United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Leumas Residential, LLC, Appellant, Appealed From Size Determination No. 02-2021-043	SBA No. SIZ-6103 Decided: June 10, 2021

APPEARANCES

Jonathan D. Shaffer, Esq., Daniel H. Ramish, Esq., Smith Pachter McWhorter PLC, Vienna, Virginia, for Appellant

Pamela J. Mazza, Esq., Peter B. Ford, Esq., Meghan F. Leemon, Esq., Sara Naseeri, Esq., PilieroMazza PLLC, Washington, D.C., for DSA, LLC.

DECISION[1]

I. Introduction and Jurisdiction

On March 25, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2021-043 (Size Determination), finding Leumas Residential, LLC (Appellant) other than small. On April 13, 2021, Appellant filed the instant appeal from that size determination. Appellant argues that the size determination is clearly erroneous, and requests that OHA reverse it, and find Appellant is an eligible small business. For the reasons discussed *infra*, I grant the appeal, and reverse the size determination.

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 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.

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

II. Background

A. Solicitation

On October 17, 2019, the U.S. Navy (Navy) issued Request for Proposals (RFP) No. N4008019R2506 for grounds maintenance services for NSA South Potomac Dahlgren, VA, Pumpkin Neck Annex, VA, Indian Head, MD, Stump Neck Annex, MD, and the NRL Satellite Location. The Contracting Officer (CO) designated the RFP under North American Industry Classification System (NAICS) code 561730, Landscaping Services, with a corresponding $7 million annual receipts size standard. However, SBA raised the size standard to $8 million, effective August 19, 2019. 84 Fed. Reg. 34261, 34276 (July 18, 2019). The procurement was entirely set aside for 8(a) firms. The CO anticipated awarding an indefinite delivery indefinite quantity contract.

The Performance Work Statement (PWS) for the RFP states as follows:

> Contractor shall furnish all labor, supervision, management, tools, materials, equipment, facilities, transportation, incidental engineering, and other items necessary to provide the services outlined below and described in this Performance Work Statement (PWS) at Naval Support Activity (NSA) South Potomac on Dahlgren Naval Support Facility, VA and Indian Head Naval Support Activity, MD and outlying areas supported by this installation under this performance-based contract comprised of both Recurring Work and Non-Recurring Work Items.
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> Recurring Work, Firm Fixed Price (FFP), requirements include, but are not limited to, grounds maintenance (grass cutting, turf and ornamental/ vegetation pest control, shrub, hedge, plant, tree maintenance, mulch bed, and debris removal) to all properties on board and supported by NSA South Potomac in accordance with current Command Naval Installation Command (CNIC) mandated service levels, defined as Common Output Levels (COLs) and current operational requirements mandated by NAVSEA OP-5 and NTTP 3-07.2.3., designated by the Performance Work Statement (PWS).
>
> Non-Recurring work, Indefinite Delivery/Indefinite Quantity (IDIQ), requirements will consist of, but not limited to predetermined/pre-negotiated grounds maintenances related service tasks with assigned maximum quantities. Government may exercise request for Non-Recurring work for grounds maintenances related service requiring negotiation in addition to the designated predetermined/pre-negotiated tasks with assigned maximum quantities under this provision.

The RFP incorporates by reference, Federal Acquisition Regulations (FAR) 52.222-17, Nondisplacement of Qualified Workers, which required a contractor to provide a right of first refusal to employees who worked on the predecessor contract, excluding managers and

supervisors.[2] The RFP also includes a safety rating to be completed by the offeror, its partners, and joint venturers, for 2016, 2017, and 2018. Offerors were not permitted to include the safety rating of subcontractors. If an offeror could not provide a rating, it was required to explain why. (RFP, at 75.)

B. Proposal

On December 23, 2019, Appellant submitted its Proposal. Under the Proposal, Appellant is the 8(a) prime contractor and ProDyn, LLC (ProDyn) is the subcontractor. (Technical Proposal, at 2; Price Proposal, at 2.) The Proposal refers to a prime-sub teaming agreement having been established for the management of the contractual requirements should Appellant seek to partner with ProDyn for a procurement. (Technical Proposal, at 5.) The Proposal also contains a Master Subcontractor Agreement between Appellant, the prime contractor, and ProDyn, the subcontractor, outlining their contractual relationship and duties in the instance Appellant desires to retain ProDyn as Appellant's subcontractor. (*Id.*, at 9-15.) The Proposal states ProDyn is the majority partner of PD&E, LLC (PD&E) the incumbent contractor at NSA South Potomac Dahlgren and Indian Head. Appellant and ProDyn will be "working together under a teaming agreement and subcontractor agreement" to provide quality service for the contract. (*Id.*, at 56.)

The Master Subcontract Agreement states in part:

> **Subcontractor's Insurance**:
>
> Prior to commencing the Work, (Subcontractor) shall procure, and thereafter maintain at its own expense, until final acceptance of the Work or later as required by the terms of the Subcontractor Agreement or any individual Work Order, insurance coverage required by the contract document and this Subcontract Agreement.
>
> . . .
>
> This insurance will provide a defense and indemnify for Leumas Residential, LLC but only with respect to liability for bodily injury, property damage and personal and advertising injury caused in whole or in part by (Subcontractor) acts or omissions or the acts of omissions of those acting on the behalf of Subcontractor.
>
> . . .

[2] Though this rule was in place at the time the procurement was issued on October 17, 2019, it was later rescinded on October 31, 2019 by Executive Order 13897 — Improving Federal Contractor Operations Revoking Executive Order 13495, 84 Fed. Reg. 50709 (November 5, 2019). However, because Executive Order 13897 was issued after the RFP, it has no effect on the solicitation or these size appeal proceedings.

> In the event that the insurance company(ies) issuing the policy(ies) required by this Agreement denies coverage to Leumas Residential, LLC, Subcontractor or the Sub Subcontractor will, upon demand by Leumas Residential, LLD defend and indemnify Leumas Residential, LLC at the expense of Subcontractor and/or Sub subcontractor.

(*Id.*, at 11-12.)

The Leumas-ProDyn team proposed to hire two Project Managers from the incumbent contractor, PD&E. (*Id.*, at 30.) The Leumas-ProDyn leadership will provide the Project Managers with "direction, guidance, policies, procedures, and process to excel." (*Id.*, at 22.) The Proposal states all equipment would be provided by the Leumas-ProDyn team. (*Id.*, at 39-50.) For its past performance, Appellant provided experience of PD&E for grounds maintenance at Dahlgren Naval, Indian Head Naval, and the U.S. Naval Academy; Leumas-ProDyn JV for grounds maintenance at Tyndall Air Force Base and multiple Marine Corps air stations in South Carolina; and ProDyn for grounds maintenance at Moody Air Force Base and NASA's Lyndon B. Johnson Space Center. (*Id.*, at 57-62.)

Appellant completed the safety form with a rating of "0" for 2016 and 2017. For 2018, Appellant provided a rating of "1." Appellant also included the safety information for ProDyn for 2016, 2017, and 2018.

On September 15, 2020, the CO notified all unsuccessful offerors that Appellant was the apparent awardee.

C. Protest

On September 22, 2020, DSA, LLC (DSA) filed a timely protest alleging that Appellant is unduly reliant on its subcontractor, ProDyn, LLC (ProDyn) to qualify for and perform the contract in violation of the ostensible subcontractor rule. (Protest, at 1.) Specifically, DSA argued ProDyn will be performing the primary and vital requirements of the work and will be supplying equipment and personnel for the contract.

D. Declaration

With its response to the underlying protest, Appellant included a Declaration from its President, [Individual #1]. The Declaration provides information regarding Appellant's experience, the work split between Appellant and ProDyn for the instant procurement, equipment, and project hiring.

The Declaration states that Appellant has been in business since 2003 and has "substantial experience performing grounds maintenance work similar to that required for Solicitation No. N40080-19-R-2506." (Declaration, at 1.) Appellant has performed on two multi-year, multi-site, multi-million-dollar grounds maintenance contracts as managing venturer of Leumas ProDyn, LLC — the joint venture between Appellant and ProDyn. (*Id.*) [Individual #1] asserts Appellant has performed 51% of the work on those contracts, including the primary and

vital functions, and the project managers are Appellant's employees. [Individual #1] explains that Appellant successfully performed grounds maintenance services as a part of its property management contract with the U.S. Department of Housing and Urban Development (HUD), which did not involve ProDyn. (*Id.*)

With regard to the work split, [Individual #1] stated, "Leumas and ProDyn planned that ProDyn would perform mowing, tree maintenance, and landscape maintenance, and that Leumas would perform the rest of the work, including all the rest of the grounds maintenance field work." (*Id.*, at 2.) Appellant's technical Proposal includes a table depicting the level of effort associated with each line item. The line item which includes mowing, tree maintenance, and landscape maintenance tasks is labeled, "Mowing — Semi-Improved Grounds, Mowing-Unimproved Grounds, and Operational Areas — Shore Mowing." (*Id.*, at 3.) [Individual #1] explained Appellant calculated the comparative work of each concern to determine their level of comparative effort for the work performed. Appellant estimated the mowing line items performed by ProDyn at [XX] full-time-equivalent (FTE) where the work completed by Appellant totals approximately [XX] FTE, which is 71% of the direct labor. Appellant will also provide indirect labor of approximately [X] FTE where ProDyn will provide [X] FTE of indirect labor. (*Id.*) Considering both recurring and non-recurring work, Appellant planned in its price Proposal to perform approximately 61% of the work, with ProDyn completing 39% of the work.

In Appellant's technical Proposal, eight key personnel are identified, where five are employees of Appellant and three were employees of ProDyn. The equipment required for performance of the contract will be provided by Leumas-ProDyn, LLC — the joint venture of which Appellant owns 51%, and thus, has a 51% interest in the concern's equipment. (*Id.*)

[Individual #1] states, "Leumas has never planned to hire any ProDyn employees. Leumas plans to recruit qualified persons to fill the positions under the contract, including former employees of PD&E." (*Id.*) Appellant will hire a significant number of employees recruited from other sources other than PD&E, as this contract is larger than the previous contract. [Individual #1] also states, "Leumas has no plans to hire any managers who have ever been employed by ProDyn. Leumas does plan to hire managerial personnel for the project who are, or once were, employed by PD&E." (*Id.*) Appellant's corporate leadership will manage and oversee the managerial personnel at all times during contract performance.

[Individual #1] states, as Appellant's President, he will:

> "[P]ersonally be actively involved in overseeing the project managers and the performance of the contract work. I will attend weekly project briefings to probe ongoing project activities and offer suggested solutions. I will conduct routine quality control site visits to ensure that all on-site activities are efficiently executed. I will also interface with the Contracting Office as needed to ensure that all expectations are being met." (*Id.*)

Other members of Appellant's leadership will be engaged in project oversight including Appellant's Director of Operations and a corporate project manager. (*Id.*, at 4.)

E. Initial Size Appeal Proceedings

On November 10, 2020, the Area Office determined Appellant was generally affiliated with ProDyn and is other than small for the applicable size standard. (Size Determination, at 9.) The Area Office did not, however, complete an ostensible subcontractor analysis, and rationalized that since the Area Office found Appellant other than small based on a finding of general affiliation, "the Area Office will not address whether the ostensible subcontractor rule was violated as it is moot." (*Id.*, at 7.)

On November 24, 2020, Appellant filed an appeal arguing the Area Office improperly concluded Appellant was other than small based solely on joint venture affiliation and was not based on a finding of an ostensible subcontractor relationship, "nor any other basis set forth at 13 C.F.R. § 121.103(h)." (Appeal, at 2.) On March 9, 2021, I granted the appeal and remanded the size determination back to the Area Office, with a direction to "specifically address whether Appellant is affiliated with ProDyn in violation of the ostensible subcontractor rule in a new size determination." (*Size Appeal of Leumas Residential, LLC*, SBA No. SIZ-6091, at 7 (2021).)

F. Size Determination on Remand

On March 25, 2021, the Area Office issued size determination No. 02-2021-043, finding Appellant other than small based on its ostensible subcontractor relationship with ProDyn. (Size Determination, at 25.)

The Area Office found it necessary to clearly identify the concerns involved and the relationships between them, "due to the ambiguity and confusion introduced by the use of identical names for a joint venture and teaming arrangement and the use of joint ventures to create indirect transference of equipment and personnel." (*Id.*, at 6.) Appellant, Leumas Residential, LLC, is a current participant in the 8(a) Business Development program and is 100% owned by [Individual #1]. The concern claims small business status under NAICS code 561730, or Landscaping Services. Appellant's tax returns all identify its primary NAICS code as 531390, or Other Activities Related to Real Estate. ProDyn is a former 8(a) participant and is 100% owned by [Individual #2]. ProDyn is the majority owner of PD&E, which is an incumbent joint venture for the instant procurement. ProDyn's tax returns identify its primary NAICS code as 561730, or Landscaping Services, which is the same as the instant procurement. ProDyn is also Appellant's minority joint venture partner in the Leumas-ProDyn, LLC joint venture (Leumas-ProDyn JV). (*Id.*) ProDyn is not a small business under the applicable size standard.

The incumbent contractor for the instant procurement is PD&E, though there were other contractors and performers on the contract. PD&E is a populated joint venture majority-owned by ProDyn. Epes Building Maintenance Company, Inc., minority owner of PD&E, is 100% owned by [Individual #3], an immediate family member of [Individual #2], ProDyn's owner. (*Id.*, at 7.) PD&E was once, but is no longer, an 8(a) program participant, nor is the firm small under the instant NAICS code.

The Leumas-ProDyn JV, which is comprised of Appellant and ProDyn, would not be eligible for award of the instant procurement because ProDyn is not a current 8(a) participant, it

is not an approved mentor to Appellant, nor is it small for the applicable NAICS code. The Leumas-ProDyn team, which is also comprised of Appellant and ProDyn, was awarded the contract for the instant procurement not as a joint venture, but as a team where Appellant is the prime contractor and ProDyn is its subcontractor. (*Id.*, at 8.)

In its ostensible subcontractor analysis, the Area Office first identified the primary and vital requirements as outlined in the PWS. *See supra* Section II.A. The Area Office determined the primary and vital requirements for the instant procurement were equipment and grounds maintenance, reasoning, "the Area Office reviewed the solicitation and agrees with the CO that the primary and vital requirements are the provision of the equipment and performance of grounds maintenance." (*Id.*, at 10.) The Area Office noted that Appellant's tax returns identify its primary NAICS code as 531390, or Other Activities Related to Real Estate and its tax returns do not indicate ownership of any equipment. (*Id.*, at 10.) ProDyn's tax returns identify its primary NAICS code as 561730, Landscaping Services, and indicates ownership of a significant amount of equipment consistent with the performance of landscaping work such as mowers, tractors, brush hogs, blowers, chippers, and cutters, with an adjusted cost of over $[XXXXXX].

The Area Office noted that the Leumas-ProDyn JV tax returns indicate the same NAICS code as ProDyn, 561730 and its most recent tax returns indicate ownership of some equipment similar to ProDyn's. The Area Office opined that all of the equipment possessed by the Leumas-ProDyn JV came from ProDyn based on the similarity in equipment models between the two concerns. (*Id.*) In a response to an Area Office inquiry, Appellant stated the Leumas-ProDyn JV did not own any equipment contemplated for use on the instant procurement. (*Id.*, citing to an Email from Appellant dated October 29, 2020). The Area Office then stated:

> This indicates that any equipment owned by Leumas-ProDyn JV as listed on its tax return from the completed year prior to its offer is not the equipment being used. It also directly contradicts the assertion of the previous provided statement unless it is taken to mean that as of the date of initial offer none of the equipment listed in the Proposal was owned by Leumas-ProDyn JV, but that it was later acquired or transferred to that joint venture for use on the instant contract. It could also mean that the exact equipment listed in the Proposal is currently owned and being used by PD&E on the incumbent contract and will be sold or transferred by its majority member ProDyn to Leumas-ProDyn JV upon award of the instant contract for use by Leumas-ProDyn Team. Regardless, by Leumas' statement, Leumas-ProDyn JV did not own any equipment to be used on the instant solicitation at the time of initial offer.

(*Id.*, at 11-12.)

The Area Office also reviewed Leumas-ProDyn JV's 2019 tax return, which indicated at the beginning of the year its current liabilities including significant funds owed to ProDyn, which increased by $[XXXXX] indicating that Leumas-ProDyn JV is financially dependent on ProDyn to meet its obligations. These facts in conjunction with the fact that Leumas-ProDyn JV obtained equipment from ProDyn is indicative of the Leumas-ProDyn JV's dependence on ProDyn and

thus Appellant's dependence on ProDyn for equipment. (*Id.*, at 12.) This also indicates that Appellant is dependent on ProDyn for performance of the contract.

With respect to grounds maintenance, the Area Office acknowledged a previous Government Accountability Office (GAO) decision sustaining Appellant's challenge of the Navy's evaluation of Appellant's Proposal as technically unacceptable for violation of the limitation on subcontracting rule, which requires the prime contractor to perform more than 50% of the work contemplated. (*Id.*) The Navy identified the scope of work as, "grass cutting, trimming, edging, weed control, fertilization, irrigation, shrub, hedge, plants and tree maintenance, plant bed maintenance, weeding, weed control, mulching and vegetation/debris removal." (*Id.*, at 13, citing *Leumas Residential, LLC*, B-418635, July 14, 2020, at 6.) GAO found that the language in Appellant's subcontract/teaming agreement, "does not, on its face, indicate that Leumas did not intend to comply with the requirement that at least 50 percent of the cost of contract performance incurred for personnel would be expended by Leumas." (*Id.*) GAO found that the language reflected the concerns' intent to enter into a subcontracting agreement, should Appellant be awarded the contract for the instant procurement. Also, the Navy had not explained how the agreement's language of "mowing, tree maintenance, and landscape maintenance at a minimum" indicated Appellant intended on subcontracting more than 50% of the effort or 50% of the cost of contract performance incurred for personnel. (*Id.*)

The Area Office reviewed the materials provided by Appellant and its response to the protest which stated Appellant will perform accounts payable, human resources, payroll, government partnership, union relations, and account functions. Appellant also stated it will perform the majority of the grounds maintenance services on the contract, will project manage the field effort, and thus the primary and vital requirements of the contract requirements. (*Id.*, at 14.) Appellant also stated the teaming agreement was not an actual subcontract and would be negotiated and refined, post-award agreement, where the teaming agreement reserves Appellant's right to assign work to ProDyn. (*Id.*) The Area Office found Appellant's contention that the subcontract was not the actual subcontract upon which performance was based to be unpersuasive, as Appellant was awarded the instant contract based on the subcontract. Further, the statement does not address which primary and vital requirements Appellant will perform. (*Id.*)

The Area Office found the Master Subcontractor Agreement indicates Appellant is reliant on ProDyn to manage any insurance requirements. *See supra*, Section II.B. Thus, the Area Office found this to indicate Appellant is uninsurable, because all the required safety ratings are provided by ProDyn and all of the experience is provided from ProDyn, PD&E, and Leumas-ProDyn JV. The Proposal also does not refer to Appellant performing the grounds maintenance service. (*Id.*, at 15.) The Area Office then highlights Appellant's use of Leumas-ProDyn to describe the prime-sub team which "introduces significant ambiguity and the impression that Leumas-ProDyn is the offeror." (*Id.*)

The Area Office noted that a required safety form was to be completed by the offeror and each contractor, except for subcontractors, for the three previous complete calendar years. The Area Office found that Appellant only provided information for the most recent year and provided information for ProDyn for the three previous complete calendar years. (*Id.*, at 17.) The Area Office concludes its primary and vital analysis finding that, "[i]t is clear that the Proposal

was not prepared by Leumas, nor can Leumas perform the primary and vital components of contract performance without ProDyn's insurability, safety rates and experience requiring ProDyn to supervise Leumas." (*Id.*)

In the second prong of the ostensible subcontractor analysis, which requires an assessment of the *Dover* factors, the Area Office found that three of the four factors were present, and the remaining factor is either present or partially present depending on the ultimate source of additional personnel hired. (*Id.*, at 25.)

First, the Area Office found that PD&E is the incumbent contractor for the instant procurement, which is majority-owned by ProDyn. The Area Office found that though ProDyn is not directly the incumbent, it was a firm that offered on and was awarded the predecessor contract as majority owner of PD&E. (*Id.*, at 19.) The Area Office acknowledges Appellant's contention that PD&E performed grounds maintenance services for some of the work scope under the earlier requirement, but "much of the work scope (e.g., edging, leaf removal, mulching, shrubs) was performed by the government or some other contractor." (*Id.*) The Area Office found that ProDyn is at least a partial incumbent, and the first *Dover* factor is present.

Next, the Area Office noted that Appellant plans to hire at least part of its workforce from the subcontractor through the incumbent joint venture it is majority member of and controls. (*Id.*, at 20, citing to Declaration, *see supra*, Section II.D.) The Area Office does not have information regarding the additional employees not from PD&E referenced by Appellant who would also be hired, however, "given the unreliable and/or misleading nature of Leumas' statements provided in connection with this case regarding the myriad of connections to and reliance on ProDyn it would be impossible to fully assess this factor until after individuals from another source were actually hired." (*Id.*, at 21.) Thus, the Area Office finds this factor either fully or partially present.

The Area Office then assessed whether Appellant's proposed management previously served with the incumbent on the predecessor contract. The Area Office found that the resumes provided with the Proposal show that Appellant hired all of its management from the incumbent, PD&E. The Area Office then states that Appellant will hire five of its key personnel from PD&E and the three remaining key personnel will be hired from ProDyn. (*Id.*) The Area Office finds no distinction between Appellant hiring key personnel from PD&E or from ProDyn where the joint venture is between firms owned by father and son. Thus, the third factor is present here. (*Id.*, at 22.)

The Area Office finds that Appellant relies on ProDyn for experience. The tax returns for ProDyn and Leumas-ProDyn JV identify the primary NAICS code as 561730, Landscaping Services. Appellant was unable to provide information on the required safety form for two of the three years required for reporting, yet ProDyn was able to provide information for all three years even though information for a subcontractor was not permitted. (*Id.*, at 23.)

The Proposal provides six past performance examples, all of which include ProDyn. Two of those examples were for PD&E where ProDyn is the majority owner. Two other examples are for Leumas-ProDyn JV. The last two examples are for ProDyn. The forms completed by the Leumas-ProDyn prime-sub team list the point of contact for Leumas-ProDyn JV as [Individual

#1]. The Area Office points out that the Contractor Performance Assessment Reports (CPAR) with respect to PD&E and the Leumas-ProDyn JV lists [Individual #2], President of ProDyn as the Contract Representative. The Area Office found that these documents were completed by the Navy, and "therefore more reliable." (*Id.*, at 24.) Performance Recognition documents were provided for PD&E and ProDyn, but not for Appellant. The Area Office found that Appellant is "entirely reliant on ProDyn as the past performance examples were all for ProDyn or involved ProDyn, the provided CPARs were all for ProDyn or involved ProDyn and indicated [Individual #2] as representative, and the Performance Recognition documents were all for ProDyn or involved ProDyn and were directed to [Individual #2] as the recipient." (*Id.*, at 25.)

The Area Office then turns to a general affiliation analysis, as "an area office both has the discretion to investigate issues beyond those raised in the protest. . . ." (*Id.*, at 26.) In its general affiliation analysis, the Area Office found that the existence of a joint venture does not shield the concerns from a finding of affiliation outside of the joint venture. (*Id.*, at 28.) Taking into consideration all of the facts previously presented, the Area Office determined:

> . . . the connections between Leumas and ProDyn established through Leumas-ProDyn JV; Leumas-ProDyn JV's dependence on ProDyn for equipment; Leumas-ProDyn JV's dependence on ProDyn for financial assistance; Leumas' dependence on Leumas-ProDyn JV for equipment; Leumas' dependence upon ProDyn for insurance; Leumas' dependence on Leumas-ProDyn JV, ProDyn and PD & E for past performance to qualify for contracts; Leumas' reliance on ProDyn's other joint venture PD & E for personnel; and ProDyn's reliance on Leumas for current 8(a) status together create a constellation of connections so suggestive of dependence as to render them affiliated, despite the fact that no single element would be sufficient to constitute affiliation.

(*Id.*, at 31.) Because the Area Office determined Appellant to be affiliated with ProDyn, a concern that is not small under the applicable NAICS code, Appellant is consequently other than small for the applicable size standard of $8 million.

G. Appeal

On April 13, 2021, Appellant filed the instant appeal. Appellant argues the size determination "misapplies SBA regulation and OHA case law, and makes numerous clear errors of fact, drawing conclusions using irrelevant information and unsupported assumptions, and ignoring the evidence in the record." (Appeal, at 2.)

Appellant contends the teaming agreement with ProDyn was not the subcontract to be used to perform the work and contemplated a separate and exclusive subcontractor agreement with project-specific details. (*Id.*, at 4.) Appellant's Proposal does not reflect work split and the solicitation did not require that this information be provided at the time of its offer. Appellant asserts the Declaration was provided to the Area Office to clarify the planned work split upon which the Proposal is based. (*Id.*, at 5.) Appellant calculated that the recurring and non-recuring work to be performed by ProDyn would total approximately 39% of the total work. Appellant proposed to provide five of the named key persons including both project managers. Appellant

planned to hire managers from PD&E, but the Proposal reflects that Appellant's corporate leadership would actively oversee the project managers and the day-to-day performance of the contract. (*Id.*, at 6.)

Appellant contends it will perform the primary and vital requirements of the RFP. The Area Office is incorrect in finding that the primary and vital requirements include providing the renting or owning of equipment for grounds maintenance services, as equipment is not the principal purpose of the contract. However, the Declaration reflects that the equipment will be provided by the Leumas-ProDyn JV, which is 51% owned by Appellant. Nothing in the record contradicts the Declaration, as "contractors often wait until after they have won a contract to purchase equipment or hire employees needed for the work." (*Id.*, at 10.) Appellant contends it is commonplace for joint venture members to contribute or sell equipment to its joint venture and the equipment the Leumas-ProDyn JV purchased from ProDyn was at fair market value. Of the $[XXXXX] of equipment purchased by the Leumas-ProDyn JV from 2017 to 2019, 36% was purchased from ProDyn and the remaining 64% was purchased from outside sources with no connection to ProDyn, PD&E, or any ProDyn-related entities. (*Id.*) the Area Office did not provide Appellant with an opportunity to address this issue, which is a "fundamental violation of due process. . . ." (*Id.*, at 10-11.)

The Area Office also erroneously inferred that the Leumas-ProDyn JV is borrowing money from and is financially dependent on ProDyn. ProDyn has never loaned money to the Leumas-ProDyn JV or to Appellant, nor has any entity of which ProDyn is a member or with which ProDyn is affiliated. (*Id.*, at 11.) Appellant also claimed the Area Office committed clear error by determining Appellant is uninsurable resulting from a blatant misreading of the teaming agreement, where the agreement requires the subcontractor to indemnify the Appellant to ensure Appellant is not denied the benefit of the insurance that Appellant requires the subcontractor to carry. (*Id.*) Appellant contends the Area Office erred in determining that Appellant did not have the required health and safety data for two of the three years where Appellant's score of zero is a valid health and safety score. (*Id.*, at 12, citing *Leumas Residential, LLC*, B-418635, July 14, 2020, at 13-15.) Further, an issue of a lack of experience based on the health score is a responsibility issue within the discretion of the CO. (*Id.*) The Area Office also erred in not acknowledging Appellant's experience as majority member of the Leumas-ProDyn JV, having worked contracts similar to the instant procurement.

Appellant has the requisite experience to perform the work under the contract and will not unduly rely on ProDyn for the hiring of employees or managers. (*Id.*, at 13.) With respect to the first *Dover* factor, PD&E is a populated joint venture that performed some of the work on the previous contract, where much of the work scope was performed by the Government or another contractor. Assuming that ProDyn, as a member of PD&E, was considered a partial incumbent, that alone cannot form the basis for a finding of ostensible subcontractor affiliation. (*Id.*, at 14.)

With respect to the second *Dover* factor, the Area Office ignored three significant facts: (1) Appellant was legally required to hire incumbent employees, (2) Appellant's Proposal stated clearly it would vet the incumbent personnel, and (3) Appellant would have to hire substantially from other sources in addition to PD&E since the instant contract is larger than the previous contract. (*Id.*, at 14-15.) The Solicitation includes FAR 52.222-17, "Non-Displacement of

Qualified Workers," which, under Executive Order 13495, requires incoming contractors to offer workers under a predecessor contract a "right of first refusal," with which Appellant planned to comply. (*Id.*, at 15.) Because Appellant planned to rigorously review personnel individually rather than a unilateral transfer, this hiring does not suggest undue reliance. (*Id.*, citing *Size Appeal of Northwind-CDM Smith Advantage JV, LLC*, SBA No. SIZ-6053, at 27 (2020).) Although Appellant did plan to employ managers that were previously employed by PD&E, all managers would be overseen by Appellant's corporate leadership team. (*Id.*, at 16.)

The Area Office's assessment of Appellant relying entirely on ProDyn for past experience is based on improper inferences and errors. It was improper for the Area Office to ignore Appellant's own past performance examples on the grounds that they involved ProDyn as a minority member of the Leumas-ProDyn JV. (*Id.*) It was not proper for the Area Office to ignore Appellant's experience because a Past Performance Questionnaire (PPQ) was submitted in lieu of a Contractor Performance Assessment Report (CPAR) or performance recognition, as the Navy properly considered completed PPQs in addition to CPARs to evaluate past performance. The Area Office substituted its view of the past performance requirements for that of the CO. (*Id.*) The CPAR incorrectly listed a ProDyn contact as contractor representative instead of Appellant's point of contact where Appellant project managed and performed the majority of the work under the contract, and the Area Office erred by disregarding this information. The Area Office took DSA's word that Appellant's only landscaping experience involves ProDyn, though the Declaration reflected Appellant's performance on a HUD contract that did not involve ProDyn. The size determination cited that Appellant's primary NAICS code is not landscaping as reflective of Appellant's lack of experience, where the NAICS code is not relevant to a concern's experience level. (*Id.*, at 17.) The Area Office also found a lack of experience based on Appellant's health and safety Score, its insurability, and equipment findings which are all based on clear error. (*Id.*) Thus, Appellant is not affiliated with ProDyn based on the *Dover* factors.

Appellant is not generally affiliated with ProDyn. The Area Office should not have addressed this issue on remand, as it was not raised by DSA nor investigated in the original size determination. (*Id.*, at 17.) Appellant contends the Area Office's one new reason for finding general affiliation is based on Appellant and ProDyn having a joint venture that operates in ProDyn's NAICS code, not in Appellant's NAICS code, though that reason is not relevant to control. (*Id.*, at 19.) The Area Office then repeats all of its errors for finding affiliation based on an ostensible subcontractor violation. The Area Office's decision should be reversed.

H. Response

On April 30, 2021, DSA responded to the appeal. DSA contends the appeal is a "mere disagreement with the Size Determination and it has failed to show the Area Office committed reversible error." (Response, at 1.)

DSA argues ProDyn will take the lead on performing the primary and vital requirements of the contract. (*Id.*, at 5.) The Area Office agreed with the CO in determining the primary and vital requirements. (*Id.*) As part of performing the services, the contractor is required to "furnish all labor, supervision, management, tools, materials, equipment, facilities, transportation, incidental engineering, and other items necessary to provide the services." (*Id.*, citing to the PWS)

(DSA emphasis added.) Appellant's argument that renting or owning equipment is not the principal purpose of the procurement has no merit. (*Id.*, at 6, citing to *Size Appeal of Brown & Pipkins, LLC*, SBA No. SIZ-5621 (2014). In *Brown & Pipkins*, OHA upheld a finding of an ostensible subcontractor relationship where the primary and vital requirements included the acquiring of the equipment to complete janitorial services. DSA notes the Area Office did require information on the equipment for the instant procurement, thus Appellant was on notice.

Appellant failed to show clear error in the size determination's finding that Appellant cannot perform the primary and vital requirements where Appellant relies on a post-protest Declaration to show work split. (*Id.*, at 6-7.) Though Appellant asserts it will perform 61% of the grounds maintenance, an ostensible subcontractor violation may still be found where the limitations on subcontracting requirements are met. (*Id.*)

Appellant is unduly reliant on ProDyn to perform the contract. Appellant acknowledges that ProDyn, as managing member of PD&E, is arguably a partial incumbent. Though Appellant was legally required to hire incumbent employees, Appellant ignored that the Executive Order does not apply to managerial personnel and does not mandate that a successor contractor will rely on the incumbent for the entire workforce. (*Id.*, at 9.) The Proposal contradicts Appellant's claim that all managerial personnel will be overseen under Appellant's corporate leadership, as [Individual #1] is not assigned a major role in the procurement. [Individual #1] is only mentioned in the Leumas-ProDyn team organizational structure as the President of Appellant, and the Proposal does not distinguish between the responsibilities of Appellant's and ProDyn's leadership teams. (*Id.*, at 10.) The Proposal notes that [Individual #2], not [Individual #1], will have a major role in the procurement as the licensed pesticide applicator. The technical and cost Proposals are signed by the Presidents of Appellant and ProDyn.

It is undeniable that ProDyn is involved with each past performance reference submitted with Appellant's Proposal. Appellant has no experience on its own in performing contracts of similar scope or size. (*Id.*) The Declaration shows that Appellant's contract with HUD runs from August 2016 through July 31, 2021 but was not included in its Proposal and only included past performance where ProDyn was involved, which shows a reliance on ProDyn and its experience to win the instant contract. (*Id.*, at 11.)

The Declaration is inconsistent with the Proposal. First Appellant claims ProDyn would complete 39% of the total work and Appellant would complete 61% of the work required. However, this split is contradictory to the Proposal in that the Declaration states the line items in the Proposal containing mowing, tree maintenance, and landscape maintenance are essentially all titled “mowing,” though the Proposal communicates that items such as tree maintenance and landscape maintenance are included in other line items. (*Id.*, at 13.) Grounds maintenance in the Proposal includes items such as mowing, trimming, edging, and blowing, which are landscape maintenance tasks that ProDyn is apparently responsible for. (*Id.*, citing to Proposal, at 42-43.) It is clear the mowing, tree maintenance, and landscaping maintenance make up more than the “mowing” line items as alleged in the Declaration. Thus, the work split in the Declaration is a change in approach from the Proposal. (*Id.*, at 14.) Even accepting the 61%/39% work split as true, Appellant is still hiring nearly all of the staff and all of the key employees from PD&E, the incumbent contractor of which ProDyn is a majority member. (*Id.*)

The Declaration's statements regarding key personnel, project hiring, and the active involvement of Appellant's leadership are entirely new and novel assertions. The Proposal is silent as to any oversight of Appellant's President. (*Id.*, at 15.) The organization chart provided in the Proposal references "presidents," which suggests that any responsibility assigned to the position in the Proposal likely involves both Appellant's President and ProDyn's President. (*Id.*, at 15-16.)

The Area Office did properly find Appellant and ProDyn generally affiliated and DSA raised the issue of general affiliation based on the totality of the circumstances in its original protest. (*Id.*, at 16.) Further, the regulations require an analysis of the totality of the circumstances in each affiliation determination. (*Id.*, at 17, citing to 13 C.F.R § 121.103(a)(5).) In looking at the totality of the circumstances, based on the facts noted in the Area Office, it is clear that Appellant and ProDyn are generally affiliated. (*Id.*)

I. Appellant Reply to DSA Response

On May 7, 2021, Appellant filed a motion for leave to reply to DSA's appeal response with a sur-reply to address DSA's factual errors, mischaracterizations of the record, and raising of issues not contained in the size determination or the instant appeal. (Appellant Sur-Reply, at 1.)

First, the CO did not identify providing equipment as a primary and vital requirement for the instant procurement, as suggested by DSA and the Area Office. (*Id.*, at 2.) DSA's own protest identified the requirements as providing grounds maintenance services for multiple naval facilities. (*Id.*)

Next, DSA incorrectly asserts Appellant was on notice regarding the Area Office's inquiry on the equipment to be used. The Area Office's letter inquired about receiving assistance, including equipment from ProDyn to Appellant, not to the Leumas-ProDyn JV, which is a distinct entity. (*Id.*, at 2-3.) The equipment Leumas-ProDyn JV purchased from ProDyn represents a minority of the equipment purchased by the JV, where 64% of the equipment was purchased from other sources. (*Id.*, at 3.)

DSA fails to establish a contradiction between the Proposal and the Declaration. Providing greater detail does not constitute a contradiction. Further:

> DSA conflates "landscape maintenance" with "grounds maintenance." All of the contract field work is "grounds maintenance." *See* SOW. The landscape maintenance, again, is primarily non-recurring work, including bedding ornamental plants and mulching. Similarly, tree maintenance is primarily non-recurring work, including tree and stump removal, stump grinding, and removal of tree limbs. That is why ProDyn's recurring work is entirely captured in the "mowing" line items; its other areas of responsibility are predominantly non-recurring, and 1.9.7 Direct Labor Hours (Technical Proposal at 25-30) does not depict non-recurring work; Leumas' Declaration accounted for non-recurring work separately. Declaration at ¶¶ 5-7. Trimming, edging and blowing are

> recurring grounds maintenance tasks that Leumas is performing, led by the five (of eight) key personnel who are Leumas employees, including both project managers. Technical Proposal at 31; Declaration at ¶ 8. Those tasks are distinct from the mowing, landscape maintenance and tree maintenance ProDyn is performing. Leumas' Declaration is perfectly consistent with its Proposal. *See* Declaration at ¶¶ 4-7.

(*Id.*, at 4.)

Appellant will hire a significant portion of its workforce for the instant procurement from sources other than PD&E, with no connection to ProDyn or ProDyn-related entities.

Appellant has self-performed approximately 55-56% of its contracts as majority member of the Leumas-ProDyn JV. That experience is no less relevant because it involved ProDyn. (*Id.*, at 5.)

J. DSA Sur-Reply

On May 21, 2021, DSA filed an Opposition to Appellant's Reply with a Motion for Leave to Sur-Reply to Appellant's Reply, arguing OHA did not direct Appellant to reply to DSA's appeal response. DSA contends Appellant's arguments that DSA mischaracterized facts are "inapposite and misguided." (DSA Sur-Reply, at 3.)

DSA argues its statement that the Area Office agreed with the CO, that the primary and vital requirements include equipment, was taken out of the size determination. Appellant's argument against this statement is a further attempt to re-present its arguments in its appeal. (*Id.*, at 4.)

Appellant was on notice that equipment purchased from ProDyn was at issue. (*Id.*, at 4-5.) Appellant's Declaration contains contradictions, which DSA addressed in its response to the appeal. (*Id.*, at 5.) Appellant has argued the Declaration is only being used by it as a clarification tool, but this is not true. Appellant's Proposal outlines the work split and the Declaration does not clarify information that was clear in the Proposal. (*Id.*, at 6.)

Appellant has failed to prove it is not unduly reliant on ProDyn. Appellant will hire much of its staff from PD&E, ProDyn's joint venture, and Appellant's Proposal is unclear as to the exact role of Appellant's corporate leadership. (*Id.*, at 7.) Lastly, Appellant does not have relevant experience on its own without unduly relying on ProDyn. (*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).)

B. Preliminary Matters

Appellant submitted a reply to DSA's response and DSA submitted a sur-reply after the close of record. Appellant provides arguments regarding the primary and vital requirements of the contract, its notice regarding equipment, and a further explanation regarding work split. DSA provides counterarguments to Appellant's contentions in the Sur-Reply.

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). A reply may be accepted, however, to address factual errors or new issues raised in an opposing party's pleading. E.g., *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359, at 9-10 (2012). In this case, both the reply and sur-reply are brief and address purported errors and inconsistencies in the response and the reply. Thus, the motions to reply and sur-reply are GRANTED, and the reply and sur-reply are ADMITTED into the record. Though DSA opposes Appellant's Reply, I am admitting the sur-reply for fairness and in the interest of having a complete record.

C. Analysis

In *Size Appeal of Leumas Residential, LLC*, SBA No. SIZ-6091 (2021), I remanded the initial size determination and directed the Area Office to conduct a complete analysis of whether Appellant's relationship with ProDyn was in violation of the ostensible subcontractor rule. After review of the size determination on remand, the appeal, and the appeal responses, I find that the Area Office clearly erred in reaching its conclusion that Appellant is affiliated with ProDyn in contravention of the ostensible subcontractor rule. Thus, I grant the instant appeal and reverse size determination No. 02-2021-043.

A contractor and its ostensible subcontractor are treated as joint venturers for size determination purposes. 13 C.F.R. § 121.103(h)(4). An analysis of a concern based on the ostensible subcontractor rule requires an assessment of (1) whether a concern will perform the primary and vital requirements of the subject procurement, and (2) whether the prime contractor is unusually reliant on its subcontractor to perform the functions required under the contract. An ostensible subcontractor analysis is extremely fact-specific and is undertaken on the basis of the solicitation and the Proposal at issue. *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 14 (2010). The Area Office must base its ostensible subcontractor determination solely on the relationship between the parties at the time of the proposal, which is best evidenced by Appellant's proposal and anything submitted therewith. 13 C.F.R. 121.404(d).

The first step in an ostensible subcontractor analysis is to determine the primary and vital requirements of the subject solicitation. The Area Office states that it "agrees with the CO that the primary and vital requirements are the provision of the equipment and performance of grounds maintenance." Size Determination, at 10. However, the CO at no point characterized the requirements of the contract in this manner. Thus, the Area Office clearly erred in concluding

that the CO determined the primary and vital requirements of the instant procurement included equipment.

I find that the primary and vital requirements are grounds maintenance only and do not include providing equipment. To determine if a concern will perform the primary and vital requirements of the contract, an Area Office must first determine what requirements constitute the principal purpose of the acquisition. *See e.g., Size Appeal of Navarro Research and Engineering, Inc.*, SBA No. SIZ-6065, at 20 (2020). OHA has generally found that there is only one principal purpose of an acquisition, although there could be multiple requirements associated with that principal purpose. *Santa Fe Protective Services, Inc.*, SBA No. SIZ-5312 at 10. Not all 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. *See Navarro Research and Engineering, Inc.*, SBA No. SIZ-6065, at 20.

The plain language of the PWS describes the requirements as "grounds maintenance (grass cutting, turf and ornamental/ vegetation pest control, shrub, hedge, plant, tree maintenance, mulch bed, and debris removal)." PWS, at 1. In a separate paragraph, the PWS states that a contractor must furnish, "all labor, supervision, management, tools, materials, equipment, facilities, transportation, incidental engineering, and other items *necessary to provide the services outlined below*. . ." *Id.* (emphasis added). From a complete and objective reading of the PWS, it is clear that the labor, supervision, management, tools, materials, equipment, facilities, transportation, incidental engineering requirements are merely ancillary to the grounds maintenance requirements of the contract. The Area Office, however, determined that equipment is a primary and vital requirement of the procurement notwithstanding the fact that equipment is just one of the items listed in the PWS as necessary to furnish the grounds maintenance services. Using the Area Office's logic, this would also mean that the primary and vital requirements include labor, supervision, transportation, and incidental engineering, which are all listed alongside equipment in the PWS. The Area Office provides no explanation why equipment should be viewed as any more necessary than the other items listed as required to complete the grounds maintenance services. Equipment to perform grounds maintenance services is necessary to undertake the requirements of the contract, but equipment is merely a means to the end of providing grounds maintenance services.

DSA cites to *Size Appeal of Brown & Pipkins, LLC*, SBA No. SIZ-5621 (2014) to bolster the Area Office's determination that equipment is included as a primary and vital requirement of the procurement. However, *Brown & Pipkins* did not find that equipment was a primary and vital requirement. Rather, there the solicitation called for a contractor "to manage their janitorial services, to secure reliable employees to comply with specific requirements for cleaning, to supply the materials and equipment necessary to successfully clean to an established standard, to follow distinct procedures for restricted rooms, and to provide quality assurance and surveillance." *Brown & Pipkins*, SBA No. SIZ-5621, at 7. The provision of equipment was ancillary to the requirement to provide overall management of the agency's janitorial services. Here, the Navy is not requiring Appellant to manage the Navy's grounds maintenance services, but to simply provide grounds maintenance services to a number of the Navy's bases. More importantly, the protested concern in *Brown & Pipkins*, unlike Appellant, depended on its subcontractor to manage nearly every aspect of the subject contract. *Brown & Pipkins* is

inapposite here and DSA's reliance upon it to establish that the provision of equipment for grounds maintenance is a primary and vital requirement is misplaced.

Though I find that equipment is not a primary and vital requirement of the instant procurement, I will address the Area Office's allegations regarding Appellant's reliance on ProDyn for equipment. On multiple occasions, the Area Office highlights that Appellant's primary NAICS code on its tax returns, 531390, Other Activities Related to Real Estate, does not indicate Appellant owns equipment, where ProDyn's primary NAICS code is 561730, Landscaping services, which indicates ownership of equipment. A concern's NAICS code alone does not indicate whether a concern possesses certain property. The Area Office also reviewed the Leumas-ProDyn JV tax return and speculated that "the exact equipment listed in the Proposal is currently owned and being used by PD & E on the incumbent contract and will be sold or transferred by its majority member ProDyn to Leumas-ProDyn JV upon award of the instant contract for use by Leumas-ProDyn Team." Size Determination, at 11-12. However, speculation is no basis for making a size determination.

OHA has held that a post-award declaration or statement is admissible so long as it does not contradict, but merely clarifies the underlying proposal. *See Size Appeal of Contego Environmental, LLC*, SBA No. SIZ-6073 (2020); ("It is well-settled law that "documents created in response to a protest may not be used to contradict an offeror's proposal." quoting, *Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815, at 10 (2017); *see also Navarro*, SBA No. SIZ-6055, at 22, "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.")

Though the Proposal itself did not provide a clear breakdown of the sources of all equipment, Appellant's Declaration states that the equipment will be provided by the Leumas-ProDyn JV, of which Appellant is 51% owner. In response to the Area Office's speculations regarding the ultimate source of the equipment coming from ProDyn, Appellant further clarified that only 36% of the equipment procured by the Leumas-ProDyn was purchased from ProDyn, where 64% of the equipment has been provided by other sources. Thus, even if equipment were a primary and vital requirement of this contract, which it is not, neither ProDyn nor a ProDyn-owned/affiliated concern provides the majority of the equipment for this procurement. This information is not in contradiction with the Proposal or any of Appellant's previous statements.

Because I have disposed of the issue of equipment being a primary and vital requirement of the contract, I must now analyze whether Appellant or its subcontractor, ProDyn, will perform the sole primary and vital requirement of grounds maintenance. It is appropriate to consider qualitative factors, such as the relative complexity and importance of requirements. 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)).

The Proposal does not provide a clear work split between Appellant and ProDyn. However, OHA will review a declaration or other document produced to provide clarity on the

work to be completed by a concern and its subcontractor in an ostensible subcontractor relationship analysis when the proposal is otherwise silent. *See e.g. Size Appeal of Nationwide Pharm., LLC*, SBA No. SIZ-6027, at 16 (2019). In its Declaration, Appellant explained that Appellant would complete 61% of the work required under the RFP. The Declaration further states that ProDyn would complete 39% of the work, completing tasks labeled in its Proposal as "mowing, mowing-semi-improved grounds, mowing-unimproved grounds, and "operational areas-shore mowing," which covers "mowing, tree maintenance, and landscape maintenance." *See supra*, Section II.D.

DSA argues for a different interpretation of Appellant's Proposal that would make ProDyn's required task to include trimming, edging, and blowing. DSA found Appellant's explanation in its Declaration of ProDyn's responsibilities to be a departure from the Proposal, though as already discussed, the Proposal is silent on the work split between the parties. Appellant provided a clear explanation for the breakdown in the work to be completed by Appellant and ProDyn, where Appellant will complete all work except for the line items delineated in the Proposal that will be covered by ProDyn. Though there may be different methods to identify certain types of work, DSA cannot insert its own interpretation of the work ProDyn will complete in place of Appellant. Based on the line items provided for in the Proposal, which is silent on work split, in conjunction with Appellant's Declaration that provides an explanation of the work split, I find that Appellant will complete the primary and vital requirements of the contract.

The Area Office makes additional statements that are not rooted in fact nor law to establish that Appellant may not be able to complete the primary and vital requirements of the contract. The Area Office reviewed the tax return for the Leumas-ProDyn JV (not Appellant or the prime-sub team) and cross-referenced the information to suggest the Leumas-ProDyn JV (again, not Appellant or the prime-sub team) is indebted to ProDyn. A mere cross-reference without a loan document or other evidence to establish that Appellant or the Leumas-ProDyn JV or Leumas-ProDyn team is financially dependent on ProDyn is baseless and speculative at best. Accordingly, I find the Area Office erred in finding Appellant financially dependent upon ProDyn.

The Area Office also found that Appellant's health and safety rating of "0" indicates it lacks the necessary experience and is unable to complete the primary and vital requirements of the contract without ProDyn is without merit, as it has been established by the GAO that a rating of "0" is an acceptable response. *See Leumas Residential, LLC*, B-418635, July 14, 2020, at 15; (stating, "There is nothing in the solicitation requiring an offeror that had a rate of "0" for any of its safety data to provide additional explanation as to why it received such rate. The solicitation required an affirmative statement and explanation only if the offeror had no safety data for any particular year. RFP at 67-68. Here, the agency concedes that the number "0" is a rate responsive to the solicitation.) Again, a finding cannot be based upon conjecture or speculation. Furthermore, such a consideration is best left within the purview if the CO who must decide contractor responsibility.

The Area Office also questioned Appellant's insurability by cherry-picking one clause from Appellant's Master Subcontractor Agreement, removing all context. Read in its entirety, it

is made clear from the plain language of the clause that is titled "Subcontractor Insurance" that Appellant would only seek access to ProDyn's insurance should Appellant be subject to liability based on an act or omission by ProDyn. *See supra*, Section II.B. The clause in no way absolves Appellant from having its own insurance or alludes to the fact that Appellant is uninsurable. Instead, the indemnity clause attempts to insulate Appellant from being liable for actions or omissions committed by ProDyn in carrying out its work as Appellant's subcontractor. The Area Office's interpretation of the language in the clause is counter to reason and is baseless on its face.

I must now turn my attention to the question of whether Appellant is unusually reliant on its subcontractor to perform the functions required under the contract. In doing so, I will determine whether (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 DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011); *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).

I find that, after a thorough review of the record and arguments of the parties, only the first of the *Dover* factors are present. Thus, Appellant is not unduly reliant upon ProDyn to perform the requirements of this contract.

It is clear from the record that PD&E worked on the predecessor contract. It is also clear from the record that PD&E is majority-owned by ProDyn, and thus PD&E and ProDyn are affiliated based on common ownership. 13 C.F.R. § 121.103(a)(2). Therefore, I will treat ProDyn as though it is PD&E for this analysis. Thus, for all intents and purposes, ProDyn is the incumbent contractor. Because ProDyn has conceded that it is no longer a small business under the applicable NAICS codes, ProDyn is ineligible to complete for this procurement. Accordingly, I find that the first *Dover* factor is present. Furthermore, I find the fact that PD&E, i.e., ProDyn was not the only contractor for the predecessor contract to be irrelevant. The question is whether the proposed subcontractor is the incumbent contractor, not whether it was the *only* contractor.

Though I do find that Appellant will hire at least some of its workforce from ProDyn, I do not find that this meets the requirement for the second *Dover* factor or establishes undue reliance by Appellant on ProDyn. First, Appellant is required to hire incumbent staff under 52.222-17, "Non-Displacement of Qualified Workers," which, under Executive Order 13495, provided that workers on a service contract be given the right of first refusal for employment with a successor contractor if they would otherwise lose their jobs as a result of expiration of the contract. Further, although Appellant has not provided a complete description on the number of employees it will hire from ProDyn compared with other sources, Appellant has explained that the instant contract is a larger requirement than the predecessor contract, which, as a result, will require the procuring of staff from sources other than ProDyn. Thus, I am unable to conclude that this *Dover* factor is present here.

The third factor concerns incumbent managers. According to the Proposal, at least three managers who will work on the contract are former PD&E managers. The Proposal is unclear regarding the leadership structure and does not address the hierarchy of command with respect to the instant procurement. Accordingly, as DSA suggests, the issue of Appellant's leadership involvement is a new assertion. However, that new assertion is welcome as it brings clarity to an otherwise unanswered, yet vital question of what parties and concern(s) will manage the contract. As previously stated, a declaration can provide insight and clarity when a Proposal is unclear so long as it does not contradict the proposal.

There is no violation of the ostensible subcontractor rule where key personnel hired from a subcontractor remain under the supervision and control of the prime contractor. *See Size Appeal of A-Team Realty, Inc.*, SBA No. SIZ-5935, at 10 (2018); Size Appeal of Hanks-Brandan, LLC, SBA No. SIZ-5692, at 9 (2015); *see also Size Appeal of GiaCare and MedTrust JV, LLC*, SBA No. SIZ-5690, at 12 (2015); *Size Appeal of Maywood Closure Co., LLC & TPMC-Energy Solutions 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). Though the Proposal is unclear, Appellant's Declaration states that [Individual #1], President of Appellant, along with Appellant's Director of Operations and Corporate Project Manager, will oversee all managers on the contract. *See supra*, Section II.D. Because all staff, including managers and key personnel, will remain under the supervision and control of Appellant, the third factor is not present to establish undue reliance.

The last *Dover* factor requires an analysis of Appellant's past performance. Both the Area Office and DSA claim that Appellant has no past performance outside of its performance with ProDyn. However, Appellant's relevant experience is not negated by the fact that this experience involved another concern. Appellant's Proposal includes multiple examples of its work on similar contracts. In addition to the experience provided in the Proposal, Appellant also submitted that it is currently working on a similar contract independent from ProDyn. Regardless of whether Appellant performed the work as a joint venturer, as a prime contractor, or as a sole contractor, nothing in the record refutes or denies that Appellant has relevant experience in grounds maintenance. Further, Appellant provided that it performed the majority of the work on the contracts it has completed as majority owner of the Leumas-ProDyn JV. Neither the Area Office nor DSA provides any evidence or argument to negate the experience Appellant has obtained by questioning the magnitude or relevance of the work, but instead suggests that somehow, Appellant does not have the experience simply because some of that experience involves another contractor. I find that contention based on the facts here to be meritless and without a legal foundation.

Accordingly, I conclude that with only one of the four *Dover Staffing* factors present, the record does not support a finding that Appellant was unusually reliant upon ProDyn, and the Area Office's finding that Appellant's relationship with ProDyn violated the ostensible subcontractor rule is based on errors of law.

The Area Office also found Appellant generally affiliated with ProDyn based on the totality of the circumstances, where affiliation may be found even though no single factor may be sufficient to constitute affiliation, but the circumstances are so suggestive of affiliation to support a finding of affiliation based on those circumstances. 13 C.F.R. § 121.103(a)(5); *Size Appeal*

of Clarity Communications Group, LLC, SBA No. SIZ-6011, at 10 (2019). As with all affiliation analyses, the question is whether one firm controls or has the power to control the other. 13 C.F.R. § 121.103(a)(1); *Size Appeal of SC&A, Inc.*, at 10 (2020). In order to find affiliation under the totality of the circumstances an area office must identify facts and explain how those facts led to conclude one firm had the power to control the other. The fact that there are ties between the firms is not sufficient to support a finding of affiliation. *SC&A, Inc., supra*. An Area Office cannot merely list connections between the firms, it must explain how those connections could lead one firm to control the other. *Size Appeal of Telaforce, LLC*, SBA No. SIZ-5970, at 15 (2018).

The Area Office identified a number of facts but failed to show how they lead to control by ProDyn over Appellant, or the other way around. The fact that the two firms have a joint venture does not lead to one firm controlling the other, and the fact it operates under a different NAICS code from Appellant does not lead to one firm controlling the other. That the Proposal referred to the two firms as a team is no indicator of affiliation. *Size Appeal of APT Research, Inc*, SBA No. SIZ-5798, at 15 (2016). As discussed above, the Area Office erred in concluding Appellant's equipment derived from ProDyn. Further the Area Office's conclusion that Appellant was indebted to ProDyn is speculative at best. In addition, as discussed above, Appellant is not completely dependent upon ProDyn for its past performance. The Area Office's contention that Appellant's Proposal should have been rejected on the merits is beyond its jurisdiction, as it attempts to make a responsibility determination left to the CO. This is true as well for its speculations on Appellant's insurability. Appellant's hiring is also no indicator of affiliation, where it will not be an *en masse* hiring of the incumbent's employees, but mostly from other sources, and those incumbent employees Appellant hires will be Appellant's employees, under Appellant's management and control. Similarly, the mere fact the incumbent is a joint venture between ProDyn and another firm is no indicator that ProDyn controls Appellant.

In sum, the Area Office's findings of fact are flawed, based on speculation and in some cases outright error. Further, the Area Office fails to explain how the facts found lead to a finding that ProDyn controls Appellant, or vice versa. Accordingly, I conclude that the Area Office's finding of general affiliation based upon the totality of the circumstances is rooted in clear error of fact and law, and I must grant the appeal and overturn it.

IV. Conclusion

Appellant has established that the size determination is based upon a clear error of fact and law. Accordingly, I GRANT the instant appeal, and I REVERSE the size determination. Appellant is an eligible small business for the instant procurement. This is the final decision of the Small Business Administration. See 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge