9.) Further, even assuming Changeis does have some relevant experience, all four factors need not be shown in order for unusual reliance to be found, citing *Automation*. (*Id.*)

Beyond the factors discussed above, Appellant alleges that the Area Office should also have found that iBiz is an ostensible subcontractor for Changeis because, upon Appellant's information and belief, iBiz rather than Changeis will perform the primary and vital requirements of the contract. (*Id.*)

G. Changeis' Response

On February 18, 2020, Changeis responded to the appeal. Changeis asserts that Appellant does not, and cannot, meet its burden of proving, by a preponderance of the evidence, all elements of the appeal, namely that the size determination is clearly erroneous. (Changeis Response at 1.) Therefore, OHA should deny the appeal.

Changeis contends that the Area Office conducted a thorough evaluation of the evidence, and the fact that Area Office did not specifically discuss agreements between Changeis and iBiz merely indicates that the documents did not raise any concerns as part of the Area Office's "ostensible subcontractor" analysis. (*Id.* at 2-3.) Changeis insists that there is no requirement that a size determination expressly address every document that is considered by the Area Office. (*Id.* at 3.) Similarly, the Area Office properly would not have discussed the details of Changeis' proposal in the size determination because those details are confidential and proprietary information that should not be revealed to a competitor, such as Appellant. (*Id.*) Absent evidence to the contrary, OHA must assume that the Area Office reviewed and considered all the materials furnished by Changeis and DOT in response to the protest. (*Id.*) Thus, Appellant's allegation that the Area Office failed to fully evaluate the record under a "heightened scrutiny" standard is meritless, and certainly does not demonstrate a clear error of fact or law. (*Id.*)

Next, Changeis maintains that the Area Office correctly determined that Changeis is not unusually reliant on iBiz. Changeis acknowledges that iBiz is the incumbent CORA prime contractor and that iBiz does not qualify as a small business under a \$15 million size standard. (*Id.* at 4.) However, OHA has held that 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. (*Id.*)

With regard to Appellant's argument that the Area Office erred by referencing Executive Order 13,495, which was revoked on October 31, 2019, Changeis insists that Executive Order 13,495 still was in effect when the RFP was issued on April 19, 2019, when proposals were submitted on May 29, 2019, and when the CTSS contract was awarded on September 9, 2019. (*Id.*) In addition, the RFP incorporated by reference FAR clause 52.222-17 "Nondisplacement of Qualified Workers (May 2014)," which would apply even though Executive Order 13,495 was rescinded. (*Id.*) Per the Executive Order and the FAR clause, Changeis had an obligation to offer a right of first refusal of employment to non-managerial employees of the incumbent contractors, and it is irrelevant that the Executive Order later was revoked after contract award. (*Id.*)

Changeis asserts that Appellant ignores that Changeis did not hire incumbent personnel *en masse*, but instead individually assessed each candidate's qualifications, made employment offers, and obtained commitment letters from those incumbents to be hired by Changeis. (*Id.*) Changeis' response to the protest also pointed to OHA precedent providing that “hiring incumbent workforce alone is not problematic so long as the personnel to be hired from the incumbent are reviewed individually rather than a unilateral transfer of employees or hiring *en masse*.” (*Id.*, quoting *Inquiries*, SBA No. SIZ-6008, at 23.) The Area Office considered these facts and correctly concluded that Changeis was not hiring the incumbent personnel *en masse*. (*Id.* at 6.)

Turning to the third unusual reliance factor, the hiring of managerial personnel, Changeis states that the Area Office properly relied upon OHA precedent that “when key personnel, even if hired from a subcontractor, remain under the supervision and control of the prime contractor, there is no violation of the ostensible subcontractor rule.” (*Id.*) Changeis explains that its President and Executive Vice President are not new to the Volpe Center and offers a summary of their background and experience. (*Id.* at 7.) Additionally, the Area Office properly considered the relevant information in reaching its conclusion that all managerial personnel, even if hired from iBiz, will report to higher-level Changeis employees. (*Id.*) Thus, the Area Office did not err in finding that Changeis' hiring of managerial personnel is not indicative of a violation of the ostensible subcontractor rule. (*Id.* at 8.)

Under the fourth factor, Changeis contends that Appellant has made no attempt to challenge the Area Office's determination that Changeis does have relevant experience, based on the three Changeis Past Performance examples included its proposal and the additional experience information provided by Changeis in response to the protest. (*Id.*) The proposal reflects that Changeis has prime contractor experience performing technical work in many, if not most, of the 17 technical sub-areas described in the RFP. (*Id.*) Changeis also highlights that Past Performance was the least-heavily weighted evaluation factor, and that DOT has not indicated that Changeis would not have won the CTSS contract if Changeis had not proposed iBiz as a subcontractor. (*Id.*)

Lastly, Changeis maintains that it will perform the primary and vital requirements of the contract. (*Id.*) OHA has recognized that “[t]he initial step in the ostensible subcontractor analysis is to determine whether the prime contractor will self-perform the contract's primary and vital requirements.” (*Id.* at 9, quoting *Size Appeal of XOtech, LLC*, SBA No. SIZ-5957, at 7 (2018).) Furthermore, where the prime contractor and the subcontractor will perform the same types of work, “the firm that will perform the majority of the total contract must be deemed to be performing the ‘primary and vital’ contract requirements.” (*Id.*, quoting *XOtech*, SBA No. SIZ-5957, at 7.) Here, the Area Office correctly found that the 17 technical sub-areas described in the RFP constitute the “primary and vital” requirements of the contract, and that Changeis will perform at least 51% of the work. (*Id.*)

The CTSS contract is an ID/IQ arrangement whereby DOT will issue task orders to Changeis, with an estimated 140 task orders to be issued during the initial 60-day transition period. (*Id.*) At the time proposals were submitted, offerors had no way of knowing the exact combination of technical sub-areas and labor categories that will be involved in any given task

order. (*Id.*) Changeis highlights that iBiz will perform [less than 40%] of the work, and that the majority of the managerial personnel, as well as the majority of the non-managerial workforce, will be Changeis employees. (*Id.*)

H. DOT's Response

On February 18, 2020, DOT intervened and responded to the appeal. (DOT Response at 1.) DOT maintains that there is no clear error in the size determination and that Changeis has not violated the ostensible subcontractor rule.

In response to Appellant's contention that Changeis does not have the relevant experience to be awarded the contract and would not have won without iBiz's involvement, DOT highlights that Past Performance was only one of five non-Price evaluation factors, and the least important of those factors. (*Id.* at 2-3). For Past Performance, the RFP instructed offerors to provide a list of five contracts that it and/or its major proposed subcontractors had completed or were performing within the past three years, with a value of at least \$1 million. (*Id.* at 3.) Offerors were instructed to select examples that were most relevant in demonstrating their ability to perform the CTSS contract. (*Id.*)

Changeis provided three examples for itself, and Changeis demonstrated relevant work in 15 of the 17 technical sub-areas in one of the examples, 13 technical sub-areas in the second example, and all 17 technical sub-areas in the third example. (*Id.* at 3.) Accordingly, Appellant's claim that Changeis lacks relevant experience, or that iBiz's experience was responsible for Changeis' award, is unsupported. (*Id.*) DOT also maintains that, to the extent that Appellant may argue that the dollar value of Changeis' Past Performance examples is not comparable to the instant procurement, the RFP merely instructed that Past Performance exceed \$1 million, and the examples provided by Changeis all did so. (*Id.*)

Turning to Appellant's arguments about the revocation of Executive Order 13,495, DOT observes that the Executive Order encouraged contractors to offer a right of first refusal to non-managerial employees of the incumbent contractor. (*Id.*) Revocation of the Executive Order does not mean that contractors become prohibited from offering positions to qualified incumbent non-managerial employees. As OHA has long recognized, it is common practice for successor companies to hire qualified incumbent employees, and doing so cannot be considered strong evidence of unusual reliance, irrespective of the revocation of Executive Order 13,495. (*Id.*) DOT further maintains the Executive Order did not, in any event, form the basis of the Area Office's decision. (*Id.*) The legal standard remains whether the prime contractor will hire employees *en masse* from the subcontractor, and the Area Office made no error in its analysis of this question. (*Id.*)

I. Supplemental Appeal

On February 18, 2020, after reviewing the Area Office file under an OHA protective order, Appellant moved to supplement its appeal.³ After reiterating arguments presented in the initial appeal, Appellant contends that Changeis' proposal heavily relies on its relationship with iBiz, and that Changeis does not hold itself out as the offeror, but instead repeatedly refers to the companies collectively as “Team Changeis.” (Supp. Appeal at 3.) Appellant urges OHA should rule that the “partnership” between Changeis and iBiz is a joint venture under the ostensible subcontractor rule, pursuant to 13 C.F.R. § 121.103(h)(4). (*Id.*)

Appellant renews its contention that the Area Office did not apply heightened scrutiny or even minimal scrutiny under the first unusual reliance factor. (*Id.*) With regard to the second factor, Appellant alleges, Changeis' proposal confirms a unilateral transfer of employees from iBiz to Changeis and that Changeis will hire iBiz's incumbent staff *en masse*. (*Id.*) Indeed, Changeis' proposal stated that: “**Team Changeis' Staffing Plan (detailed in Volume II) is based on 100% retention of incumbent staff. . . .**” (*Id.*, quoting Vol. I at 18, emphasis added by Appellant.)

Further, the proposed management structure confirms *en masse* hiring from the incumbent. Appellant highlights that “**[e]very single person on the CLIN100 Task Order Management Team was working for iBiz when Team Changeis submitted its proposal in May 2019.**” (*Id.*, emphasis Appellant's.) Specifically, the proposed PM, [XXXXXXX] each worked for iBiz for at least 4 years. (*Id.*) The lower-level of management similarly is made up of individuals who were iBiz employees at the time of proposal submission. (*Id.* at 5-6.)

Appellant maintains that the Area Office file does not contain evidence that Changeis conducted a review of individual employees to meet particular needs. (*Id.* at 7.) Changeis could have submitted declarations or other evidence describing and confirming this process but did not do so. (*Id.*) Instead, the Area Office file, including Changeis' proposal, confirms that there was a unilateral transfer of employees from iBiz to Changeis and that Changeis conducted *en masse* hiring of iBiz's employees to ensure that Changeis retained 100% of the incumbent personnel. (*Id.*)

Appellant renews its arguments that the third unusual reliance factor is met, because every single person on Team Changeis' proposed managerial team was working for iBiz when Team Changeis submitted its proposal in May 2019. (*Id.* at 8.) As part of its proposal, Changeis identified [XXXX] persons as Changeis contingent hires, and stated that [XXXX] would remain iBiz employees. (*Id.*) Appellant argues that Changeis' proposal does not attempt to conceal this *en masse* hiring of iBiz's incumbent management. (*Id.*)

Additionally, Appellant alleges, the proposal does not show that managerial personnel, including the PM, will be under the control of Changeis, and the Area Office clearly erred when it reached this conclusion. (*Id.* at 9.) As an example, the PM provides on-site planning, direction,

³ The Supplemental Appeal contains various arguments pertaining to the ITSS contract and CLIN 0200. As explained in footnote [2] above, these matters are not properly before OHA.

and supervision across the contract and is responsible for ensuring TOs and projects are on time, within budget, and meeting quality standards. The PM's communications and significant management decisions need not be routed through any existing Changeis employee. (*Id.*) Appellant contends that Varun Malhotra and Urvashi Malhotra are not assigned any “Key Responsibilities” under the CTSS proposal that would inhibit or control the decisions and communications of the PM. (*Id.* at 9.) Further, the “[XXXX]” includes iBiz's [XXXX], but no employee from Changeis will serve on the [XXXX]. (*Id.* at 10.)

In its Supplemental Appeal, Appellant renews its argument that Changeis lacks relevant experience and must have relied upon its more experienced subcontractor to win the contract. (*Id.* at 11.) Appellant argues that the Area Office did not apply the required heightened scrutiny, because Changeis does not have experience with any procurements that are as large and complex as the CTSS contract. (*Id.*)

Appellant concludes that Changeis attempted to make up for its own minimal Past Performance by submitting two Past Performance examples from iBiz, which were collectively valued at \$207,646,462. (*Id.* at 12.) According to Appellant, the two Past Performance examples from iBiz made up approximately 93% of the combined value of all the Past Performance submitted by Team Changeis. (*Id.*) In Appellant's view, these lopsided values again confirm that Changeis lacks relevant experience for the RFP and that it was heavily relying on its more experienced subcontractor to win the contract. (*Id.*)

Appellant also argues that the Area Office should not have considered or relied upon Attachment K to Changeis' protest response, because that document did not contain all pertinent information, such as the total contract values. (*Id.* at 13.)

Finally, Appellant contends that the Area Office erred when it found that Changeis is performing the primary and vital requirements of the contract. (*Id.* at 14.) Apart from its lack of experience, Changeis also does not have existing managerial or non-managerial personnel to perform the contract. (*Id.*) To correct for its own inadequacies, Changeis hired the significant majority of iBiz's staff, took on iBiz's leadership and management, and will rely heavily on iBiz to perform the CTSS contract. (*Id.*)

J. Changeis' Supplemental Response

On March 2, 2020, Changeis responded to the Supplemental Appeal. Changeis asserts that Appellant mischaracterizes and cherry-picks from the record and turns a blind eye to compelling similarities between the facts in this case and those in directly-relevant OHA decisions. (Changeis' Supp. Response at 1.)

Changeis first contends that Appellant's repetitive allegation that Changeis must be unusually reliant upon iBiz because managerial and non-managerial personnel proposed by Changeis were iBiz employees at the time of proposal submission is meritless and contrary to OHA precedent. (*Id.* at 1-2.) Changeis cites *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305 (2011) for the proposition that “OHA has long recognized that it is common practice in Government services contracts for successor companies to hire an incumbent's employees.”

Changeis then argues that Appellant ignores OHA precedent, because “hiring the incumbent workforce alone is not problematic so long as the personnel to be hired from the incumbent are reviewed individually rather than a unilateral transfer of hiring *en masse*,” and “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.” (*Id.* at 2, quoting *Inquiries*, SBA No. SIZ-6008, at 23.)

Changeis also contends that Appellant misconstrues OHA precedent when it claims that references to “Team Changeis” and “partnership” are evidence of affiliation between the concerns. (*Id.* at 3.) OHA has made clear that “references to ‘team’ in a proposal do not support a finding of affiliation.” (*Id.*, quoting *Inquiries*, SBA No. SIZ-6008, at 22.) Changeis concludes that its proposal referencing its partnering and teaming with iBiz and [XXXX] “has no bearing on the substantive question of reliance.” (*Id.* at 3.)

Changeis explains that, according to the RFP, DOT planned to issue 140 task orders within the 60-day transition period, which will necessitate an immediate effort by the awardee to assess the requirements of each task order, develop a proposal and staffing plan for each task order, and ensure that the appropriate personnel are available and hired to work on the task orders. (*Id.* at 4.) Thus, any contractor was expected to seek out and hire most, if not all, of the incumbent personnel, who have highly-specialized skills and expertise. (*Id.*) Changeis also emphasizes that, in its proposal, Changeis stated that it planned to capture 100% of the incumbent personnel, referring to incumbents then working for iBiz and its subcontractor, [CORA Subcontractor], as well as for a group of specialized subcontractors that worked with iBiz and [CORA Subcontractor]. (*Id.*)

In response to the size protest, Changeis explained that the incumbent workforce was comprised of approximately 90-100 FTEs whereas the SCOAR contract will require an estimated 145 FTEs. (*Id.*) In anticipation of the tight labor market for qualified individuals in the Cambridge, Massachusetts area, Changeis proactively established its team and Changeis executives obtained job applications and resumes from, and carefully considered the qualifications of, incumbent personnel well before the proposal due date. (*Id.*)

Changeis responds to Appellant's contention that the Area Office file contains no evidence that Changeis conducted a review of individual employees to meet particular needs. Appellant is incorrect, Changeis argues, and points to Changeis' response to the size protest, where Changeis explained its proactive and individualized hiring efforts, as well as its plan for recruiting and hiring qualified personnel in addition to incumbents. (*Id.* at 5.) Individual commitment letters were included with Changeis' proposal, which would not have been possible unless there were discussions with individual employees. (*Id.* at 5-6.) Changeis notes that there is no requirement in the ostensible subcontractor rule or OHA precedent that a prime offeror already employ proposed incumbent personnel at the time of proposal submission or subsequent oral presentations. (*Id.* at 6.)

With regard to Appellant's attempt to attribute management responsibilities to the proposed [XXXX], Changeis contends that the [XXXXX], consisting of [XXXX] as well as

other “[XXXXX],” is available to Changeis management for “[XXXXXXXXXX].” (*Id.* at 7.) The [XXXX] does not oversee or control the CTSS contract, but instead merely provides specialized, technical advice as requested. (*Id.*, citing Proposal, Vol. II at 21.)

Changeis highlights that Appellant avoids the “striking similarities” between the facts here and those described in OHA's *Inquiries* decision. (*Id.* at 7-8.) Regarding the second unusual reliance factor, Changeis emphasizes that that OHA stated:

The second factor of the test may be met on its face, because a large portion of [the prime contractor's] 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 [the] 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.

(*Id.* at 8, quoting *Inquiries*, SBA No. SIZ-6008, at 23.)

Similar to the facts of *Inquiries*, Changeis is not hiring the incumbent personnel *en masse*, having engaged in pre-proposal actions to announce its recruiting plans, such as announcing job opportunities on its website, holding an event for incumbents to learn about Changeis and discuss potential employment, receiving job applications from incumbent personnel (including from employees of [CORA Subcontractor]), and considering individual resumes and qualifications before making any hiring decisions. (*Id.*) The pool of employees is limited because it consists of highly-skilled professionals with specialized experience needed to accomplish the Volpe Center's unique requirements. (*Id.* at 9.) Furthermore, Changeis' proposal did not rely exclusively on the incumbent workforce, as the proposal described Changeis' recruiting plan that will enable Changeis to find and hire additional qualified personnel. (*Id.*, citing Proposal, Vol. II, at 30-31.)

As to the third unusual reliance factor, Changeis observes that in *Inquiries*, OHA found no ostensible subcontractor violation even though the prime contractor planned to hire managerial personnel, including the Program Manager, from its subcontractor. (*Id.*) In the instant case, OHA should find no error by the Area Office since the evidence establishes that the PM and other managerial personnel would become Changeis employees and would be under the supervision and control of Changeis, the prime contractor. (*Id.*, citing *Inquiries*, SBA No. SIZ-6008, at 23.) Specifically, they will be under the supervision and control of Changeis' President, Ms. Malhotra, and Changeis' Executive Vice President/Transition Manager, Mr. Malhotra. (*Id.*)

Changes also maintains that the record reflects Changeis is a well-established company in the transportation field, having performed numerous contracts supporting and advancing transportation missions (and involving most, if not all, of the technical tasks described in the RFP) for the Volpe Center and the FAA. (*Id.*) Although the three Past Performance examples provided in Changeis' proposal are each significantly smaller than the total value of the CTSS contract, the RFP established a relevancy threshold of \$1 million for Past Performance, and the Past Performance examples contained relevant experience in the 17 technical sub-areas discussed in the RFP. (*Id.* at 11.) Further, contrary to Appellant's suggestions, the Area Office did not err in relying on Attachment K submitted by Changeis in response to the protest. (*Id.* at 12.) The record reflects that the Area Office invited Changeis to provide additional experience information, and thus, it cannot have been clear error for the Area Office to consider the information it requested. (*Id.*)

Changeis concludes that it has the relevant experience outlined in the RFP's specified 17 technical sub-areas and, in some areas, possesses more relevant experience than iBiz. (*Id.* at 14.) Changeis reiterates that it will be performing the primary and vital requirements of the contract, as explained in its response to the initial appeal. (*Id.*)

K. DOT's Supplemental Response

On March 2, 2020, DOT responded to the Supplemental Appeal. With regard to Attachment K, DOT cites 13 C.F.R. § 121.1009, and maintains that SBA may request additional information and that it was entirely proper for the Area Office to have requested and considered additional experience evidence from Changeis, while it is irrelevant that the RFP asked for less, or different, information. (*Id.* at 3.)

L. New Evidence

Accompanying its Supplemental Appeal, Appellant moved to introduce new evidence, specifically Linked-In profiles and an iBiz newsletter, confirming that three Changeis employees previously were employed by iBiz at the time of proposal submission.

Accompanying its Supplemental Response, Changeis moved to admit a declaration from its Executive Vice President, Mr. Malhotra, to address three issues raised by Appellant in the Supplemental Appeal. Changeis maintains that the declaration refutes Appellant's argument that Changeis will hire iBiz personnel *en masse*. (Motion at 1-2.) Specifically, Mr. Malhotra's declaration provides additional information about Changeis' pre-proposal actions relative to obtaining job applications from, considering the qualifications of, and making hiring decisions about, incumbent personnel. (*Id.*) Changeis highlights that it addressed these issues in its response to the protest. The Area Office considered Changeis' response satisfactory and did not ask Changeis to elaborate on these points.

Mr. Malhotra's declaration also responds to Appellant's allegations that Changeis relied on iBiz's experience. (*Id.*) In the declaration, Mr. Malhotra explains that the RFP allowed for the submission of Past Performance Questionnaires (PPQs) if Contractor Performance Assessment

Reporting System (CPARS) data were not available. (*Id.*) Finally, Mr. Malhotra's declaration details his personal contributions to the oral presentation. (*Id.*)

With its Supplemental Response, DOT also moved to introduce new evidence in response to Appellant's contention that Changeis lacks experience. DOT seeks to admit the three PPQs provided by Changeis with its proposal to ensure that OHA has a complete record on this issue.

On March 10, 2020, Appellant opposed Changeis' and DOT's motions to admit new evidence. Appellant contends that Mr. Malhotra's declaration could have been, but was not, previously presented to the Area Office, and Changeis has failed to establish good cause for the submission of such evidence. Particularly, Appellant insists that none of issues raised in the declaration is new. Changeis should not be given an opportunity to supplement information that it was required to have provided during the size investigation.

As for the PPQs, Appellant maintains that Changeis and DOT have made no showing that the PPQs were unavailable during the size investigation. Appellant argues that Changeis knew, or should have known, that its past performance would be at issue since the beginning of the size protest, and it was Changeis' responsibility to fully address those allegations during the size investigation.

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). The rule essentially 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. New Evidence

New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). It is well-settled that OHA “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

In the instant case, I find that both Appellant and Changeis have established good cause to introduce their respective new evidence. Appellant did not have access to the details of Changeis' proposal at the time of the protest or the subsequent appeal, and thus, Appellant could not previously have submitted information pertaining to Changeis' hiring of particular individuals from iBiz. Similarly, Changeis must be afforded an opportunity to respond to arguments raised in the Supplemental Appeal, including Appellant's contentions that Changeis will hire its workforce *en masse* from iBiz. Changeis addressed the question of *en masse* hiring in its response to the protest, and the new evidence (Mr. Malhotra's declaration) merely expounds upon points already raised in the protest response. Section II.D, *supra*. I therefore ADMIT both Appellant's and Changeis' new evidence into the record.

As for DOT's motion, I must deny it. The Past Performance Questionnaires (PPQs) show that Changeis has, in the opinion of the persons completing the PPQs, performed well on prior projects, but DOT has not explained how the PPQs shed light on any issue currently before OHA, or why the PPQs were not, or could not have been, submitted to the Area Office for its review. Good cause to admit the PPQs therefore has not been established. DOT's new evidence is EXCLUDED from the record and has not been considered for purposes of this decision.

C. 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). Further, OHA will attach some weight to the CO's opinion of the primary and vital contract requirements, although OHA has recognized that “a contract's primary and vital requirements are ascertained from the solicitation itself, and not from comments by the procuring agency.” *Size Appeal of K? pono Gov't Servs., LLC*, SBA No. SIZ-5967, at 13 (2018) (quoting *Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5466, at 9 (2013)). If the prime contractor and subcontractor will perform the same types of work, “the firm that will perform the majority of the total contract must be deemed to be performing the ‘primary and vital’ contract requirements.” *Size Appeal of*

XOtech, LLC, SBA No. SIZ-5957, at 7 (2018) (quoting *Size Appeal of A-P-T Research, Inc.*, SBA No. SIZ-5798, at 11 (2016)).

In the instant case, the Area Office found, based on its review of the RFP, that the primary and vital requirements of the CTSS contract are to provide a wide range of specialized “communications and operations” support services to the Volpe Center. Section II.E, *supra*. The Area Office's conclusion is supported by the RFP itself, as well as by comments from the CO. Sections II.A and II.E *supra*. Further, Appellant does not dispute that the Area Office correctly identified the primary and vital contract requirements. Sections II.F and II.I, *supra*. Both Changeis and iBiz will perform the required services, but Changeis' proposal, and the Teaming Agreement between Changeis and iBiz, committed that Changeis would manage the contract and would self-perform at least 51% of the procurement, while subcontracting [less than 40%] of the procurement to iBiz. Section II.B, *supra*. According to the proposal, at the outset of the contract, [a majority] of the workforce ([XX] of 102.25 FTEs) would be employed by Changeis, compared with [less than 40%] ([XX] FTEs) for iBiz. *Id.* Given this record, the Area Office did not err in determining that Changeis will perform the majority of the CTSS support services, and thus will perform the “primary and vital” contract requirements.

The Area Office also considered whether Changeis will be unusually reliant upon iBiz to perform the contract, based on OHA's decision in *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011) and its progeny. This line of cases has outlined “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 (2017); *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017); *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716 (2016); *Size Appeal of Prof'l Sec. Corp.*, SBA No. SIZ-5548 (2014); *Size Appeal of Wichita Tribal Enters., LLC*, SBA No. SIZ-5390 (2012); *Size Appeal of SM Res. Corp., Inc.*, SBA No. SIZ-5338 (2012). 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).

Here, based on the information in the record, the Area Office reasonably determined that Changeis is not unusually reliant upon iBiz. As discussed above, iBiz is not expected to perform 40% or more of the CTSS contract. Section II.B, *supra*. Moreover, only the first of the “four key factors” is clearly met, as iBiz is the incumbent prime contractor on the predecessor CORA contract. The first factor alone, though, is not sufficient to find violation of the ostensible subcontractor rule. *E.g.*, *Size Appeal of InGenesis*, SBA No. SIZ-5436, at 16 (2013).

The second *DoverStaffing* factor is not present, because the record does not support the conclusion that Changeis will hire the large majority of its workforce from iBiz. Appellant bases its allegations primarily on the fact that Changeis' proposal stated that Changeis planned to retain 100% of the incumbent CORA staff. OHA has long recognized, however, that “there is no

violation of the ostensible subcontractor rule when a prime contractor proposes to hire incumbent personnel from a firm other than the proposed subcontractor.” *Size Appeal of The Logistics Co., Inc.*, SBA No. SIZ-5975, at 10 (2018); *see also Size Appeal of Residential Enhancements, Inc.*, SBA No. SIZ-5931, at 15 (2018); *Size Appeal of Synergy Solutions, Inc.*, SBA No. SIZ-5843, at 15 (2017); *Size Appeal of Alphaport, Inc.*, SBA No. SIZ-5799, at 11 (2016); *Size Appeal of Logistics & Tech. Servs., Inc.*, SBA No. SIZ-5482, at 7 (2013); *Size Appeal of J.W. Mills Mgmt., LLC*, SBA No. SIZ-5416, at 8 (2012); *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305, at 12-13 (2011). In the instant case, Changeis' proposal made clear that the “incumbent” CORA workforce consisted not only of iBiz personnel, but also of substantial numbers of employees from [CORA Subcontractor] and other firms, and that Changeis planned to retain the entire incumbent workforce. Section II.B, *supra*. Changeis cannot have violated the ostensible subcontractor rule by proposing to retain incumbent personnel from firms other than iBiz.

Similarly, it appears that the incumbent CORA workforce is insufficient to staff the CTSS contract, and that Changeis therefore will be required to engage in substantial additional hiring. The RFP estimated that the CTSS contract will require 274,060 labor hours for each full year of contract performance, and a total of 1,096,240 labor hours over the entire duration of the contract. Section II.A, *supra*. Such estimated labor hours substantially exceed the 102 FTEs currently devoted to the CORA contract. It follows that Changeis will be required to provide dozens of additional FTEs beyond the incumbent CORA personnel in order to perform the CTSS contract. Nor is there any reason to believe, based on Changeis' proposal or otherwise, that Changeis plans to hire these additional personnel from iBiz. On the contrary, Changeis' proposal outlined a specific plan for recruiting and hiring qualified personnel in addition to incumbents. Section II.B, *supra*.

As Changeis observes in its responses to the appeal, even assuming that Changeis will, as a factual matter, hire the large majority of its workforce from iBiz, OHA has stated 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 Inquiries, Inc.*, SBA No. SIZ-6008, at 23 (2019); *see also Size Appeal of Elevator Serv., Inc.*, SBA No. SIZ-5949, at 9-10 (2018). In this case, Changeis argued, and the Area Office agreed, that Changeis executives assessed the resumes and qualifications of the incumbent CORA employees, made individual employment offers, and obtained commitment letters from those personnel that Changeis had hired or planned to hire. Sections II.D and II.E, *supra*. Mr. Malhotra's declaration provides further details regarding Changeis' hiring practices. Section II.L, *supra*. Given this record, there is no basis to conclude that Changeis engaged in a unilateral transfer of employees or *en masse* hiring, thereby further weakening any argument that the second *DoverStaffing* factor is met.

The third *DoverStaffing* factor does appear to be met, inasmuch as Changeis' proposed managerial personnel, including the proposed PM, previously served with iBiz on the CORA contract. OHA has recognized on numerous occasions, however, that “when key personnel, even if hired from the subcontractor, remain under the supervision and control of the prime contractor, there is no violation of the ostensible subcontractor rule.” *Size Appeal of NVE, Inc.*, SBA No. SIZ-5638, at 10 (2015); *see also Size Appeal of A-Team Realty, Inc.*, SBA No. SIZ-5935, at 10 (2018); *Size Appeal of Hanks-Brandan, LLC*, SBA No. SIZ-5692, at 9 (2015); *Size Appeal of*

GiaCare and MedTrust JV, LLC, SBA No. SIZ-5690, at 12 (2015); *Size Appeal of Maywood Closure Co., LLC & TPMC-EnergySolutions Envi'l. Servs. 2009, LLC*, SBA No. SIZ-5499, at 9 (2013); *Size Appeal of J.W. Mills Mgmt.*, SBA No. SIZ-5416, at 8 (2012). In the instant case, the Area Office determined, and the record supports, that proposed managerial personnel will become Changeis employees upon contract award, and that they will be under the supervision and control of Changeis leadership. Sections II.B and II.E, *supra*. Accordingly, the third factor appears questionable based on the record presented.

The fourth *DoverStaffing* factor also is not met, as the Area Office correctly found that Changeis is a proven business with relevant experience for this procurement. Indeed, three of the five Past Performance examples provided in the proposal were for Changeis itself, and Changeis also submitted to the Area Office a separate list of eleven other prime contracts that Changeis considered to be relevant. Sections II.B and II.D, *supra*. Appellant argues that Changeis may still lack experience with contracts comparable in dollar value to CTSS. Appellant does not offer specific evidence to support this claim, however, and OHA has held that an ostensible subcontractor analysis must be based on more than “mere speculation.” *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850, at 18 (2017). Moreover, even assuming that the overall ceiling value of the CTSS contract is larger than any one contract previously performed by Changeis, it is worth noting that the CTSS contract does not call for the completion of a single large project, but rather the performance of numerous smaller task orders. Thus, the RFP indicated that DOT planned to issue approximately 140 task orders during the transition period alone, and further specified that, to be considered relevant, Past Performance examples need only have a dollar value of at least \$1 million. Section II.A, *supra*. Given this structure of the CTSS contract, Appellant has not persuasively explained why prior experience with very large projects would be essential to successfully function as the CTSS prime contractor. Accordingly, Appellant has not established that Changeis lacks relevant experience and would have to rely on iBiz to perform the required work.

In seeking to overturn the size determination, Appellant also maintains that the Area Office did not explore “all aspects” of the relationship between Changeis and iBiz, because the size determination made no reference to documents such as subcontracts or teaming agreements. Sections II.F and II.I, *supra*. I find these contentions meritless. The mere fact that the Area Office did not comment specifically on one or more documents does not establish that the Area Office failed to consider those matters or that the Area Office committed any error. *E.g.*, *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359, at 12 (2012) (area office's failure to comprehensively discuss all available documents did not constitute reversible error).

Appellant also argues that the Area Office improperly relied on Executive Order 13,495 (Nondisplacement of Qualified Workers Under Service Contracts), which has now been formally rescinded. Section II.F, *supra*. This argument fails because Executive Order 13,495 was in effect on April 19, 2019, the date for determining size. 13 C.F.R. § 121.404(d). Thus, the Area Office properly recognized that, as of the date to determine size, Changeis was still expected to offer a right of first refusal of employment to incumbent non-managerial employees. In any event, the Area Office made only passing mention of Executive Order 13,495, and the record as a whole firmly supports the Area Office's decision. Any error in discussing Executive Order 13,495 therefore was harmless. *Size Appeal of CopaSat, LLC*, SBA No. SIZ-5918, at 6 (2018)

(explaining that “[a]n area office's error is harmless when rectifying the error would not have changed the result.”).

IV. Conclusion

Appellant has not shown clear error in the size determination. The appeal therefore is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge