United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Montech, Inc., Appellant, Appealed From Size Determination No. 05-2021-007	SBA No. SIZ-6100 Decided: May 26, 2021

APPEARANCES

Jeffrey Weinstein, Esq., The Weinstein Law Group, PLLC, Washington, D.C., for the Appellant.

Robert K. Tompkins, Esq., Hillary J. Freund, Esq., Kelsey M. Hayes, Esq., Holland & Knight LLP, Washington, D.C., for ISS Action, Inc.

JiSan A. Lopez, Esq., Office of General Counsel, Tracy CDeBaca, Contracting Officer, National Nuclear Security Administration, Albuquerque, New Mexico

DECISION[1]

I. Introduction and Jurisdiction

On January 6, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination No. 05-2021-007, concluding that Montech, Inc. (Appellant) is not a small business for the subject procurement. The Area Office specifically found that Appellant is affiliated with its subcontractor, The Whitestone Group, Inc. (TWG), under the "ostensible subcontractor" rule.[2] On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office 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.

[2] The ostensible subcontractor rule previously was found at 13 C.F.R. § 121.103(h)(4), but effective November 16, 2020, SBA redesignated the rule as § 121.103(h)(2). *See* 85 Fed. Reg. 66,146 (Oct. 16, 2020). The text of the rule, however, remained unchanged.

Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted and the size determination is reversed.

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 August 5, 2020, the U.S. Department of Energy (DOE), National Nuclear Security Administration (NNSA) issued Request for Proposals (RFP) No. 89233120RNA000078 for security services at the NNSA Albuquerque Complex and the New Albuquerque Complex Project (NACP), located on the grounds of Kirtland Air Force Base in Albuquerque, New Mexico.[3] (RFP at 1-2.) The Contracting Officer (CO) set aside the procurement entirely for Women-Owned Small Businesses (WOSBs), and assigned North American Industry Classification System (NAICS) code 561612, Security Guards and Patrol Services, with a corresponding size standard of $22 million average annual receipts. (*Id.*)

The RFP's Performance Work Statement (PWS)[4] explained that the contractor will perform "a range of professional security services." (PWS at 4.) Such services will include, but are not limited to, the following:

> security program planning, physical security, protective force (PF), alarm monitoring and response, security management and supervision, quality assurance, access control, security officer and visitor control specialist training, security patrols, implementing and maintaining appropriate staffing for all positions, non-security emergency response, plans and procedures development and implementation, alarm monitoring station, monitoring and dispatch, visitor control and Homeland Security Presidential Directive 12 (HSPD-12) credential issuance and control, performance testing, report writing and other duties as required by DOE/NNSA orders and directives in the implementation of an effective security program.

(*Id.*) The PWS identified the "Project Manager" and the "Training Manager/Trainer" as "Key Personnel." (*Id.* at 6.) Other required labor categories were: Shift Supervisor/Lieutenant; Security Guard Level II/Security Officer; Alarm Monitor; and Badge Specialist/Badging Officer. (*Id.* at 6-7.) The contractor "shall provide and maintain adequate numbers of trained, appropriately cleared and qualified personnel to ensure all positions are properly staffed in accordance with

[3] The NACP is a new administrative building presently under construction. (PWS at 3.)

[4] NNSA issued a revised version of the PWS with RFP Amendment 0001. Unless otherwise indicated, all citations are to the revised PWS.

this PWS and Attachment 3 Pricing Spreadsheet." (*Id.* at 5.) Nearly all positions required DOE "Q" level security clearance, equivalent to "Top Secret" level, and the PWS emphasized that the contractor must "provide personnel with the ability to obtain a 'Q' clearance." (*Id.* at 6, 8, 20.) According to the PWS, the contractor should expect to immediately provide 18.34 full-time equivalents (FTEs) as of contract award. (*Id.* at 6.) However, an estimated 29.41 FTEs, who will collectively perform approximately 54,704 labor hours, were anticipated for each full year of the contract. (RFP, Appx. 1 at 8; RFP, Attach. 3, Pricing Spreadsheet.)

A copy of an existing Collective Bargaining Agreement (CBA) between the incumbent prime contractor, TWG, and United Government Security Officers of America Local 373 was provided as an attachment to the RFP. (RFP, Attach. 6.) The CBA indicated that contractor employees performing services covered by the CBA are to be "paid wage rates and fringe benefits set forth in the current [CBA] and modified extension agreement(s)." (*Id.* at 3.) In the event that the existing prime contract expires or is terminated, and "to the extent [permitted] by controlling law, the economic portions of [the CBA] will be binding upon the successor." (*Id.* at 11-12.) The CBA stated that TWG, as the employer, has "the right to: hire, assign, schedule, layoff, recall, promote, demote, transfer, suspend, discharge, or otherwise discipline employees for just cause," subject to the terms of the CBA. (*Id.* at 16-17.) However, "[w]hen a vacancy arises [as a result of a layoff], the employer shall recall employees in accordance with seniority." (*Id.* at 20.) The employer must notify the union of all new hires or terminations. (*Id.* at 27.) Attachment 10, entitled "Questions and Answers," provided additional information about the prime contractor's responsibilities under the CBA. (RFP, Attach. 10.) Asked whether all incumbent personnel possess the necessary security clearances, NNSA confirmed that "[a]ll incumbent workforce positions are cleared." (*Id.* at 6.)

The PWS stated that, in preparing its proposed staffing, an offeror must:

> develop Security Officer (SO) work schedules consistent with existing collective bargaining agreements and contracts and must be based on the following guidelines, where appropriate.
>
> No more than twelve (12) total hours per workday, excluding shift change and equipment issuing activities, should be scheduled.
>
> No more than sixty (60) total hours per workweek, excluding shift change and equipment issuing activities, should be scheduled.
>
> Continuous protective services are required 24 hours per day, 365 days per year by the Alarm Monitor II and Security Guard II/Security Officer positions. With the exception of the Project Manager, Training Manager and Badge Specialist/Badging Officer positions who must comply with this PWS and [CBA] requirements regarding holiday hours.

(PWS at 10 (internal citations omitted).)

The RFP stated that NNSA would award the contract to the offeror with the lowest-price technically-acceptable proposal. (RFP, Appx. 1 at 11.) Proposals would be evaluated on two factors: (1) "Technical Capability" (comprised of three subfactors: "Security Requirements," "Personnel Qualifications," and "Staffing") and (2) Cost/Price. (*Id.* at 11-12.) Under the "Technical Capability" factor, NNSA would evaluate proposals as either "Technically Acceptable" or "Technically Unacceptable." (*Id.* at 11.) Only proposals receiving a "Technically Acceptable" rating would be considered for award, and of those "the proposal representing the lowest evaluated price will be selected." (*Id.*) The RFP did not require offerors to submit information about their corporate experience or their past performance on similar projects.

The RFP contemplated the award of a single, time-and-materials contract with a one-year base period and four one-year options. (*Id.* at 8-9.) Proposals were due September 7, 2020. (RFP, Amendment 0001, at 1.) Appellant and ISS Action, Inc. (ISS Action) submitted timely offers.

B. Appellant's Proposal

Appellant submitted its proposal on September 4, 2020. (Proposal, Vol. at 1.) The proposal stated that, for the instant procurement, Appellant will partner with TWG to form "Team Montech." (*Id.*) Appellant will be the prime contractor and TWG will be Appellant's sole subcontractor. (*Id.* at 1-2.) The proposal described four contracts previously performed by Appellant for various components of DOE, and two contracts previously performed by TWG. (*Id.* at 7-11.) Appellant's four contracts were for "Transcription Support Services," "Court Reporting Services," "Utility Management Support Services," and "Fact Finding Investigation Support Services." (*Id.* at 8-10.)

The proposal asserted that "Team Montech is the Incumbent." (Proposal, Vol. II, at 1.) To perform the contract, "[Appellant] will utilize [TWG's] fully staffed and equipped security operations, along with their solid understanding of all pertinent NNSA policies and requirements at the Albuquerque Complex." (*Id.*)

According to the proposal, Team Montech is capable of "execut[ing] the contract within five (5) working days" and has obtained "Letters of Intent" from incumbent personnel. (*Id.*) The proposed Project Manager, [Project Manager], currently serves as TWG's Project Manager on the incumbent contract. (*Id.* at 3.) In this capacity, he has managed, supervised, and counseled "16 Protective Force Security Officers, four (4) Visitor Control/Badge Office personnel, and one (1) Assistant Manager; for a total of 21 personnel." (*Id.*) The proposal included a Letter of Intent, signed by [Project Manager], expressing his "willingness and commitment as a Key Personnel member being proposed within Team Montech's offer." (*Id.* at 5.) According to a "Team Montech Organizational Chart" included in the proposal, the Project Manager will be subordinate to the "Montech/Whitestone (Corporate Program Management Office)." (*Id.* at 9.)

The proposed Training Manager, [Training Manager], currently serves as TWG's Training Manager on the incumbent contract. (*Id.* at 6.) The proposal included a Letter of Intent, signed by [Training Manager], expressing his "willingness and commitment as a Key Personnel member being proposed within Team Montech's offer." (*Id.* at 8.) According to the "Team

Montech Organizational Chart," the Training Manager is subordinate to the Project Manager. (*Id.* at 9.)

The proposal included a table outlining Appellant's approach to staffing the contract. In addition to the Project Manager, the Training Manager, and the Shift Supervisor/Lieutenant, Appellant proposed 3.38 Badge Specialist/Badging Officer FTEs; 9.48 Alarm Monitor II FTEs; and 12.86 Security Guard II/Security Officer FTEs. (*Id.* at 9-10; Proposal, Vol. III, Pricing Spreadsheet.)

The proposal stated that:

> ***Team Montech***'s staffing approach is to hire qualified incumbent employees immediately. Our team understands these individuals have the institutional knowledge and experience critical to maintaining mission continuity. Our Subcontractor (current incumbent), [TWG], is fully staffed at the [NNSA] Albuquerque Complex. ***Team Montech*** has secured the commitment of the key personnel and incumbent staff to onboard every position identified as necessary for completing the requirements of the contract. Our goal is to preserve and maintain the institutional knowledge, qualifications, and first-hand experience of existing staff. . . .
>
> In the event incumbent personnel do not meet the new contract standards, we will recruit new personnel to backfill immediately in order to meet mission requirements.

(Proposal, Vol. II, at 9.) According to the proposal, there is "Low" risk that "***Team Montech*** captures less than 100% of the incumbent staff within five (5) days" of contract award. (*Id.* at 12.)

The proposal stated that "once our incumbent capture efforts have been completed," Appellant will conduct a "gap analysis" to determine if additional staffing would be required. (*Id.* at 10.) To fill any such vacancies, Appellant will draw upon its "existing candidate pools" of qualified personnel. (*Id.*) However, "[i]f qualified candidates cannot be identified from our internal resource pool, we will [XXXXXXXXXXXX]." (*Id.*)

The proposal stated that [XXXXXXXXXXXXXXXXXXXXXXXXXXX]. (*Id.*) Additionally, candidates may be [XXXXXXXXXXXXXXXXXXXXXXXXXX]. (*Id.*) [XXXXXXXXXXXXXXXXXXX]. (*Id.*)

The Pricing portion of Appellant's proposal indicated that the Project Manager will be an employee of Appellant, whereas the Training Manager and Shift Supervisor/Lieutenant will be employees of TWG. (Proposal, Vol. III, Pricing Spreadsheet, Labor Crosswalk.) The three remaining labor categories — Badge Specialist/Badging Officer, Alarm Monitor II, and Security Guard II/Security Officer — would be [XXXXXXXXXXXXX]. (*Id.*) In total, Appellant's FTEs would perform [a majority of] labor hours for each year of contract performance, and TWG's FTEs would perform [a minority]. (*Id.*)

PWS Labor Categories	Montech (Prime)	[TWG] (subcontractor)
Project Manager (Montech)	[100%]	0
Training Manager / Trainer ([TWG])	0	[100%]
Shift Supervisor / Lieutenant ([TWG])	0	[100%]
Security Guard II / Security Officer (Team Montech)	[XXX]	[XXX]
Alarm Monitor II (Team Montech)	[XXX]	[XXX]
Badge Specialist / Badging Officer (Team Montech)	[XXX]	[XXX]
Total	[More than 50%]	[Less than 50%]

(*Id.*)

C. Teaming Agreement

Appellant and TWG entered into a Teaming Agreement, dated August 24, 2020, for the purpose of competing for the instant procurement. (Teaming Agreement at 1.) The Teaming Agreement identified Appellant as the prime contractor and TWG as the subcontractor. (*Id.*)

A "Statement of Work" included with the Teaming Agreement provided, in part:

> [Appellant's] goal is to grant [TWG] a [less than 50%] percent workshare (or as close to [XX] percent) on this effort. [Appellant's] ability to allocate work to [TWG] is dependent on [TWG's] ability to provide available staffing that meet the required labor qualifications and clearance levels. All candidates must be approved by [Appellant] and [NNSA].

(*Id.* at 10.)

D. Protest

On November 30, 2020, the CO informed ISS Action that Appellant was the apparent awardee. On December 7, 2020, ISS Action filed a size protest contending that Appellant is affiliated with TWG in contravention of the ostensible subcontractor rule. (Protest at 4.) ISS Action alleged that the primary and vital contract requirements "involve professional security services expertise, personnel, materials, supplies, and other resources." (*Id.* at 5.) Appellant, though, "has no professional security services experience," and likewise lacks "qualified personnel necessary to perform the requirements of the Contract." (*Id.*) As a result, Appellant must rely upon TWG for "a large majority, if not all, of its workforce." (*Id.* at 6-7.)

According to ISS Action, TWG, the incumbent contractor, is not a WOSB and is not small under NAICS code 561612. (*Id.* at 7.) ISS Action asserted that Appellant will "bring

nothing to the procurement but its [WOSB] status," and that Appellant will be unduly reliant upon TWG. (*Id.* at 7-8, citing *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011).)

E. Protest Response

The CO forwarded the protest to the Area Office for review. On December 14, 2020, Appellant responded to the protest. Appellant denied the allegation that it lacks the ability to perform the primary and vital contract requirements. (Protest Response at 2.) Appellant's President, Ms. Monica Jojola, [XXXXXXXXXXXXXXXXXXXXX]. (*Id.* at 3.) Although [XX] TWG personnel will "assist in the day-to-day contract management, only [Appellant's] management will be authorized to interface with the [CO] and make key decisions." (*Id.*)

Appellant acknowledged that, during the initial stage of the contract, a majority of its own employees on the contract, as well as a majority of TWG's employees, would be hired from the incumbent workforce. (*Id.* at 16.) This is because Appellant "offered first right of refusal of employment" to "incumbent employees who met the qualifications for a particular position." (*Id.* at 11.) As contemplated in the proposal, though, Appellant also has recruited additional personnel. (*Id.* at 11-12.) Indeed, "[w]ithout any involvement from [TWG], [Appellant] to date has interviewed and hired [XX] security guard personnel who will be used to staff the [instant] contract." (*Id.* at 4.) Further, "[o]ngoing recruiting efforts continue in order to support the future location ([NACP]) currently under construction." (*Id.* at 16.) Appellant insisted that "[a]t all times during performance of the DOE contract, [Appellant] will be performing [a majority] of the work." (*Id.*)

Appellant provided two tables describing Appellant's and TWG's respective workforces:

[Appellant's] Employees/Tasks to be Performed — Percentage of Work: [More than 50]% of Contract

[XXX]

Subcontractor's Employees/Tasks to be Performed — Percentage of Work: [Less than 50]% of Contract

[XXX]

**Recruited by [Appellant] / **Transition to [Appellant], New Hire*

(*Id.* at 16-17.)

Appellant maintained that several of ISS Action's protest allegations are factually inaccurate. Although Appellant is a small business, its workforce is not comprised of only 19 total employees; instead, it has "[XX] full-time, part-time, and temporary personnel." (*Id.* at 10.) Because Appellant performs certain Government contracts which are sensitive in nature, it does not publicly disclose information about those contracts. (*Id.*) Contrary to ISS Action's claims, though, Appellant has performed work as a prime contractor and subcontractor on several federal

government contracts, including for the performance of security services, that are directly relevant to the instant award. (*Id.* at 10-11.) Appellant offered descriptions of four such contracts, including a contract to perform physical security services for the U.S. Air Force. (*Id.* at 4-10.)

With its response to the protest, Appellant submitted a copy of its proposal; the Teaming Agreement between Appellant and TWG; a completed SBA Form 355; corporate and financial records; and the redacted resume of an individual "who will work directly with [Appellant's] corporate management on oversight of the DOE/NNSA contract." (*Id.* at 12.)

F. Size Determination

On January 6, 2021, the Area Office issued Size Determination No. 05-2021-007, concluding that Appellant does not qualify as a small business for the instant procurement. The Area Office agreed that Appellant's own receipts do not exceed the size standard, so Appellant itself is small. (Size Determination at 2.) However, the Area Office determined, TWG is an "ostensible subcontractor and must be treated as a joint venturer with [Appellant]." (*Id.* at 2, 8.)

The Area Office found, first, that Appellant managed and controlled the proposal process. (*Id.* at 6.) Appellant will "utilize its own corporate resources to execute this contract, and its corporate offices are located in proximity to the place of performance." (*Id.*) TWG, the incumbent prime contractor, is Appellant's sole subcontractor. (*Id.* at 1, 6.) The Project Manager, a TWG employee who will become Appellant's employee upon contract award, will oversee and manage all work performed by the subcontractor for the instant procurement. (*Id.* at 6.) According to Appellant's proposal and its response to the size protest, "[Appellant's] employees (including the employees hired that were employed previously by [TWG]) will perform the majority of the work." (*Id.*) Similarly, the Teaming Agreement establishes that TWG "will perform [less than 50]% of the work." (*Id.*) The Area Office therefore concluded that "[Appellant] will self-perform [more than 50]% of the contract and be responsible for that portion's cost." (*Id.*)

The Area Office considered whether Appellant will be unusually reliant upon TWG to perform the contract, based upon OHA's line of cases stemming from *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011). (*Id.*) Those cases have outlined four key factors that are suggestive of unusual reliance:

> (1) the proposed subcontractor is the incumbent contractor and 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. When these factors are present, violation of the ostensible subcontractor rule is more likely to be found if the subcontractor will perform 40% or more of the contract.

(*Id.* at 7, citing *Size Appeal of Human Learning Systems, LLC*, SBA No. SIZ-5785 (2016).)

Similar to the facts seen in *DoverStaffing*, Appellant will perform [a majority] of the contract and TWG the remaining [XX]%. The Area Office continued:

> (1) [TWG] (the proposed subcontractor) is the incumbent contractor and is ineligible to bid on the contract as a prime contractor. It will perform 40% or more of the contract. Additionally, the other conditions of *DoverStaffing* are present: (2) [Appellant] plans to hire a majority of the workforce of its subcontractor, (3) [Appellant's] management for the contract (Project Manager, Training Manager, and Shift Supervisor) were previously employed by the subcontractor, and (4) [Appellant] relied on the experience of its subcontractor to win the contract.

(*Id.*) Considering these circumstances, the Area Office concluded that, as in *DoverStaffing*, Appellant will be unduly reliant on its subcontractor in contravention of the ostensible subcontractor rule. (*Id.*) The Area Office reiterated that TWG, the incumbent contractor, is not a small business, and thus was precluded from competing for the award. (*Id.* at 3, 7.) According to the staffing plan submitted with Appellant's response to the protest, Appellant will hire [XXXXXX] employees from TWG, including the Project Manager, [Project Manager]. (*Id.* at 7.) The remaining [XXXXX] employees would be "new hires." (*Id.*) The two proposed key personnel, the Project Manager and the Training Manager, both were identified in the proposal as current TWG employees. (*Id.* at 4, 7-8.) Although [Project Manager] would become an employee of Appellant after contract award, the Training Manager and Shift Supervisor would remain TWG employees. (*Id.* at 6.)

The Area Office also found that Appellant lacks the relevant experience to perform the contract without the support of TWG, because the proposal indicated that Appellant's experience is limited to "transcription support and court reporting, transcription support, utility management support, and fact-finding litigation support." (*Id.* at 8.) The proposal also discussed two prior contracts, including the incumbent contract, performed by TWG for "protective force services" and "armed security and protective services." (*Id.*) Although Appellant offered additional examples of relevant experience in its response to the protest, the Area Office was unable to consider this information because "documents created in response to a protest may not be used to contradict an offeror's proposal." (*Id.*, citing *Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815 (2017).) Because Appellant's proposal "did not contain significant relevant expertise similar to that required by the instant solicitation," the Area Office found it "reasonable to conclude that [Appellant] relied heavily on [TWG's] experience to win the contract." (*Id.*)

With regard to whether Appellant or TWG will manage the contract, the Area Office rejected Appellant's claim that Appellant will "retain ultimate contract authority." (*Id.*) The two key personnel identified in the proposal, the Project Manager and the Training Manager, will be responsible for the "contract's daily operations." (*Id.*) At the time the proposal was submitted, both individuals were employees of TWG. (*Id.*) Appellant did not employ any key employees or supervisors on the date of proposal submission, nor any of the "workforce that would perform on the contract." (*Id.*) As in *Size Appeal of Professional Security Corp.*, SBA No. SIZ-5548 (2014), an OHA decision which found violation of the ostensible subcontractor rule in a contract to

provide security services, Appellant's President will not have a major role in the procurement. (*Id.* at 8-9.)

Having found all of the *DoverStaffing* factors present, the Area Office concluded that Appellant is "bringing very little to the contract other than its small business and WOSB status." (*Id.* at 8.) Although Appellant itself is small, the combined receipts of Appellant and TWG exceed the size standard. (*Id.* at 9.) Appellant therefore is not eligible for the instant award.

G. Appeal

On January 20, 2021, Appellant filed the instant appeal. Appellant contends that the Area Office clearly erred in finding that it will be unduly reliant on its subcontractor, TWG, in contravention of the ostensible subcontractor rule. The facts in the instant case are readily distinguishable from those set forth in *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011), and thus, the size determination should be reversed. (Appeal at 3.)

Appellant first disputes the notion that Appellant will hire the "large majority" of its workforce from TWG. (*Id.*) The RFP made clear that a Collective Bargaining Agreement (CBA) applied to the predecessor contract, which is binding on any successor prime contractor. (*Id.* at 5-6.) Pursuant to the CBA, Appellant "had to offer the right of first refusal to qualified incumbent personnel." (*Id.* at 6.) Despite this requirement, Appellant "never stated that it would rely solely on former [TWG] employees to perform the contract, nor did it in fact do so." (*Id.* at 5.) Rather, Appellant's proposal outlined a process whereby Appellant would interview, vet, and hire additional qualified personnel with the requisite security clearances. (*Id.* at 5-6.) The proposal explained that Appellant "intended to hire qualified incumbent personnel if possible," but that incumbent workers still would need to be reviewed individually as not all TWG personnel were necessarily eligible to work on the new contract. (*Id.* at 5.)

Upon notification that it was the apparent successful offeror, and in accordance with its proposal, Appellant conducted a "gap analysis" to determine hiring needs and initiated a recruitment process. (*Id.* at 6.) [XXXXXXXXXXX]. (*Id.*) Appellant notes that, at a December 3, 2020 "kick-off" meeting, NNSA confirmed that, due to the agency's imminent transition to the NACP, it would be necessary for Appellant to be fully staffed with 29-30 FTEs by May 2021. (*Id.* at 7, n.4.)

Appellant contends that OHA has applied *DoverStaffing* and its progeny only in situations "where the prime contractor had little or no experience." (*Id.* at 7-8, citing *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436 (2013).) Like the challenged firm in *InGenesis*, though, Appellant here is "a highly-experience[d] prime contractor on dozens of federal contracts." (*Id.* at 8.) Further, in *InGenesis*, OHA found that an area office had "overlooked the fact that the prime contractor specifically hired its own employees in addition to personnel formerly employed by the incumbent subcontractor, and that the prime would individually vet each hire from the incumbent." (*Id.*) In the instant case, the Area Office similarly erred by failing to consider "[Appellant's] hiring new staff in addition to former [TWG] personnel, and [Appellant's] detailed vetting process to evaluate and negotiate with employees individually." (*Id.*)

Appellant points to *Size Appeal of Elevator Service, Inc.*, SBA No. SIZ-5949 (2018) for the proposition that hiring incumbent employees will not necessarily lead to violation of the ostensible subcontractor rule. (*Id.*) In that case, the prime contractor hired six employees, who represented "nearly the entire labor requirement," directly from the incumbent contractor. (*Id.* at 9.) The employees, all union members, were given the opportunity to work for the new prime contractor. (*Id.*) Like in *Elevator Service*, Appellant planned to offer employment to the incumbent contractor's union employees who satisfied licensing requirements. (*Id.* at 9-10.) Appellant screened and hired job candidates individually rather than hiring from the incumbent contractor *en masse*. (*Id.* at 9.)

Next, Appellant argues that the Area Office erred in finding that Appellant's proposed management previously served with the incumbent subcontractor. (*Id.* at 10.) Appellant avers that the facts in the case do not satisfy the third *DoverStafffing* factor because Appellant proposed to retain two former TWG employees, the Project Manager and Training Manager, to serve in management positions where they would be "subordinate to and supervised by [Appellant's] more senior management." (*Id.* at 10-11.) The facts again are analogous to *InGenesis*, where OHA found that there was "no violation of the ostensible subcontractor rule when key personnel hired from an incumbent would be subordinate to the prime's own employees." (*Id.* at 10.) Appellant asserts that the Area Office also incorrectly concluded that "[Appellant's] proposal does not explicitly state that the Project Manager will report to [an Appellant] employee." (*Id.* at 11, quoting Size Determination at 5, n.3.) Appellant claims that its proposal made clear that the Project Manager will report to Appellant's [XXXXXXXXX], and that [XXXXXX] will have direct oversight over the work of the Project Manager. (*Id.* at 11, 13.)

Appellant argues that the Area Office incorrectly treated the Shift Supervisor as "Key Personnel" and a managerial position. Appellant explains that the Shift Supervisor is not categorized as a "key" position in the RFP, and will not have a managerial role in the performance of the contract. (*Id.* at 10.) The Area Office also erred in finding that Appellant did not have any of the "key employees/shift supervisor(s)" that would perform the contract, as the RFP did not require offerors to already employ proposed key personnel at the time of proposal submission. (*Id.* at 13-14.) Rather, the RFP stipulated that the awardee should have a "qualified workforce to perform the contract by the time of award and contract performance." (*Id.* at 14.) Qualified personnel could consist of employees of the prime contractor or a subcontractor. (*Id.*)

Appellant contends that the Area Office erred in finding that the fourth *DoverStaffing* factor was met in this case. (*Id.*) The Area Office determined that Appellant had to rely on the experience of TWG because Appellant lacks relevant experience to win the contract on its own. (*Id.*) Appellant could not have depended on its subcontractor for past performance, though, because past performance was not an evaluation factor for the instant procurement and thus, NNSA did not consider Appellant's past performance in making the award decision. (*Id.*) Although not required by the RFP, Appellant chose to include four examples of its own prior contracts, as well as two examples of TWG's past performance. (*Id.* at 15.)

Appellant argues that, even if past performance had been an evaluation factor, Appellant still did not rely on its subcontractor to win the contract. (*Id.* at 15.) The procurement is not limited merely to "guard services" and instead calls for a broad range of professional security

services. (*Id.* at 15-16.) The proposal made clear that Appellant does have relevant experience performing work similar to the instant RFP, such as security program planning and security management. (*Id.* at 16.) The Area Office focused narrowly on Appellant's prior "guard services" experience and "failed to take into consideration other services called for in the DOE solicitation for which [Appellant] demonstrated its experience and intent/ability to perform." (*Id.* at 17.) Further, the Area Office unreasonably refused to consider the additional information Appellant provided in its response to the protest, where Appellant explained how its past performance directly correlates with the skills and experience required under the RFP. (*Id.*)

Appellant disputes the Area Office's finding that Appellant "is bringing very little to the contract other than its small business and WOSB status." (*Id.*, quoting Size Determination at 8.) Instead, according to Appellant:

[XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX]

(*Id.* at 17-18.) Accordingly, Appellant will perform the primary and vital requirements of the contract and will not be unduly reliant upon TWG. (*Id.* at 18.)

Accompanying its appeal, Appellant offers a sworn statement from Ms. Jojola. Appellant did not file a motion to introduce the statement as new evidence on appeal, as required by 13 C.F.R. § 134.308, and has not explained why Ms. Jojola's statement was not, or could not have been, provided to the Area Office in response to the protest.

H. ISS Action's Response

On February 9, 2020, ISS Action responded to the appeal. ISS Action argues, as a preliminary matter, that OHA should exclude new evidence that was not submitted to the Area Office during the size review. (ISS Action's Response at 3.) Appellant has not attempted to show "good cause" to introduce new evidence in accordance with 13 C.F.R. § 134.308, nor did Appellant even file the requisite motion to admit new evidence. (*Id.* at 3-4.) OHA therefore should disregard Ms. Jojola's statement, as well as other new facts or information that were not previously provided to the Area Office. (*Id.* at 4.)

ISS Action argues that the Area Office correctly found Appellant violated the ostensible subcontractor rule based on the *DoverStaffing* line of cases. (*Id.* at 4-5.) The appeal does not show clear error in the size determination and instead "distorts certain material facts in the record in order to inflate [Appellant's] role." (*Id.* at 6.)

ISS Action notes that Appellant does not dispute that the first *DoverStaffing* factor is met, because the proposed subcontractor, TWG, is the incumbent prime contractor. (*Id.* at 6, n.3.) With regard to the second *DoverStaffing* factor, the Area Office did not err in finding that Appellant planned to hire the majority of its workforce from TWG. (*Id.* at 7.) A principal defect in Appellant's proposal was that Appellant failed to "delineate a single specific task which [Appellant] will perform." (*Id.* at 7.) Further, the proposal referred to the offeror as "Team Montech," and specifically stated that "Team Montech is the Incumbent." (*Id.* at 7-8.) It

therefore appears that "'Team Montech' really means '[TWG]"', and that Appellant will not self-perform any meaningful portion of the contract. (*Id.* at 14.) In any event, though, Appellant itself conceded, in its response to the size protest, that Appellant "intends to fill [XXXXXX] positions (or [XX] percent) with 'incumbent hires' and that [TWG] intends to fill [LX] positions (or [XX] percent) with its own incumbent employees." (*Id.* at 9.) It therefore is evident that a substantial majority of Appellant's workforce will be derived from TWG's incumbent workforce, rendering the Area Office's finding that Appellant plans to hire most of its workforce from TWG both reasonable and factually accurate. (*Id.*)

ISS Action argues that Appellant's reliance on *Elevator Service* is misplaced. (*Id.* at 10.) Appellant's contentions that it will hire union employees, and that will screen employees individually, are premised on facts that were not presented to the Area Office and that "post-date its proposal submission." (*Id.* at 10.) Appellant's arguments cannot be reconciled with its proposal, which made no mention of the CBA and baldly stated that "Team Montech's staffing approach is to hire qualified incumbent employees immediately." (*Id.* at 10-11.)

Next, ISS Action asserts that the Area Office did not err in concluding that Appellant's proposed managerial personnel previously worked for TWG. (*Id.* at 11.) It is "indisputable" that both the proposed Project Manager, [Project Manager], and the proposed Training Manager, [Training Manager], were TWG employees at the time of proposal submission, and that they held the same exact roles on the incumbent contract. (*Id.*) While it is apparent that Appellant proposed to retain incumbent managerial staff, what is "***unclear whether these key persons will in fact become [Appellant's] employees if [Appellant] is awarded the contract***." (*Id.* at 14 (emphasis ISS Action's).) ISS Action observes that the Letters of Intent signed by [Project Manager] and [Training Manager] only commit that they will be employed on the new contract by "Team Montech," not necessarily by Appellant. (*Id.*)

ISS Action disputes the notion that Appellant's corporate leadership will supervise the Project Manager. The chart in Appellant's proposal indicates only that the Project Manager will report to the "MONTECH/WHITESTONE [XXXXXXXXXXXX]." (*Id.* at 12-13.) Although Appellant now claims in its appeal petition, and in Ms. Jojola's statement, that Appellant alone will oversee contract performance, such arguments are inconsistent with the proposal and should be rejected by OHA. (*Id.* at 13, n.5.)

ISS Action also argues that the Area Office made no error in concluding that Appellant lacked relevant experience. (*Id.* at 15.) Although OHA's decision in *Size Appeal of XOtech, LLC*, SBA No. SIZ-5957 (2018) also involved a lowest-price technically-acceptable source selection, the challenged firm in that case had "more than 14 years of relevant experience." (*Id.* at 15.) Conversely, according to ISS Action, "[t]he only 'relevant' experience provided in [Appellant's] proposal ***comes from [TWG]***." (*Id.* at 16 (emphasis ISS Action's).)

While the Area Office correctly found violation of the ostensible subcontractor rule under the *DoverStaffing* line of cases, ISS Action argues the Area Office also could have found that TWG will perform the primary and vital contract requirements. Appellant's Price proposal indicated that the only labor category that will be filled solely by Appellant's own personnel is [XXXXXXX]. (*Id.* at 18.) The remaining labor categories will be filled either by TWG alone or

by "Team Montech." (*Id.*) The proposal, however, described "Team Montech" as "the Incumbent," so "Team Montech" logically does not mean Appellant itself. (*Id.*) Assuming work attributed to "Team Montech" actually will be performed solely by TWG, it follows that TWG will be responsible for the overwhelming majority of this contract. (*Id.* at 18-19.)

I. NNSA's Response

On February 9, 2021, NNSA responded to the appeal. NNSA argues that the Area Office incorrectly analyzed at least two of the four *DoverStaffing* factors. (NNSA's Response at 2.) NNSA urges OHA to grant the appeal and reverse the size determination.

NNSA argues, first, that the Area Office erred in concluding that Appellant will hire most of its employees from the incumbent contractor, TWG. (*Id.* at 10.) TWG employs only [XX] individuals on the incumbent contract, but the new contract calls for 18.34 FTEs immediately, subsequently rising to 29.41 FTEs, due to the new requirement of staffing the NACP. (*Id.* at 10-11.) Therefore, Appellant, "even if it wished to, could not rely on [TWG] to staff this contract because [TWG] did not have adequate staffing to provide services at both the current Albuquerque Complex and the NACP." (*Id.* at 13.) NNSA asserts that the new prime contractor "was always going to have to hire FTEs well beyond those employed by the incumbent because of the NNSA's complex move, and the need to have these services at two locations instead of the one location currently serviced by the incumbent." (*Id.* at 11.)

Although Appellant proposed to retain the incumbent workforce to the extent feasible, NNSA asserts that "nearly all offerors" proposed such an approach because "there is a collective bargaining agreement at play." (*Id.*) Moreover, OHA has held that "hiring the incumbent workforce alone is not problematic so long as the personnel to be hired from incumbent are reviewed individually rather than a unilateral transfer of employees or hiring *en masse*." (*Id.* at 12-13, citing *Size Appeal of NorthWind-CDM Smith Advantage JV, LLC*, SBA No. SIZ-6053 (2020) and *Size Appeal of Elevator Serv., Inc.*, SBA No. SIZ-5949 (2018).) Appellant's proposed "Staffing Approach" contemplated that Appellant would "review incumbent employees individually" and hire new personnel to meet the increased staffing needs of the RFP due to "NNSA's planned building move and the need for security services at two sites instead of just one." (*Id.* at 13.) Appellant also proposed a vetting process to ensure that only qualified candidates would move forward in the hiring process. (*Id.* at 12.)

NNSA argues that the Area Office also erred in finding that Appellant must have relied upon TWG to win the instant procurement. (*Id.* at 13.) The RFP did not contain any evaluation criteria for corporate experience or past performance, nor did the RFP instruct offerors to submit such information for evaluation. (*Id.*) Appellant was selected for award because its proposal offered the lowest price among those offerors that NNSA deemed "Technically Acceptable" as defined by the RFP. (*Id.* at 9.)

NNSA asserts that it is "befuddled" by the size determination, because NNSA informed the Area Office, during the size review, that "experience and past performance were not evaluated under the [RFP]." (*Id.* at 14.) Further, although Appellant voluntarily included information pertaining to prior contracts in Volume I of its proposal, NNSA only evaluated

Volume II of the proposal in assessing technical acceptability. (*Id.*) Given that past performance and corporate experience were not even evaluation criteria, it was "unreasonable" and "material error" for the Area Office to find that Appellant relied upon TWG to win the award. (*Id.*)

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).

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. 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, 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, professional security services are the primary purpose of this contract. Section II.A, *supra*. The Area Office determined, based upon Appellant's proposal and the Teaming Agreement, that Appellant will self-perform a majority of this work. Sections II.B, II.C,

and II.F, *supra*. Although ISS Action contends that Appellant's proposal did not clearly delineate how much work would be performed by Appellant itself, as opposed to "Team Montech" more generally, Appellant did, in fact, include such information in its Price proposal. Specifically, Appellant's Price proposal provided detailed labor hours, by labor category, for both Appellant and TWG. Section II.B, *supra*. Given this record, the Area Office reasonably concluded that Appellant will self-perform a majority of the professional security services, and thus will perform the "primary and vital" contract requirements.

The Area Office also considered whether Appellant will be unusually reliant upon TWG 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, the Area Office found that all four *DoverStaffing* factors are met. Section II.F, *supra*. As Appellant and NNSA correctly observe, however, the Area Office's analysis is undermined by significant errors, particularly with regard to the second and fourth factors. Consequently, the record does not support the conclusion that Appellant will be unduly reliant upon TWG to perform this contract.

There is no dispute that the first *DoverStaffing* factor is met, as the proposed subcontractor, TWG, is also the incumbent prime contractor and was ineligible to submit a proposal in its own name for the instant procurement. The first factor alone, though, is not sufficient to find violation of the ostensible subcontractor rule. *E.g., Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436, at 16 (2013).

The Area Office clearly erred in its analysis of the second *DoverStaffing* factor, because the record does not indicate that Appellant will hire a "large majority" of its workforce from TWG. There are two principal flaws in the Area Office's reasoning. First, although it is true, as the Area Office observed, that during the initial phase of the contract Appellant will hire [XXXX] FTEs from TWG, the Area Office failed to consider that the [XXXX] initial FTEs represent only a portion of the total workforce that Appellant would need to hire to fulfill this contract. Specifically, the RFP explained that, for each full year of contract performance, the contractor must furnish 29.41 FTEs, due to the new requirement of staffing the NACP. Section II.A, *supra*. Appellant's proposal likewise contemplated [XXXX] FTEs, and indicated that Appellant had

existing pools of candidates, with no apparent connection to TWG, that Appellant could draw upon to fill these positions. Section II.B, *supra*. Accordingly, Appellant, as the prime contractor, would have to provide at least [XXXX] FTEs for this procurement (*i.e.*, [more than 50]% of [XXXX] FTEs), of which no more than [XXXX] are incumbent personnel previously employed by TWG. Contrary to the size determination, then, Appellant will not rely on TWG's incumbent personnel for a majority of its workforce.

A second flaw in the Area Office's analysis was that, even if Appellant had proposed to hire the large majority of its workforce from TWG, OHA has recognized that "a wholesale hiring of incumbent employees from a subcontractor is justified when the pool of eligible employees is small or limited." *Size Appeal of Inquiries, Inc.*, SBA No. SIZ-6008, at 23 (2019). In the instant case, the RFP stipulated that the contractor must immediately provide personnel with high-level security clearances, and further stated that the contractor must make staffing decisions in accordance with an existing Collective Bargaining Agreement (CBA), which was provided as an attachment to the RFP. Section II.A, *supra*. The CBA in turn required that the prime contractor consider the seniority of incumbent personnel in hiring. *Id.* In light of these restrictions, Appellant had a limited pool of eligible employees that could be utilized, particularly in the initial stages of the contract, and more extensive reliance upon TWG's incumbent workforce would not have been improper. On these facts, the Area Office incorrectly concluded that the second *DoverStaffing* factor was met.

The Area Office's consideration of the third *DoverStaffing* factor appears questionable based on the record provided. The Area Office properly recognized that both of Appellant's proposed key personnel, [Project Manager] and [Training Manager], were TWG employees at the time of proposal submission, and indeed held the same managerial roles on the incumbent contract. Sections II.B and II.F, *supra*. Under OHA precedent, however, "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 XOtech, LLC*, SBA No. SIZ-5957, at 6 (2018) (quoting *Size Appeal of NVE, Inc.*, SBA No. SIZ-5638, at 10 (2015)); *see also 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 Envt'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, according to the "Team Montech Organizational Chart" included in the proposal, [Training Manager] will be subordinate to the proposed Project Manager, [Project Manager], and [Project Manager] in turn will report to a "Montech/Whitestone [XXXXXXXXXXXX]." Section II.B, *supra*. Although Appellant's proposal did not describe the specific responsibilities of the "Montech/Whitestone [XXXXXXXXXXXXXXXX]," Appellant did address this issue in its response to the protest. Section II.E, *supra*. Specifically, in a signed statement, Appellant's President explained that she will be the "ultimate key manager responsible for successful contract performance" together with [XXXXXXXXXX]. While [Project Manager] and [Training Manager] will "assist in the day-to-day contract management, only [Appellant's] management will be authorized to interface with the [CO] and make key decisions." *Id.* Moreover, Appellant's President clarified that Appellant's corporate headquarters will be the "single point of location" for the Project Manager. *Id.* An area office must disregard post-

proposal information that conflicts with the proposal, but it is not improper to consider post-proposal information which merely "clarifies or explains the contents of the proposal and does not contradict it." *Size Appeal of Navarro Research and Eng'g, Inc.*, SBA No. SIZ-6065, at 22 (2020); *see also Size Appeal of Nationwide Pharm., LLC*, SBA No. SIZ-6027, at 16 (2019); *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). The third factor therefore is questionable based on the record presented, as it appears plausible that Appellant's proposed key personnel, [Project Manager] and [Training Manager], will operate under Appellant's control and supervision.

Turning to the final *DoverStaffing* factor, the Area Office found that Appellant relied on the past performance of its subcontractor to win the award. Section II.F, *supra*. This finding is clearly erroneous because the RFP contained no evaluation factor for past performance or corporate experience, and stipulated that the awardee would be selected on a lowest-price technically-acceptable basis. Section II.A, *supra*. In a lowest-price technically-acceptable source selection, "past performance need not be an evaluation factor" and "[p]roposals are evaluated for acceptability but not ranked using the non-cost/price factors." Federal Acquisition Regulation 15.101-2. OHA thus has held that "when a procurement is conducted on a lowest-price technically-acceptable basis, the inclusion of a more experienced proposed subcontractor 'could not have materially enhanced [the offeror's] prospects for award.'" *Size Appeal of XOtech, LLC*, SBA No. SIZ-5957, at 9 (2018) (quoting *Size Appeal of Emergent, Inc.*, SBA No. SIZ-5875, at 9 (2017).) Given that NNSA did not evaluate past performance or corporate experience, nor consider such information in making the award decision, it follows that Appellant could not have relied on TWG's experience to win the instant award.

IV. Conclusion

Appellant has established that the Area Office clearly erred in finding that Appellant is affiliated with TWG under the ostensible subcontractor rule. The record shows that Appellant will self-perform a majority of the primary and vital contract requirements. Further, Appellant will not be unusually reliant upon TWG to perform the contract, as the second and fourth of the "four key factors" are absent in this case. The Area Office determined, and no party disputes, that Appellant's own receipts do not exceed the size standard, so Appellant qualifies as a small business if it is not affiliated with TWG. Section II.F, *supra*. Accordingly, this appeal is GRANTED, and the size determination is REVERSED. Appellant is an eligible small business for this procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge