Cite as: *Size Appeal of Navarro Research and Eng'g, Inc.*, SBA No. SIZ-6065 (2020)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Navarro Research and Engineering, Inc., Appellant, RE: RSI EnTech, LLC Appealed From Size Determination No. 3-2020-046	SBA No. SIZ-6065 Decided: August, 12, 2020

APPEARANCES

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Janella E. Davis, Contracting Officer, U.S. Department of Energy, Washington, D.C.

DECISION[1]

I. Introduction and Jurisdiction

On April 20, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area III (Area Office) issued Size Determination No. 3-2020-046, concluding that RSI EnTech, LLC (RSI) is a small business under the size standard associated with the subject procurement. The Area Office found that RSI is not affiliated with its proposed subcontractor, Amentum Services, Inc. (Amentum), or other alleged affiliates, as was contended by the protester, Navarro Research and Engineering, Inc. (Appellant). On appeal, Appellant maintains that the size determination is clearly erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied.

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 appeal within fifteen days of

[1] This decision was originally issued under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

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. The RFP

On July 1, 2019, the U.S. Department of Energy (DOE) issued Request for Proposals (RFP) No. 89303019RLM000002, seeking a contractor to perform support services for DOE's Office of Legacy Management. The RFP contemplated the award of a single indefinite delivery/indefinite quantity (ID/IQ) contract with a guaranteed minimum of $500,000 and a maximum value of $1 billion. (RFP at 3.) Specific services would be defined in task orders issued after award of the base contract. (*Id.* at 17.)

According to the RFP's Statement of Work (SOW), the Office of Legacy Management was created in 2003 to "manage [DOE's] responsibilities associated with the legacy of the Cold War" by conducting "post-closure site operations" at locations "formerly associated with the nuclear weapons complex and the nation's early atomic energy program." (RFP, Attach. A, at 2, 7.) The instant contractor will assist the Office of Legacy Management in carrying out Long-Term Surveillance and Maintenance (LTS&M) at such sites. (*Id.* at 8.) The SOW explained:

> The major portion of ongoing LTS&M support includes operating, maintaining, monitoring and evaluating site remedies. Other typical LTS&M activities include conducting site inspections; air, soil, surface water, groundwater and ecological receptor monitoring; active record and data administration; and performing regulatory compliance and stakeholder coordination.

(*Id.*) The SOW stated that the required LTS&M support includes "significant asset management responsibilities" as well as "significant information and technology management responsibilities." (*Id.* at 10-11.) Consequently, "[t]he Contractor must be adept at integrating all the various functions and skillsets needed for a robust LTS&M program - environmental management, data management, records management, asset management, and stakeholder engagement." (*Id.* at 4.) In addition to LTS&M support, the contractor may also be called upon to assist other DOE efforts, including: Long-Term Management and Storage of Mercury; Defense-Related Uranium Mines (DRUM); and the Uranium Leasing Program. (*Id.* at 8-9.)

The RFP stated that proposals would be assessed based on five evaluation factors: Technical and Capability Approach; Management Approach; Teaming Approach; Past Performance; and Price. (RFP at 102-103.) For the Price evaluation, offerors were required to complete a pricing model by proposing labor rates based on labor categories and estimated hours specified by DOE. (RFP, Attach 8.) There were four required key personnel: IDIQ Manager; Information and Technology Manager; Health and Safety Manager; and Quality Assurance Manager. (RFP at 36-37.) To be considered relevant, Past Performance references were required to have a dollar value of at least $20.5 million per year. (RFP, Amendment 0006, at 103.)

The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 562910, Remediation Services. NAICS code 562910 ordinarily is associated with a size standard of $22 million, but the RFP indicated that the procurement fit within the exception for Environmental Remediation Services, which has a corresponding size standard of 750 employees. (RFP at 77, 83.) Proposals were due September 30, 2019. (RFP, Amendment 0002, at 1.)

B. Size Protest

On March 13, 2020, the CO informed offerors that RSI was the apparent awardee. On March 20, 2020, Appellant filed a size protest disputing RSI's size. The CO forwarded Appellant's protest to the Area Office for review.

In its protest, Appellant alleged that RSI is unduly reliant on one or more ostensible subcontractors, probably including Amentum, a large business. (Protest at 1.) Appellant claimed that RSI has a long-standing relationship with Amentum through its partnership with a joint venture known as URS/CH2M Oak Ridge LLC (UCOR), of which Amentum serves as the managing member. (*Id.* at 1-2.)

Appellant asserted that RSI was founded in 1996 in the state of Tennessee. In October 2016, RSI was acquired by ASRC Industrial, LLC (ASRC Industrial). (*Id.* at 4.) ASRC Industrial is a wholly-owned subsidiary of Arctic Slope Regional Corporation (ASRC), an Alaskan Native Corporation (ANC). (*Id.*) Appellant alleged that RSI has been awarded only one federal prime contract in the past three years. (*Id.*) This contract has a value of $71.2 million between July 2013 and March 2020, or about $10 million per year. (*Id.*) According to Appellant, RSI's other work with the federal government is as a subcontractor to UCOR, which began in August 2011 and is valued at approximately $233 million, or $20 million per year. (*Id.*) UCOR's website identifies RSI as a "partner." (*Id.*)

Appellant asserted that RSI is economically dependent upon Amentum and/or UCOR, as over 60% of RSI's revenue historically has originated from UCOR. (*Id.*) Moreover, because RSI's lone prime contract has now expired, some 90% of RSI's revenue currently is from its subcontract with UCOR. (*Id.*) Appellant noted that a DOE Inspector General report in 2012 noted a potential conflict of interest stemming from RSI's work with UCOR. (*Id.* at 4-5.)

Appellant alleged that, for the instant procurement, RSI will be dependent upon an ostensible subcontractor. (*Id.* at 7.) RSI's subcontractor, likely Amentum, will perform the primary and vital requirements of the contract and RSI will be unusually reliant upon that subcontractor. Appellant highlighted that RSI is not experienced performing as a prime contractor in contracts of comparable complexity or value. (*Id.* at 8.) Conversely, Amentum does have such experience, so RSI likely relied upon Amentum's experience to win the award. (*Id.*)

Next, Appellant alleged that RSI is economically dependent upon UCOR and they are therefore affiliated through identity of interest. (*Id.* at 9, citing 13 C.F.R. § 121.103(f).) SBA regulations state that SBA may presume such an identity of interest if a concern derived 70% or more of its receipts from another concern over the previous three years. (*Id.*) According to

Appellant, RSI has derived approximately 66% of its annual revenues from UCOR since 2013, which is sufficient to support a finding of economic dependence. (*Id.*, citing *Size Appeal of Rockwell Med., Inc.*, SBA No. SIZ-5559 (2014).)

Appellant alleged that RSI has other affiliates besides Amentum and UCOR. (*Id.* at 10.) Such affiliates likely include Jacobs Engineering Group, Inc. (Jacobs), another participant in UCOR. (*Id.*)

Appellant also contended that RSI is affiliated with Amentum and UCOR under the totality of the circumstances. (*Id.*) Appellant argued that the long-standing business and contractual relationships between UCOR, Amentum, and RSI demonstrate affiliation on this basis. (*Id.*)

Lastly, Appellant maintained that RSI is not small when its employees are combined with those of its affiliates. (*Id.*) Both Amentum and UCOR exceed the 750-employee size standard applicable to the procurement. (*Id.*) As a result, RSI is not a small business. (*Id.*)

On April 8, 2020, Appellant e-mailed the Area Office to reiterate its view that RSI is economically dependent upon UCOR. Appellant asserted that RSI has derived 60-90% of its total revenues from UCOR over the past decade. (E-mail from S. Navarro-Valenti to J. Abioye (April 8, 2020).)

C. RSI's Proposal and Response to the Protest

On April 7, 2020, RSI responded to the size protest. RSI denied that it is affiliated with any of the alleged affiliates, and insisted that it has fewer than 750 employees. (Protest Response at 1.) RSI also claimed that it will self-perform a large majority of the primary and vital requirements, and does not have an ostensible subcontractor. (*Id.*) RSI acknowledged that it ultimately is owned by ASRC, an ANC, through an immediate wholly-owned subsidiary, ASRC Industrial. (*Id.* at 2.) Because RSI can rely upon the substantial resources of its ANC parent and sister companies, "there is no possibility that RSI is economically dependent on any outside party, including the alleged affiliates named in [Appellant's] size protest, and no possibility that those outside parties can control it." (*Id.*)

RSI explained that it has nearly two decades of experience performing similar services as those requested in the RFP. (*Id.* at 4.) RSI wrote its proposal with limited assistance from its two proposed subcontractors, AECOM N&E Technical Services, LLC (AECOM) (now spun off as an independent company renamed Amentum) and TFE, Inc. (TFE). (*Id.*) Moreover, RSI will self-perform the large majority of the contract, as well as the large majority of the primary and vital requirements, the LTS&M services. (*Id.*) The RFP did not request, and RSI's proposal therefore did not contain, a breakdown of anticipated workload between RSI and its subcontractors. However, the blended labor rates in the proposal show that RSI anticipated, and still anticipates, that RSI will self-perform approximately [XX]% of the contract requirements, including [XX]% of the LTS&M work; TFE will perform [XX]%, and Amentum only [XX]%. (*Id.*) RSI noted that these percentages "tie back" to the labor category allocations described in Vol III, Figure 1 of RSI's proposal. (*Id.*) Although the proposal stated that work assignments

would made using [XXXX] approach, they are nevertheless expected to adhere to the "[XXXX] work share percentages." (*Id.*)

RSI addressed each of the allegations raised in the size protest. First, RSI argued that it will not violate the ostensible subcontractor rule because it will self-perform the primary and vital requirements of the contract and is not unusually reliant upon Amentum. (*Id.* at 6.) RSI identified the "primary and vital" requirements of the instant contract as the LTS&M work, and quoted the SOW's description of the LTS&M requirements:

> **LONG-TERM SURVEILLANCE AND MAINTENANCE**
>
> Long-Term Surveillance and Maintenance is site support to enable safe, compliant, cost effective execution of site scope. Integration of LTS&M site support with program and business support is a priority. The major portion of ongoing LTS&M support includes operating, maintaining, monitoring and evaluating site remedies. Other typical LTS&M activities include conducting site inspections; air, soil, surface water, groundwater and ecological receptor monitoring; active record and data administration; and performing regulatory compliance and stakeholder coordination.
>
> Ongoing work involves LTS&M to ensure protection of human health and the environment. This includes inspection and maintenance of engineered barriers and containment systems, operating active and passive groundwater treatment systems, inspecting and maintaining institutional controls, invasive weed control, road and trail repair and maintenance, wetland, wildlife and threaten/endangered species habitat protection and monitoring, and periodic or regular sampling and analysis of a variety of media including air, soils, surface water, groundwater, biota and gaseous phase materials. Some activities, such as active and passive groundwater treatment and monitoring, leachate collection, wastewater treatment, maintenance and abandonment of wells, stream and bank stabilization, site revegetation, landfill and cell covers, and land contouring require construction-type work. Ancillary work includes inspecting and maintaining facilities, parking lots, outdoor lighting, electrical, water, and sewer infrastructure, signage, security, ice and snow removal, gardens, landscaping, and miscellaneous activities required to maintain visitor access to sites with 24/7 operations.

(*Id.* at 7-9, quoting SOW at 8.) The paramount importance of the LTS&M work is further reflected by the fact that LTS&M represented nearly two-thirds of DOE's 2019 funding for Legacy Management. (*Id.* at 9.)

RSI reiterated that it will self-perform [XX]% of the contract's LTS&M requirements as well as [XX]% of the overall contract, whereas TFE will perform [XX]% of the work and Amentum will perform [XX]% of the work. (*Id.*) In support, RSI offered a declaration from [President], who was RSI's President at the time of proposal submission. (*Id.*, citing [President] Decl. ¶ 12.) RSI also pointed to the labor category allocations in Volume III, Figure 1 of its proposal. That figure stated:

[XXXXXXXX]

(RSI Proposal, Vol. III at 3.)

RSI also highlighted the breakdown of anticipated tasking in RSI's technical proposal to show that RSI was to be the lead team member for the LTS&M work. The proposal contained the following figure:

[XXXXXXXX]

(Proposal, Vol. II, Factor 3, at 18.)

RSI noted that its proposal contained teaming agreements between RSI, TFE, and Amentum, which established target profit goals of RSI [more than 50]%, TFE [XX]%, and Amentum [XX]%. (*Id.* at 10-11, citing RSI Proposal Vol. I at 53; [President] Decl. ¶ 13.) Because the profit-sharing goals do not correspond exactly to work share, Amentum's [XX]% anticipated workshare on the basis of labor cost does not match its larger profit goal. But in any event, "it is clear that RSI will self-perform the vast majority of the primary and vital requirements of the acquisition (the LTS&M work, which traditionally has been the majority of the Legacy Management program's work), as well as the majority of the contract overall." (*Id.* at 11.) In fact, Amentum will not perform the majority of the work for any of the SOW elements, including for the elements where Amentum is providing the functional lead. (*Id.* (citing [President] Decl. ¶ 14).) Further, RSI will manage the contract, under the supervision of the proposed IDIQ Manager, [XXXX], an RSI employee who will report directly to RSI leadership. (*Id.* at 12-13.)

RSI next argued that it is not unusually reliant upon Amentum. (*Id.* at 11.) Appellant's allegations that Amentum wrote RSI's proposal, or that RSI relied on Amentum's experience to win the contract, are factually incorrect. (*Id.*)

RSI noted that OHA case law has identified "four key factors" that may be suggestive 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. (*Id.*) Here, Amentum is not the incumbent contractor, and RSI does not plan to hire Amentum's staff, and so Appellant's theory of unusual reliance rests solely on RSI's alleged lack of experience. (*Id.* at 11-12.) This one factor alone is not enough to show unusual reliance. (*Id.* at 12, citing *Size Appeal of Logistics & Tech. Servs., Inc.*, SBA No. SIZ-5482, at 8 (2013).) But Appellant's allegations with regard to the one factor are also incorrect, for several reasons.

First, RSI has the necessary experience to perform the contract. (*Id.*) Although Appellant focuses narrowly on federal prime contract experience, RSI has extensive experience performing large and complex subcontracts. (*Id.*) Second, RSI wrote its own proposal with limited assistance

from its two proposed subcontractors. (*Id.* at 13-14, citing [President] Decl. ¶¶ 8-11.) Third, RSI's proposal relied upon its own experience in addition to that of its subcontractors. (*Id.* at 15.) RSI submitted three past performance references for itself, three for Amentum, and three for TFE. DOE found one of RSI's references to be not only similar in scope and complexity, but also larger than the RFP's size relevancy requirement. (*Id.*, citing DOE Evaluation Report at 161.)

RSI addressed Appellant's second protest allegation by arguing that RSI is not economically dependent on UCOR. (*Id.* at 17.) Under 13 C.F.R. § 121.103(f), affiliation may arise when firms are "economically dependent through contractual or other relationships." (*Id.*) Further, there is a rebuttable presumption that a concern is economically dependent upon another if it derives 70% or more of its revenue from that firm over the previous three fiscal years. (*Id.*, citing 13 C.F.R. § 121.103(f)(2); *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 8 (2007).) However, a wholly-owned subsidiary of an ANC, such as RSI, can rely upon support from its ANC parent and thus is not economically dependent upon a third party, even if it derives more than 70% of its revenues from that third party. (*Id.*, citing *Size Appeal of Olgoonik Solutions, LLC*, SBA No. SIZ-5669 (2015).) Such a rule is consistent with the notion that "[a]ffiliation through economic dependence, like all affiliation questions, concerns whether an outside entity has the power to control the protested company." (*Id.*)

In the instant case, RSI derived [XX]% of its revenues from UCOR subcontracts in 2019, [XX]% in 2018, and [XX]% in 2017. (*Id.*, citing [President] Decl. ¶ 16.) These amounts are well below the 70% threshold that would create a rebuttable presumption of economic dependence. (*Id.*) Moreover, RSI is a wholly-owned subsidiary of ASRC, "the largest and most successful of all ANCs." (*Id.* at 18.) As a result, "[i]f there were any doubt about RSI's own viability - which there is not - RSI could rely upon the support of its $3.8 billion ANC family to weather any storm, with or without the revenue from UCOR." (*Id.* at 18-19.)

Because RSI is not affiliated with UCOR or Amentum, RSI cannot be affiliated with UCOR or Amentum's affiliates, including Jacobs. (*Id.* at 20.) Nor is RSI affiliated with any entity under the totality of the circumstances. (*Id.*) RSI claimed that, absent economic dependence between RSI and UCOR and/or Amentum, a history of teaming between RSI, UCOR, and Amentum is in no way suggestive of affiliation. (*Id.*)

D. Size Determination

On April 20, 2020, the Area Office issued Size Determination No. 3-2020-046, concluding that RSI is a small business. (Size Determination at 1, 8.) The Area Office declined to address Appellant's April 8, 2020 e-mail, because the e-mail was not timely submitted with Appellant's protest. (*Id.* at 2.)

Next, the Area Office explained that RSI was formed in 1996 and converted into a limited liability corporation (LLC) in 2017. (*Id.* at 4.) ASRC Industrial is the sole owner and member of RSI, and ASRC Industrial in turn is 100% owned by ASRC, an ANC. ASRC thus has the power to control RSI based on stock ownership. (*Id.*, citing 13 C.F.R. § 121.103(c)(1).) Under 13 C.F.R. § 121.103(b)(2), however, RSI is exempt from affiliation with ASRC or ASRC Industrial. (*Id.*)

The Area Office found that UCOR was organized in 2010 by URS Energy and Construction, Inc. (URS) and CH2M Hill Constructors, Inc. (CH2M Hill). (*Id.* at 4-5.) URS has the power to control UCOR due to its majority ownership interest. (*Id.* at 5.)

The Area Office found that, as of the date for determining size (*i.e.*, September 27, 2019), URS was owned and controlled by AECOM Energy & Construction, Inc. (AECOM E&C). (*Id.*) AECOM E&C was 100% owned by a parent company named AECOM. (*Id.*) On October 12, 2019, AECOM sold AECOM E&C, AECOM N&E Technical Services, LLC (AECOM N&E), and AECOM's Management Services Group to private equity firms. (*Id.*) AECOM N&E later changed its name to Amentum. (*Id.*) The Area Office found that, as of the date size is determined, the entity later known as Amentum was 100% owned by AECOM E&C. (*Id.*)

CH2M Hill was formed in 1993, and is 100% owned by CH2M Hill Companies, LTD, which in turn is 100% owned by Jacobs. Thus, Jacobs has the power to control CH2M Hill based on stock ownership. (*Id.*) The Area Office determined that Jacobs was formed in 1947 and has widely-held stock. (*Id.*) Jacobs is controlled by Chris Thompson, the Lead Independent Director of the Board of Directors, and by Steve Demetriou, Chairman and CEO. (*Id.*, citing 13 C.F.R. § 121.103(c)(3).)

The Area Office next addressed Appellant's allegations pertaining to the ostensible subcontractor rule. (*Id.*) The Area Office reviewed the "four key factors" suggestive of unusual reliance as discussed in OHA case law, and found that none of the four factors is applicable here. (*Id.* at 5-6.) The Area Office determined that Appellant, not Amentum, is the incumbent prime contractor; that RSI will not hire a majority of its workforce from Amentum; that RSI's proposed managerial personnel did not previously work for Amentum; and that, based on its proposal, RSI did not rely on Amentum for past performance. (*Id.* at 6.) Although the Area Office did not explain what contract requirements it considered "primary and vital," the Area Office commented that it had "reviewed [Appellant's] allegations that RSI will depend on the experience and expertise of Amentum to perform the contract, including the primary and vital requirements." (*Id.*)

Turning to Appellant's allegations of affiliation through identity of interest, the Area Office found that RSI derived less than 70% of its average receipts from UCOR over the three fiscal years prior to September 27, 2019. This amount is below the regulatory threshold when SBA may presume an identity of interest based on economic dependence. (*Id.* at 7, citing 13 C.F.R. § 121.103(f)(2).) Even 66%, as alleged by Appellant, would be below that threshold. (*Id.*) Because RSI is not affiliated with Amentum or UCOR through identity of interest, RSI also is not affiliated with Jacobs or any of Amentum's or UCOR's other affiliates. (*Id.*)

Lastly, the Area Office rejected Appellant's allegations of affiliation based on the totality of the circumstances. (*Id.*) Having found that RSI is not affiliated with Amentum, UCOR, or Jacobs under any of the other theories advanced by Appellant, it was unnecessary to further analyze affiliation based on the totality of the circumstances. (*Id.*) As RSI has no affiliates, its size is calculated based only on its own employees, which do not exceed the size standard. (*Id.* at 7-8.)

E. Appeal

On May 5, 2020, Appellant filed the instant appeal. Appellant contends that the size determination is clearly erroneous and should be reversed. (Appeal at 2.) Appellant raises three grounds for appeal. First, that the Area Office misapplied the ostensible subcontractor rule standard and ignored important facts. (*Id.* at 7-15.) Second, that the Area Office committed errors of fact and law in its analysis of economic dependence. (*Id.* at 15-18.) Third, that the Area Office misapplied the totality of the circumstances legal standard and ignored relevant facts. (*Id.* at 19.)

With regard to the ostensible subcontractor rule, Appellant argues that the Area Office failed to apply the correct legal standard. (*Id.* at 6.) The Area Office did not identify the "primary and vital" requirements of the contract, and did not examine whether RSI or Amentum will perform those requirements. (*Id.*) Furthermore, although 13 C.F.R. § 121.103(h)(4) requires the Area Office to consider "[a]ll aspects" of the relationship between the prime and subcontractor, including the terms of the proposal and agreements between the prime and subcontractor, the Area Office did not do so here. (*Id.* at 6-7.) Appellant claims that the Area Office improperly limited its review only to whether Amentum is the incumbent prime contractor. (*Id.* at 7.)

Appellant argues that the "four key factors" stemming from *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011) are not relevant to the instant case. (*Id.*) This test is used when there is a follow-on procurement that is newly set aside for small businesses, and when the incumbent prime contractor is not eligible to compete for the new procurement. (*Id.*) It should not be not surprising that the *DoverStaffing* test failed to show affiliation here, given that the test is irrelevant to the instant situation. (*Id.* at 8.)

Appellant next contends that the Area Office made numerous errors of fact relating to the ostensible subcontractor allegations. (*Id.* at 8-15.) The Area Office failed to identify the "primary and vital" contract requirements, nor did the Area Office address how work would be divided between RSI and Amentum. (*Id.* at 8.) Appellant argues that the Area Office also ignored evidence that RSI will rely upon Amentum for experience and capabilities. (*Id.* at 9.) In support, Appellant points to the ceiling value of the instant contract as compared to RSI's prior prime contracts. (*Id.*) Further, RSI's proposal made repeated references to Amentum's capabilities, which the Area Office apparently overlooked. (*Id.*)

Appellant argues that Amentum rather than RSI will perform the primary and vital contract requirements. (*Id.* at 10.) Appellant claims that the primary and vital requirements are the LTS&M support services that will be performed at numerous sites throughout the United States. (*Id.*) To carry out these primary and vital requirements, "the contractor must possess technical experience managing numerous sites, which are subject to various regulatory regimes." (*Id.*, citing SOW at 2, 7-9.) Appellant maintains that RSI "only has experience dealing with a portion of these regulatory regimes at a single site," whereas Amentum has "experience at dozens of sites with the full spectrum of regulatory regimes." (*Id.*, emphasis Appellant's.) Appellant further criticizes RSI's "plan to assign qualified personnel without regard to the entity that employs the individual" as a way to conceal RSI's reliance on Amentum in RSI's proposal.

(*Id.* at 11.) Appellant asserts that RSI will rely upon Amentum "to provide the labor categories responsible for the LTS&M technical work," such as engineers and scientists. (*Id.*)

Appellant argues that the RSI's staffing approach, and references to the "RSI Team" rather than to RSI as the prime contractor, obscure which entity will perform the bulk of the contract. (*Id.* at 12.) Appellant maintains that RSI's price proposal shows that RSI will perform only 23% of labor hours under the contract. (*Id.*) Meanwhile, 31% of labor hours will be performed by non-RSI personnel, and the remaining 46% will be performed by "some unknown combination of prime and/or subcontractor personnel." (*Id.*) Appellant argues that the Area Office failed to consider these issues. (*Id.*)

Appellant maintains that RSI will rely upon Amentum for key personnel. (*Id.* at 13.) RSI's proposal shows that RSI will "only provide half" of the key personnel for the contract, and "Amentum will provide the other half." (*Id.*) The Area Office made no mention of key personnel in the size determination. (*Id.*)

Appellant argues that RSI relied upon Amentum for past performance. (*Id.*) The RFP defined relevant past experience as including only contracts valued at least $20.5 million per year and with a duration of at least three years. (*Id.*) RSI's own prior experience as a prime contractor is small compared to the value of the current procurement. (*Id.*) Furthermore, the RSI Team's only relevant past performance reference as a prime contractor belonged to Amentum, not to RSI. (*Id.*) Reliance upon Amentum for past performance suggests that RSI would be unable to perform the contract without Amentum. (*Id.* at 14.) In addition, although the Area Office recognized that RSI proposed its own past performance history, the Area Office failed to consider that RSI's own past performance was too small to the relevancy requirements of the RFP. (*Id.* at 15.)

Appellant alleges that Amentum participated substantially in drafting the proposal. (*Id.* at 14.) Appellant claims that the disparity in experience between RSI and Amentum, as well as language in the Teaming Agreement, suggest that Amentum was involved in drafting the proposal, and the Area Office should have explored this possibility. (*Id.*)

Appellant next attacks the Area Office's findings with regard to identity of interest. (*Id.* at 15.) Appellant claims that the Area Office based its decision on two facts, first that Appellant had alleged that 66% of RSI's receipts were from UCOR when the threshold at which affiliation is presumed is 70%, and second that RSI's average receipts from UCOR were below 70%. (*Id.*) The Area Office thus simply assumed that an identity of interest could not exist unless RSI's receipts from UCOR exceeded 70%, which is not the correct legal standard. (*Id.* at 15-16.) Contrary to the size determination, OHA has recognized that affiliation through economic dependence may arise when one concern is dependent upon another for a large majority of its revenue, or over 60%. (*Id.* at 16, citing *Size Appeal of Rockwell Med., Inc.*, SBA No. SIZ-5559 (2014) and *Size Appeal of Supreme-Technology, Inc.*, SBA No. SIZ-4092 (1995).)

Appellant argues that the Area Office also made factual errors of fact when considering the identity of interest allegations. (*Id.*) Appellant claims that the Area Office ignored and did not consider Appellant's claims that the large majority of RSI's revenue has been derived from

UCOR not just over a three-year period, but over a seven-year period. (*Id.*) The Area Office also never considered Appellant's allegation that nearly all of RSI's revenue currently is from UCOR. (*Id.* at 16-17.) Additionally, the Area Office did not consider the long-term commercial or strategic relationship between RSI and UCOR, and whether the companies have contracts for exclusive dealing or shared resources. (*Id.* at 17.)

Appellant contends that the Area Office erred by not adequately exploring the protest allegations. (*Id.* at 16, n.5.) An area office is charged with "using the initial [protest] information to commence a further investigation which culminates with a size determination that should include a fuller understanding of the facts involved," and an area office may not simply "ignore facts that are plainly part of the record or that are reasonably available to it in making a size determination." (*Id.*, quoting *Size Appeal of Fort Carson Support Servs.*, SBA No. SIZ-4740, at n.3 (2005) (PFR) and *Size Appeal of Tiger Enters., Inc.*, SBA No. SIZ-4848, at 5 (2007) (emphasis added by Appellant).)

Appellant claims that the Area Office made errors of law when considering the totality of the circumstances. (*Id.* at 18.) The Area Office summarily concluded that because it had found that RSI is not affiliated with other concerns through the ostensible subcontractor rule or economic dependence, "additional analysis due to the totality of the circumstances is not required." (*Id.*) The totality of the circumstances, though, can be an independent basis for a finding of affiliation, even though no other theory would support such a finding. (*Id.*, citing 13 C.F.R. (a)(5).) The Area Office thus did the "exact opposite" of what the regulation required. (*Id.*) Appellant further argues that by not analyzing the totality of the circumstances, the Area Office did not meaningfully consider the relationships between RSI, Amentum, and UCOR. (*Id.* at 19.)

Appellant concludes by requesting that OHA reverse the size determination and find that RSI is not small. (*Id.*) While OHA typically might remand a size determination if an area office conducts an inadequate investigation, such a result would be unjust here because DOE has already awarded the contract to RSI without awaiting resolution of Appellant's size protest. (*Id.*) A remand would entail significant delays, potentially enabling DOE to "frustrate the goals of the SBA protest process." (*Id.* at 19-20, citing *North Wind Site Services, LLC v. U.S.*, 142 Fed. Cl. 802 (2019).)

F. Supplemental Appeal

On May 19, 2020, after reviewing the Area Office file under an OHA protective order, Appellant moved to supplement its appeal. Appellant argues that the Area Office file confirms that the Area Office made errors of law and fact, and confirms that RSI is affiliated with Amentum and UCOR. (Supp. Appeal at 2-3.) Further, the Area Office file confirms that the Area Office misapplied the *DoverStaffing* test for unusual reliance when considering the ostensible subcontractor allegations, and there is no evidence that the Area Office reviewed "all aspects of the relationship" between RSI and Amentum, as the regulation requires. (*Id.* at 2.) Appellant renews its claims that the Area Office should have found affiliation through economic dependence. Lastly, the Area Office file shows that the Area Office failed to correctly evaluate the totality of the circumstances. (*Id.* at 3.)

Appellant claims that Amentum, not RSI, will perform the primary and vital requirements of the contract. (*Id.* at 4.) In its response to the size protest, RSI asserted that it will self-perform [XX]% of the contract requirements. (*Id.*) However, Appellant argues, RSI's proposal does not support RSI's position. (*Id.*) RSI points to Figure 1 of its price proposal, but this figure is "vague" and "omits workshare percentages altogether." (*Id.* at 4-5.) Figure 1 also indicates that, for three labor categories [XXXXX], work will be performed both by RSI and Amentum, with no specific division between the firms. (*Id.* at 5.)

Appellant maintains that RSI's proposal shows that RSI committed to perform only 23% of the contract work. (*Id.*) By contrast, according to Appellant, Amentum and TFE will share 31% of the work, RSI and TFE will share 8% of the work, and RSI and Amentum will share 38% of the work [XXXXXX]. (*Id.*) Appellant offers its own chart purporting to summarize this division of labor:

[XXXXXXXX]

(*Id.* at 6.)

Appellant alleges that, in order to self-perform [XX]% of the work as RSI claimed in its protest response, RSI would have to perform an additional [XX]% of the work, including all work that, based on Appellant's analysis of RSI's proposal, would be split with Amentum or TFE. (*Id.*) Therefore, Appellant concludes, the notion that RSI will self-perform [XX]% of the work is not credible. (*Id.*) In Appellant's view, RSI was intentionally vague with workshare percentages so as to avoid disclosing how much work each team member will perform. (*Id.* at 7.)

Appellant argues that Amentum, not RSI, will perform the primary and vital contract requirements. (*Id.* at 8.) Although RSI's proposal identified RSI as having the leading role in performing LTS&M work, the proposal also stated that Amentum would be a lead or support team member for other work related to the LTS&M requirements, specifically Long-Term Management and Storage of Mercury, the DRUM Program, the Uranium Leasing Program, and the Applied Studies and Technology Program. (*Id.* at 8-9.) RSI will not self-perform all of the LTS&M work. (*Id.* at 9.)

Appellant contends that the profit-sharing arrangement between RSI and Amentum shows that RSI is unusually reliant on Amentum. (*Id.* at 10.) The profit-sharing agreement guarantees Amentum [XX]% of the profits, yet Amentum's workshare is only [XX]%, according to RSI. (*Id.*) In Appellant's view, the "unsavory" disparity between workshare and profit distribution is evidence that "RSI could not compete effectively for the Contract without Amentum's support." (*Id.*)

Appellant next claims that RSI may have withheld requested information from the Area Office, which might have further shown that RSI is economically dependent on UCOR. (*Id.* at 11.) Specifically, RSI apparently did not provide information about its total receipts. (*Id.* at 12.) Appellant argues that the Area Office could, and should, have drawn an adverse inference against RSI, and should have presumed that the missing information would have shown economic dependence. (*Id.* at 12-13.)

Even without an adverse inference, though, the Area Office file shows that RSI should have been found economically dependent upon UCOR. (*Id.* at 13.) RSI represented to the Area Office that its receipts from UCOR were [XX]% in 2019, [XX]% in 2018, and [XX]% in 2017. Assuming these figures are accurate, this represents a large majority of RSI's revenue, and is enough to find economic dependence. (*Id.* at 14.) Appellant maintains that "RSI is not a viable business without revenues from UCOR." (*Id.*) Appellant also alleges that RSI currently relies on UCOR for nearly all of its revenue, that RSI and UCOR have a long-term relationship, and that RSI has "exclusive-dealing and unusual profit-sharing arrangements" with UCOR, circumstances which further suggest that RSI is economically dependent on UCOR. (*Id.*)

Appellant distinguishes the instant case from *Olgoonik*, referenced by RSI in response to the protest. (*Id.*) Contrary to RSI's claims, *Olgoonik* does not stand for the proposition that status as a subsidiary of an ANC is sufficient to rebut any possibility of economic dependence. (*Id.*) Rather, in *Olgoonik*, OHA found that the contested firm was not affiliated with a prime contractor from which it derived 85% of its revenues because those revenues were insufficient to sustain the protested firm's business operations. (*Id.* at 15.) The small business only was able to sustain its business operations with support from its ANC-owned parent companies. (*Id.*) By contrast, RSI has not proven, or even asserted, that it would be viable without the revenues derived from UCOR. (*Id.*)

Finally, Appellant argues that the Area Office file confirms that without Amentum, RSI's past performance evaluation would have been significantly weaker. (*Id.*) The RSI Team had only one relevant prime contract for purposes of the past performance evaluation, and that prime contract was Amentum's. (*Id.* at 16.) In addition, this prime contract was the only past performance reference cited in DOE's evaluation report to support RSI's past performance rating. (*Id.*) RSI's own prior prime contracts were considered too small to be relevant for the instant procurement, although DOE did find one RSI subcontract to meet the RFP's relevancy standards. (*Id.*)

G. RSI's Response

On June 3, 2020, RSI responded to the appeal and the supplemental appeal. As a preliminary matter, RSI objects that many of the arguments raised in the supplemental appeal should be considered untimely. (RSI Response at 2.) According to RSI, much of the supplemental appeal is based on arguments pertaining to RSI's proposal and evaluation, yet Appellant has had access to such information since April 3, 2020 through a bid protest at the Government Accountability Office (GAO). (*Id.*) As such, most of Appellant's supplemental appeal raises or restates issues which could and should have been presented in its initial appeal. (*Id.*)

Apart from being untimely, Appellant's allegations are meritless. Based on the record before it, the Area Office reasonably concluded that RSI did not violate the ostensible subcontractor rule. (*Id.* at 4.) Although the size determination did not expressly state which requirements were primary and vital, the Area Office nevertheless clearly considered that issue. (*Id.*) RSI's response to the protest addressed the issue extensively, and the Size Determination

itself states that the Area Office "reviewed [Appellant's] allegation that RSI will depend on the experience and expertise of Amentum to perform the contract, ***including the primary and vital requirements***, resulting in a violation to the ostensible subcontracting rule." (*Id.*, quoting Size Determination at 6 (emphasis added by RSI).)

RSI reiterates the argument, raised in its response to the protest, that the primary and vital requirements of the contract are the LTS&M requirements. (*Id.* at 6.) In its appeal, Appellant agreed that the primary and vital requirements are the LTS&M work. (*Id.*, citing Appeal at 10.) RSI's response to the protest demonstrated that RSI will self-perform [XX]% of the contract's LTS&M requirements, as well as [XX]% of the total contract. (*Id.*, citing RSI Protest Response at 9.) In contrast, [XX]% will go to TFE (a similarly-situated entity) and only [XX]% to Amentum, the alleged ostensible subcontractor. (*Id.*) RSI's proposal further made clear that RSI will "take the leading role in [the] LTS&M work." (*Id.* at 7.)

In addition to self-performing "the vast majority of the primary and vital requirements," RSI also will be responsible for the majority of the total contract. (*Id.*) The profit-sharing goals in the teaming agreement do not correspond exactly to work share, but still establish goals of [more than 50]% for RSI, [XX]% for TFE, and [XX]% for Amentum. (*Id.*) Thus, RSI will self-perform the majority of the contract. (*Id.*) "Because Amentum will perform neither the majority of the contract's LTS&M requirements (which [Appellant] agrees are the primary and vital requirements) nor the majority of the contract overall (which the Limitation on Subcontracting clause prohibits in any event), and RSI will manage the contract (a point that [Appellant] did not contest either in its size protest or in its appeal or supplemental pleading), the Area Office was right to find no violation of the ostensible subcontractor rule." (*Id.* at 7-8.)

RSI next disputes various claims made by Appellant regarding the ostensible subcontractor allegations. First, contrary to Appellant's suggestions, RSI is not unusually reliant upon Amentum for experience and capabilities. (*Id.*) Although the instant contract has a potential ceiling value of $1 billion, offerors were neither expected nor required to have prior experience performing contracts of this magnitude. Rather, the RFP defined contracts valued at least $20.5 million per year as being of similar size. (*Id.* at 9-10, citing RFP, Amendment 0006 at 103.) DOE's evaluation of RSI's past performance shows that DOE considered one of RSI's prior projects to be of relevant size. (*Id.* at 10.) Although two of Amentum's references were also deemed relevant, DOE has stated that it would have given RSI the same past performance rating based on RSI's reference alone. (*Id.* at 11.) Accordingly, the record is clear that RSI was in no way dependent on Amentum's past performance.

RSI reiterates its arguments that Amentum will not perform the primary and vital requirements of the contract, the LTS&M work. (*Id.* at 12.) The mere fact that Amentum brings "admittedly impressive LTS&M credentials" does not establish that RSI must intend to delegate all such work to Amentum. (*Id.*) Moreover, Figure 1 of RSI's price proposal, which Appellant utilizes to support its allegations, does not show that LTS&M related labor categories, such as engineers and scientists, will be supplied by Amentum. (*Id.* at 14.) RSI highlights that it will self-perform "nearly three quarters of the LTS&M requirements," whereas Amentum is responsible only for approximately [XX]%. (*Id.*)

Nor does the record establish that Amentum even will perform a substantial portion of the contract. (*Id.* at 15.) While Appellant complains that the proposal did not provide specific workshare estimates for each team member, such information was never requested by the RFP, and the absence of this information confirms that Appellant's allegations are based on nothing more than "suspicion and innuendo." (*Id.*) Appellant's allegation that RSI will perform 23% of the contract, non-RSI personnel will perform 31%, and the remaining 46% will be performed by an unknown combination of firms, is incorrect. (*Id.*) Appellant created a flawed "pseudo-estimate" to support these allegations, but Appellant's estimate is wrong and misleading for several reasons. (*Id.* at 15-17.) TFE is a similarly-situated entity so its work cannot give rise to an ostensible subcontractor violation, and Appellant made faulty assumptions as to how work would be divided among RSI, Amentum, and TFE. (*Id.* at 16.)

RSI agrees that a precise breakdown of work is "indeterminable" based solely on the proposal. (*Id.*) But the Area Office did not have to rely only upon the proposal, because it had [President's] declaration, provided to the Area Office in response to the protest, which stated that RSI would self-perform [XX]% of the work, TFE [XX]%, and Amentum [XX]%. (*Id.*)

Contrary to Appellant's suggestions, [President's] declaration is fully consistent with RSI's proposal. (*Id.* at 17-18.) RSI argues that it developed its proposal with such workshares in mind, and so [President's] declaration also is not a *post hoc* rationalization. (*Id.*)

RSI argues that the use of the term "RSI Team" is not problematic, because Amentum is not the dominant partner and RSI is not unusually reliant on Amentum. (*Id.* at 19.) Furthermore, RSI will self-perform the primary and vital functions of the contract. (*Id.*)

Next, RSI insists that it will not rely on Amentum for key personnel. (*Id.*) Appellant has not disputed that RSI will manage the contract. (*Id.* at 20.) While two of four key personnel will be Amentum employees, they are subordinate to the IDIQ Manager, who is an RSI employee. (*Id.* at 20-21.)

RSI renews its arguments that it did not rely on Amentum for past performance to win the contract. (*Id.* at 21.) DOE has made clear that RSI had relevant past performance of its own, and that RSI still would have received the highest rating for past performance even without Amentum. (*Id.*)

RSI denies that Amentum drafted large portions of RSI's proposal. (*Id.* at 22.) RSI points to provisions within the teaming agreement stating that proposal preparation would be "managed and led by RSI" and that "RSI retains sole authority to make a final decision" over proposal form and content. (*Id.*, citing Proposal, Vol. 1 at 45.)

RSI next argues that the Area Office was correct to find that it is not economically dependent on UCOR and that the firms are not affiliated through identity of interest, for several reasons. (*Id.* at 23.) First, contrary to Appellant's allegations, it is immaterial what percentage of current revenues RSI derives from UCOR, as the relevant date for determining size is September 27, 2019, the date of proposal submission. (*Id.* at 24.)

Second, RSI argued to the Area Office, and provided supporting evidence, that its contracts with UCOR average [XX]% over the relevant three-year period, which is less than the 70% threshold that creates a presumption of economic dependence, less than the 66% estimate Appellant alleged, and less than the 60% threshold which Appellant claims can "generally" show dependence. (*Id.* at 25.)

Third, the percentage of revenue derived from another firm is not controlling in any event; rather, OHA's analysis must always turn upon consideration of the specific facts of the case. Here, RSI is ultimately owned and controlled by ASRC, a very large ANC with annual revenues of approximately $3.8 billion. "This fact alone refutes [Appellant's] suggestion that RSI is somehow subject to control by UCOR." (*Id.* at 26.) In *Olgoonik*, OHA recognized that a wholly-owned subsidiary of an ANC that was able to rely upon the support of its ANC parent and sister companies for its viability was not affiliated with an alleged affiliate, even when the concern derived all, or nearly all, of its revenue from that alleged affiliate. (*Id.*) Similarly, in the instant case, the Area Office found, and Appellant does not dispute, that ASRC controls RSI. Given that ASRC "has far greater economic wherewithal than UCOR," there is no possibility that RSI could be dependent upon UCOR for viability. (*Id.* at 27.) Appellant's attempts to distinguish *Olgoonik* are unavailing, as "[t]he critical fact in *Olgoonik* was not that the challenged firm had suffered massive losses, but that it was able to depend upon its ANC corporate family for viability." (*Id.*)

Fourth, RSI attacks the additional circumstances that, according to Appellant, suggest economic dependence. (*Id.* at 28-31.) In RSI's view, none of these circumstances, either individually or collectively, are indicative of economic dependence.

RSI contends that the Area Office was correct to find that it is not affiliated with Amentum or UCOR under the totality of the circumstances. The central issue in any type of affiliation is control, and nothing in the record would support such a finding of control. (*Id.* at 31.) RSI maintains that, after having individually rejected the bulk of Appellant's protest allegations as meritless, "the Area Office then implicitly concluded that those same flimsy allegations did not create affiliation under the totality of the circumstances when considered collectively because they did not establish that the alleged affiliates had the power to control RSI." (*Id.* at 32.) While the Area Office might have added a sentence "to make that implicit conclusion express," this omission is not valid basis to grant the appeal, because the record does not support a finding that any alleged affiliate has the power to control RSI. (*Id.*, citing *Size Appeal of Optivision, Inc.*, SBA No. SIZ-5740 (2016).)

RSI disputes the notion that, if OHA were to find the appeal meritorious, OHA should reverse, rather than remand, the size determination. (*Id.* at 33.) Appellant has not explained why utilizing normal procedures would result in any "miscarriage of justice." (*Id.*)

RSI concludes by reiterating its objections to Appellant's supplemental appeal as untimely. (*Id.* at 34-37.) Regarding Appellant's claim that RSI may have failed to provide receipts information as required by SBA Form 355, RSI contends that such documentation was required only under receipts-based size standards, whereas the instant RFP utilized an employee-based size standard. (*Id.* at 37.) Further, RSI provided requested tax returns and truthfully

explained that it did not provide RSI's 2018 receipts because they were consolidated with ASRC's taxes. (*Id.* at 38.)

H. CO's Memorandum

On June 5, 2020, two days after the close of record, the CO filed a memorandum in response to the appeal. The CO states that, prior to award, she reviewed RSI's proposal and found it to be compliant with all terms and conditions of the RFP, including limitations on subcontracting. (CO's Memorandum, at 1.) In addition, she found no basis to question RSI's self-certification as a small business. (*Id.*) The CO states that her opinions remain unchanged after reviewing the instant appeal. (*Id.*) In an e-mail accompanying her memorandum, the CO explains that she was delayed in filing her memorandum due to a personal emergency.

On June 5, 2020, Appellant objected to the CO's memorandum as untimely. (Objection at 1.) In addition, Appellant maintains, the memorandum has little, if any, probative value, as it consists of conclusory remarks without supporting analysis or rationale. (*Id.*)

RSI opposed Appellant's objection. (Opp. at 1.) In RSI's view, no party is prejudiced by the two-day delay in filing the memorandum, and there is good cause to consider the CO's views due to her "unique perspective on the procurement and the proposal under scrutiny here." (*Id.*) RSI requests that OHA retroactively extend the close of record until June 5, 2020, to permit consideration of the CO's memorandum.

I agree with RSI that no party is prejudiced by the slight delay in filing the CO's memorandum, particularly in light of Appellant's position that the memorandum lacks probative value. As such, the close of record is hereby extended until June 5, 2020, and the CO's memorandum is ADMITTED into the record.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

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

1. Ostensible Subcontractor Rule

Beginning with the ostensible subcontractor rule, Appellant maintains that Amentum, rather than RSI, will perform the primary and vital requirements of the contract. In addition, Appellant argues, RSI relied on Amentum for past performance, and therefore RSI will be dependent upon Amentum to perform the contract. The record, though, does not support Appellant's contentions.

OHA has explained that "[t]he initial step in an ostensible subcontractor analysis is to determine whether the prime contractor will self-perform the contract's primary and vital requirements." *Size Appeal of Innovate Int'l Intelligence & Integration, LLC*, SBA No. SIZ-5882, at 6 (2018). The "primary and vital" requirements are those associated with the principal purpose of the acquisition. *Size Appeal of Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312, at 10 (2012); *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 17 (2011). Not all the requirements identified in a solicitation can be primary and vital, and the mere fact that a requirement is a substantial part of the solicitation does not make it primary and vital. *Id.* Frequently, the primary and vital requirements are those which account for the bulk of the effort, or of the contract dollar value. *Size Appeal of Social Solutions Int'l, Inc.*, SBA No. SIZ-5741, at 12 (2016); *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359, at 12 (2012). It is, however, also appropriate to consider qualitative factors, such as the relative complexity and importance of requirements. *Id.* 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, Appellant highlights that the Area Office did not specify which requirements the Area Office considered to be primary and vital. While this is true, such an omission is not fatal to a size determination, because it is well-settled law that "a contract's primary and vital requirements are ascertained from the solicitation itself." *Size Appeal of Kupono 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)). Further, "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).

Here, a review of the RFP establishes that the Long-Term Surveillance and Maintenance (LTS&M) support services are the primary and vital requirements of this solicitation. The RFP described a variety of LTS&M work - such as environmental inspections, cleanup, and monitoring - that the contractor will perform to support DOE's long-term management of contaminated sites. Section II.A, *supra*. In performing these services, the contractor also is

charged with "significant asset management responsibilities" as well as "significant information and technology management responsibilities," but the RFP emphasized that such work will be in support of the LTS&M services. *Id.* Accordingly, the RFP explained that "[t]he Contractor must be adept at integrating all the various functions and skillsets needed for a robust LTS&M program - environmental management, data management, records management, asset management, and stakeholder engagement." *Id.* The fact that the CO assigned NAICS code 562910, Environmental Remediation Services, to the instant RFP, and that LTS&M costs represent a majority of DOE's funding for its Legacy Management program, further support the conclusion that LTS&M support services are the primary and vital aspects of this procurement. Sections II.A and II.C, *supra*.

Appellant also observes that the Area Office failed to offer any rationale for concluding that RSI, rather than Amentum, will perform the primary and vital contract requirements. Instead, the Area Office stated, in conclusory fashion, that it found no merit to Appellant's "allegation that RSI will depend on the experience and expertise of Amentum to perform the contract, including the primary and vital requirements." Section II.D, *supra*.

Again, while I do not disagree with Appellant that the Area Office could have provided a more cogent explanation for its decision, the record before the Area Office nevertheless was sufficient for the Area Office to find that RSI will self-perform a majority of the primary and vital requirements. The Area Office had access to RSI's proposal, which designated RSI as the prime contractor and as the "lead" for the LTS&M work, and which further indicated that RSI would at least partially staff a majority of the labor categories, including labor categories for complex work such as Scientists, Engineers, and Environmental Specialists. Section II.C, *supra*. The proposal also stated that RSI would enjoy a majority ([XX]%) of profits. *Id.* The RFP did not request, and RSI's proposal therefore did not contain, a detailed breakdown of the respective roles and responsibilities between RSI and its subcontractors. These matters are discussed, however, in [President's] sworn declaration submitted in response to Appellant's protest. In his declaration, [President] avers that RSI will self-perform approximately [XX]% of the LTS&M work, as well as [XX]% of the overall contract. *Id.* Although Appellant notes that [President's] declaration was created after the date to determine size (*i.e.*, after the date of RSI's self-certification as small with its proposal), 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 Nationwide Pharm., LLC*, SBA No. SIZ-6027, at 16 (2019); *see also Size Appeal of Inquiries, Inc.*, SBA No. SIZ-6008, at 23 n.5 (2019); *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, [President's] declaration does not conflict with RSI's proposal, and indeed purports to describe an intended division of labor which existed at the time of proposal submission. Section II.C, *supra*. Accordingly, the Area Office could properly review [President's] declaration in deciding whether RSI will self-perform the primary and vital contract requirements, and could reasonably conclude, based on the available record, that RSI will self-perform a majority of the primary and vital requirements.[2]

[2] In its supplemental appeal, Appellant alleges, based on Appellant's analysis of RSI's proposal, that RSI committed to perform only 23% of the contract, with another 38% split

Appellant also contends that, even if RSI will self-perform the primary and vital contract requirements, RSI will be unusually reliant upon Amentum to perform the contract. Appellant emphasizes in particular that Amentum was the only member of RSI's team with relevant experience as a prime contractor.

I find Appellant's arguments unpersuasive. RSI submitted three past performance references for itself, three for Amentum, and three for TFE. DOE determined one of RSI's references to be not only similar in scope and complexity, but also larger than the RFP's size relevancy requirement. Section II.C, *supra*. Although RSI's relevant reference was not as a prime contractor, the RFP did not require that experience be as a prime contractor in order to be considered relevant. Section II.A, *supra*. The record thus does not support the conclusion that RSI relied upon Amentum for past performance. Further, even if OHA were to find that RSI did rely upon Amentum for past performance, OHA has repeatedly held that past performance is only one among several factors in an ostensible subcontractor rule analysis, and is not by itself sufficient to establish violation of the ostensible subcontractor rule. *Size Appeal of Milani Constr., LLC*, SBA No. SIZ-5898, at 7 (2018); *Innovate Int'l Intelligence & Integration*, SBA No. SIZ-5882, at 7; *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). No other factors are identified here that are strongly suggestive of unusual reliance.

OHA has explained that "[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). Here, RSI will self-perform a large majority of the primary and vital requirements, as well as a large majority of the total contract, and will manage the contract through the IDIQ Manager, an RSI employee. Appellant has not established that RSI relied heavily upon Amentum for past performance, or that RSI otherwise is dependent upon Amentum to perform the contract. Accordingly, the Area Office correctly found no violation of the ostensible subcontractor rule.

2. Economic Dependence

Appellant also contends that the Area Office erred by failing to find RSI affiliated with UCOR through economic dependence. Appellant maintains that, while it may be true that RSI has derived less than 70% of its revenues from UCOR over its three latest fiscal years, the Area Office nevertheless could, and should, have found affiliation through economic dependence.

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between RSI and Amentum. Section II.F, *supra*. Appellant, though, has not established that this analysis is accurate, and OHA must give greater weight to "specific, signed, factual evidence" - such as RSI's proposal and [President's] sworn declaration - than to "general, unsupported allegations or opinions." 13 C.F.R. § 121.1009(d). Further, Appellant acknowledges that, of the 38% of work that purportedly would be split between RSI and Amentum, Appellant is unable to determine how much would be performed by RSI itself. Accordingly, Appellant's own analysis is not inconsistent with the notion that RSI will self-perform at least a majority of the total contract, and a majority of the primary and vital contract requirements.

SBA regulations state that affiliation through identity of interest may arise between "firms that are economically dependent through contractual or other relationships." 13 C.F.R. § 121.103(f). In interpreting this provision, OHA has long held that, when one concern depends upon another concern for 70% or more of its revenues, a strong presumption arises that the concern is economically dependent upon, and therefore affiliated with, the other. *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834 (2007). Such a presumption is rebuttable, however, and OHA has, in fact, found the presumption to be rebutted under certain circumstances. In one such case, OHA found the presumption rebutted when the challenged firm, a wholly-owned subsidiary of an ANC, demonstrated that it had access to the resources of its ANC parent and sister companies, and thus was not dependent upon the revenues earned from the alleged affiliate, a company that was not associated with the ANC. *Size Appeal of Olgoonik Solutions, LLC*, SBA No. SIZ-5669 (2015).

Historically, the 70% threshold existed only in OHA case law, not in SBA's affiliation regulations. Effective June 30, 2016, though, SBA amended its affiliation regulations to incorporate the 70% threshold. 81 Fed. Reg. 34,243 (May 31, 2016). As a result, SBA regulations now state that "SBA may presume an identity of interest based upon economic dependence if the concern in question derived 70% or more of its receipts from another concern over the previous three fiscal years." 13 C.F.R. § 121.103(f)(2). Further, according to the current version of the rule, a presumption of economic dependence "may be rebutted by a showing that despite the contractual relations with another concern, the concern at issue is not solely dependent on that other concern." 13 C.F.R. § 121.103(f)(2)(i).

In the instant case, the Area Office found, based on the record before it, that RSI derived less than 70% of its receipts from UCOR over the three fiscal years prior to self-certification. Sections II.C and II.D, *supra*. Specifically, RSI's contracts with UCOR averaged approximately [XX]% over this three-year period. *Id.* Appellant questions the accuracy of the [XX]% figure, but does not point to any evidence that contradicts it. Accordingly, the Area Office correctly determined that the presumption at § 121.103(f)(2) does not apply in this case. Moreover, even if the presumption did apply, RSI, like the challenged firm in *Olgoonik*, is a wholly-owned subsidiary of an ANC. The Area Office thus could reasonably conclude that any presumption would have been rebutted, as RSI logically could not be "solely dependent" upon UCOR - as § 121.103(f)(2)(i) now provides - given that RSI has access to the resources of its ANC parent and sister companies.

On appeal, Appellant alleges that RSI presently derives more than 70% of its receipts from UCOR. OHA, though, recently considered, and rejected, a similar argument in *Size Appeal of Oak Grove Techs., LLC*, SBA No. SIZ-6051 (2020). There, OHA found that, under the current version of § 121.103(f), an area office need only consider what proportion of the challenged firm's receipts were derived from another concern over its three most recently completed fiscal years. *Oak Grove*, SBA No. SIZ-6051, at 10-11. Accordingly, the area office in *Oak Grove* committed no error in confining its review only to that time period. *Id.* at 11. Similarly, in the instant case, it is immaterial what percentage of RSI's receipts currently are derived from UCOR.

Appellant also contends that RSI and UCOR may still share an identity of interest because RSI derived almost [XX]% of its receipts from UCOR over the three fiscal years in question. Appellant points to *Size Appeal of Rockwell Medical, Inc.*, SBA No. SIZ-5559 (2014) and *Size Appeal of Supreme-Technology, Inc.*, SBA No. SIZ-4092 (1995) for the proposition that two firms may be economically dependent where one depends on another for 60% or more of its revenues.

Appellant's arguments fail for two reasons. First, both *Rockwell* and *Supreme-Technology* were decided before SBA amended its affiliation rules pertaining to economic dependence, and before OHA issued its *Olgoonik* decision. Indeed, the *Supreme-Technology* case substantially pre-dates even the *Faison* decision, where OHA first introduced the 70% threshold for economic dependence. Appellant has not persuasively explained how *Rockwell* and *Supreme-Technology* apply in light of subsequent changes in the law. In particular, Appellant has not addressed the new language at 13 C.F.R. § 121.103(f)(2)(i), which now indicates that a presumption of economic dependence may be rebutted by showing that the challenged firm is "not solely dependent" upon the alleged affiliate. Given this phrasing of § 121.103(f)(2)(i), it is not clear that a concern such as RSI, a wholly-owned subsidiary of an ANC, can still be affiliated with a third party through economic dependence.

Second, both *Rockwell* and *Supreme-Technology* are, in any event, readily distinguishable from the instant case. In *Rockwell*, OHA observed that "where a concern is dependent for over 70% of its revenue on another concern, where there need be no other basis for finding economic dependence." *Rockwell*, SBA No. SIZ-5559, at n.3. OHA commented, however, that affiliation could exist if a firm derived at least 60% of its revenues from another, provided there were also other indicia of economic dependence. *Id.* at 6. Because the challenged concern in *Rockwell* did not derive even 60% of its revenues from the alleged affiliate, OHA found no affiliation through economic dependence. *Id.* at 6-7. *Rockwell*, then, does not support the conclusion that economic dependence necessarily arises whenever one firm depends upon another for at least 60% of its revenues.

In *Supreme-Technology*, the concerns in question were owned by a father and son respectively, and OHA found that, irrespective of any identity of interest through economic dependence, "there is affiliation because [the two concerns] have an identity of interest based on a family relationship." *Supreme-Technology*, SBA No. SIZ-4092, at 3. Accordingly, *Supreme-Technology* involved separate and independent grounds for affiliation that are not present here. *26 For these reasons, Appellant has not shown that the Area Office erred in concluding that RSI is not affiliated with UCOR through economic dependence.

3. Totality of the Circumstances

Lastly, I find no merit to Appellant's contentions that the Area Office should have found RSI affiliated with other concerns - such as Amentum, UCOR, or Jacobs - under the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). OHA has repeatedly held that "in order to find affiliation through the totality of the circumstances, 'an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.'" *Size Appeals of Med. Comfort Sys., Inc. et al.*, SBA No. SIZ-5640, at 15 (2015) (quoting *Faison*, SBA

No. SIZ-4834, at 11); *see also Size Appeal of Nat'l Sec. Assocs., Inc.*, SBA No. SIZ-5907, at 10 (2018); *Size Appeal of First Nation Group d/b/a Jordan Reses Supply Co., LLC*, SBA No. SIZ-5807, at 9 (2017). It follows, therefore, that merely identifying "connections between concerns does not suffice to show that they are affiliated under the totality of the circumstances." *Size Appeal of Hendall, Inc.*, SBA No. SIZ-5888, at 10 (2018). Here, as discussed above, the Area Office reasonably concluded that RSI is not affiliated with other concerns through the ostensible subcontractor rule or through economic dependence, and Appellant has not alleged other facts or circumstances that might enable Amentum, UCOR, and/or Jacobs to control RSI, or *vice versa*. It follows, then, that RSI is not affiliated with other concerns under the totality of the circumstances.

IV. Conclusion

Appellant has not shown clear error in the size determination. The appeal therefore is DENIED.[3] This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge

[3] In light of this outcome, it is unnecessary to rule on RSI's motion to dismiss portions of the supplemental appeal as untimely. *See* Section II.G, *supra*.