United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Telesis Corporation, Appellant, Appealed From Size Determination No. 2-2021-022	SBA No. SIZ-6113 Decided: August 9, 2021

APPEARANCES

Mark J. Maier, Esq., Shulman, Rogers, Gandal, Pordy & Ecker, P.A., Potomac, Maryland, for Appellant

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DECISION[1]

I. Introduction and Jurisdiction

On February 19, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2021-022, sustaining a size protest filed by QED Systems, LLC (QED) against Telesis Corporation (Appellant). The Area Office concluded that Appellant is affiliated with its subcontractor, Sev1Tech, LLC (Sev1Tech), through the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(2). On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is 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 timely filed the instant appeal on March 8, 2021.[2] Accordingly, this matter is properly before OHA for decision.

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[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] Ordinarily, a size appeal must be filed within 15 calendar days of receipt of the size determination. 13 C.F.R. § 134.304(a). Here, Appellant received the size determination on

II. Background

A. The Solicitation

On February 28, 2020, the U.S. Army Contracting Command — Aberdeen Proving Ground (Army) issued Request for Proposals (RFP) No. RS3-18-0881 for "Systems Engineering and Technical Assistance (SETA) Support for Product Manager Radars." The RFP stated that the Army intended to award a single task order under the Responsive Strategic Sourcing for Services (RS3) multiple-award indefinite-delivery / indefinite-quantity (IDIQ) contracts. The Contracting Officer (CO) restricted the task order to RS3 prime contractors who were small businesses. Pursuant to a provision in the RS3 base contracts, prime contractors were required to recertify their size under North American Industry Classification System (NAICS) code 541715, Research and Development in the Physical, Engineering, and Life Sciences (except Nanotechnology and Biotechnology), for "[a]ny proposals submitted for a task order restricted to small businesses."

The RFP's Performance Work Statement (PWS) explained that the contractor will perform a variety of engineering and technical assistance services, to include "programmatic, technical, engineering, testing, logistics, maintenance, training, integration, business management, administrative, and operational program support." (PWS at 15.) Such services will assist the Army's Product Manager Radars (PdM Radars) in "successful product development, acquisition, sustainment, supportability, fabrication, overhaul, fielding, training, de-fielding, and administration." (*Id.*) The RFP provided detailed estimates of anticipated labor categories and labor hours, including a potential requirement for "Surge Support." (RFP, Attach. 2.) Offerors were instructed that they must propose "the exact manpower requirements" specified by the RFP. (RFP at 6-7.)

The RFP stated that each offeror must submit a Technical proposal, limited to a maximum of 25 pages; a Cost proposal, with no page limit; and a Small Business Participation Plan, limited to one page. (*Id.* at 3-4.) The Technical proposal must address the offeror's corporate experience, manpower, and management plan. (*Id.* at 4-6.) With regard to corporate experience, offerors were instructed to submit a minimum of one, and a maximum of four, examples of the past experience of the proposed prime contractor or of any subcontractor who would perform 20% or more of the instant order. (*Id.* at 4.) Offerors could not, however, select "a base IDIQ contract or a Blanket Purchase Agreement (BPA) as an example," and any examples must have involved "at least 65 full time equivalent (FTE) employees, per year." (*Id.*) The RFP stated that the examples of corporate experience must "collectively" demonstrate the experience of the offeror or its subcontractor(s) in four areas: 1) Program Management; 2) Systems Engineering; 3) Integrated Logistics Support; and 4) Planning, Programming, Budgeting, and Execution (PPBE) Support. (*Id.* at 5.)

February 19, 2021. Fifteen calendar days after February 19, 2021 was March 6, 2021. Because March 6, 2021 was a Saturday, the appeal petition was due on the next business day: Monday, March 8, 2021. 13 C.F.R. § 134.202(d)(1)(ii).

Proposals for the task order were due April 1, 2020. Appellant and QED, both of which are RS3 prime contractors, submitted timely offers.

B. Appellant's Proposal

Appellant proposed that Appellant will serve as the prime contractor for the instant order, with Sev1Tech as Appellant's principal subcontractor. (Proposal, Vol. I, at 1.) In addition, Appellant intends to subcontract certain tasks to three other "partner small businesses": [XXXXXXXXXXXX]. (*Id.*) Appellant brings a "stellar record of providing exceptional program management, IT operations, research and development, software engineering, systems integration, logistics management, test and evaluation, and acquisition support services." (*Id.*) Sev1Tech is the incumbent on the current PdM Radars SETA contract, and currently employs approximately "80% of the incumbent workforce supporting PdM Radars today." (Proposal, Vol. II, at 9.) Appellant acknowledged that Sev1Tech is not a small business. (*Id.*, at 8.)

Appellant noted that, according to the RFP, the instant order calls for a total of [XXX] full-time equivalent (FTE) employees per year in a "non-surge" scenario, rising to [XXX] FTEs per year in a "surge" scenario. (Proposal, Vol. I, at 19-20; Vol. II, at 5.) Appellant proposed that, in a non-surge scenario, [a majority] of the FTEs will be Appellant's own employees; [less than 40% of the] FTEs would be employed by Sev1Tech; and [XXXXXXXXXXXX]. (Proposal, Vol. I, at 19-20.) In the surge scenario, [a majority of the] FTEs would be Appellant's own employees; [less than 40% of the] FTEs would be employed by Sev1Tech; and [XXXXXXXXXXXXX]. (*Id.*) Viewed from a dollar value standpoint, in a non-surge scenario Appellant will subcontract [less than 40%] of contract dollar value to Sev1Tech; [XXXXXXX XXXXXXX]. (Proposal, Vol. II, at 9-11.)

To manage the order, Appellant proposed to retain [Program Manager], who currently manages the incumbent PdM Radars SETA contract for Sev1Tech. (Proposal, Vol. I, at 24.) [Program Manager] will become an employee of Appellant upon contract award. (*Id.*, at 19.) The proposal stated:

> **Operations and Program Management**: [Appellant] proposes [Program Manager] as the Operations Manager for the program, and he is responsible for overall performance and quality of the entire team including subcontractors. He has authority to make decisions and commitments on behalf of [Appellant]. He has a long history supporting the PdM Radars program as the Operations Manager for four years and as the contractor PM for the past 15 months. His dedication and understanding of the PdM Radars mission resulted in sustained CPARS ratings of "Exceptional.' We propose [Program Manager], the incumbent PM, in the Operations Manager labor category to serve as the Program Manager (PM).
>
> Effective coordination of internal and external issues and communication is essential for attaining program objectives. As the lead on-site manager, [Program Manager] is the single Point-of-Contact (POC) for program staff, [Appellant's] leadership and Corporate [Program Management Office (PMO)], and PdM Radars stakeholders. He provides day-to-day, project-level guidance and direction to

> support efficient operations to [Team Lead and Site Leads], who are responsible for staff execution. He interacts daily with [Army personnel] to ensure project tasks are correctly prioritized and objectives achieved. To ensure operational continuity during [Program Manager's] absence, we assign [LXXX] serving in the role of the Action Officer, Team Lead as a Deputy PM.
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> . . .
>
> **Executive Management**: The PdM Radars program gains visibility at the highest level of [Appellant] through the engagement of the executive management team that participates in a weekly status review with the Corporate PMO and [Program Manager]. They receive updates on program status, allowing management to proactively address obstacles to performance. They are accessible to the on-site team and PdM Radars stakeholders as required.
>
> **Corporate PMO**: The Corporate PMO, which reports to [Appellant's Chief Operating Officer], works closely with [Program Manager] to provide program administration and oversight. Additionally, the Director of Contracts works with [Program Manager] to ensure performance of subcontractors through the execution of processes detailed in a Subcontractor Management Plan.

(*Id.* at 24-25.)

The proposal included a diagram illustrating Appellant's proposed organizational structure. (*Id.*, at 24.) The diagram reflected that the proposed Program Manager, [Program Manager], will operate under the control and supervision of Appellant's Chief Operating Officer, [XXXXXX], who in turn will operate under the control and supervision of Appellant's CEO and President, [XXXXXXXX]. (*Id.*) Appellant stated that [XXXXXXXX] also will serve as Transition Manager for the order, and will be responsible for "[m]anag[ing] overall execution of Transition-In Plan and Schedule." (Proposal, Vol. II, at 4.)

[ORGANIZATIONAL CHART REDACTED]

(Proposal, Vol. I, at 24.)

For corporate experience, Appellant provided one example of its own past experience, and one example for Sev1Tech. (*Id.*, at 1-17.) The Sev1Tech example was for Sev1Tech's work on the incumbent PdM Radars SETA contract. (*Id.*, at 7-17.)

Accompanying its proposal, Appellant submitted the required certification that Appellant qualifies as a small business for its RS3 contract. The certification was digitally signed by [XXXXXXXXXX] and dated March 30, 2020.

C. Size Protest

On January 21, 2021, the CO announced that Appellant was the apparent awardee. On January 26, 2021, QED filed a protest challenging Appellant's size. QED alleged that Appellant is not a small business because Appellant was acquired by Belcan, LLC (Belcan) in November 2020. (Protest at 2.) In addition, QED contended, Appellant is affiliated with its proposed subcontractor, Sev1Tech, under the ostensible subcontractor rule. (*Id.* at 2-3.)

QED observed that Belcan, a large business, announced its acquisition of Appellant on November 2, 2020. (*Id.* at 2.) Pursuant to 13 C.F.R. § 121.404(g)(2), Appellant should have recertified its size as a result of the merger. (*Id.*) Had Appellant done so, it would no longer be small, as Belcan and Appellant together have well over 1,000 employees. (*Id.* at 3.)

QED maintained that Appellant's relationship with Sev1Tech violates the ostensible subcontractor rule. (*Id.*) OHA has identified "four key factors" that are relevant in assessing whether a prime contractor is unusually reliant upon a subcontractor:

> 1. The proposed subcontractor is the incumbent prime contractor, and was not itself eligible to compete for the procurement.
>
> 2. The prime contractor plans to hire a large majority of its workforce from the subcontractor.
>
> 3. The prime contractor's proposed management previously served with the subcontractor on the incumbent contract.
>
> 4. The prime contractor lacks relevant experience, and was obliged to rely upon its more experienced subcontractor to win the contract.

(*Id.*)

In QED's view, each of these factors is present in the instant case. First, Sev1Tech is the incumbent prime contractor for the PdM Radars SETA contract, and would not have been eligible to submit its own proposal for this task order because Sev1Tech is a large business. (*Id.*) QED alleged that Appellant plans to hire a majority of Sev1Tech's incumbent workforce. (*Id.*) Further, QED claimed, Appellant likely also will hire much of the incumbent managerial staff currently employed by Sev1Tech. (*Id.*) Lastly, QED alleged that Appellant has no prior experience supporting PdM Radars. (*Id.*) QED predicted that Sev1Tech's past experience was "likely submitted" in Appellant's proposal, and would have been instrumental in enabling Appellant to achieve an "Outstanding" evaluation rating for corporate experience. (*Id.*)

The CO forwarded QED's protest to the Area Office for review.

D. Area Office Investigation

On February 8, 2021, Appellant responded to the protest, and provided a completed SBA Form 355; a copy of its proposal for the instant order; teaming agreements with each of its proposed subcontractors; corporate records; tax returns; and other documents. Appellant stated "does not dispute that it is no longer small due to its acquisition by Belcan." (Protest Response at 5 (emphasis Appellant's).) The issue is immaterial, though, because Appellant "was small when it submitted its proposal for this task order." (*Id.*) Appellant denied affiliation with Sev1Tech under the ostensible subcontractor rule. (*Id.* at 6.)

Appellant argued that QED's protest should be dismissed as untimely. Appellant "properly certified its small size when it won the RS3 contract," and "was not required to recertify its size during the other instances referenced by QED." (*Id.* at 3.)

With regard to QED's allegations pertaining to the ostensible subcontractor rule, Appellant maintained that Appellant and Sev1Tech have "an ordinary prime/subcontractor contractual relationship." (*Id.* at 6.) The two firms have no ability to control one another, and do not share common management or other resources. (*Id.*) Appellant highlighted that, based on its proposal, Appellant will self-perform a majority of the work for the instant task order. (*Id.* at 8.) Further, apart from the one example of corporate experience discussed in Appellant's proposal, Appellant also has other relevant experience. Appellant proceeded to describe three recent procurements in which Appellant has performed similar work for Federal government customers. (*Id.* at 10-11.)

The Area Office requested that Appellant explain what proportion of its workforce would be hired from Sev1Tech. In response, provided a table entitled "[Appellant's] Proposed Labor Mix." According to the table, in a non-surge scenario, [XXX] FTEs, out of the total [XXX] FTEs, would be Appellant's own employees. (Labor Mix Table at 1-3.) Of Appellant's [XXX] FTEs, [XXX] FTEs, or [less than 50]%, are current Sev1Tech employees. (*Id.*) In a surge scenario, [XXX] FTEs, out of a total of [XXX] FTEs, would be Appellant's own employees. (*Id.*) Of Appellant's [XXX] FTEs, [XXX] FTEs, or [less than 50]%, are current Sev1Tech employees. (*Id.*)

The Area Office asked the CO to address whether Appellant relied on Sev1Tech's corporate experience to win the instant task order. In response, the CO provided the Area Office a copy of an evaluation report pertaining to Appellant, in which the CO "highlighted the actions in green that came ONLY from the Sev1Tech example," such that "if [Appellant] did not utilize that example, [Appellant] would not have met the following requirements":

[XXXXXXXXXXX]

(E-mail from [CO] (Feb. 19, 2021) (emphasis CO's).) The CO also provided the Area Office a "[h]ighlighted RFP for your reference." (*Id.*) According to the CO, in this latter document, "[y]ellow highlights means [Appellant] had the experience on their own, green indicates it was from Sev1Techs example." (*Id.*)

E. Size Determination

On February 19, 2021, the Area Office issued Size Determination No. 2-2021-022, concluding that Appellant is not small for the instant procurement. The Area Office specifically found that Appellant will be unusually reliant upon Sev1Tech to perform the order, in contravention of the ostensible subcontractor rule. (Size Determination at 3, 6-7.) Appellant concedes that Sev1Tech is a large business, so the combined employees of Appellant and Sev1Tech exceed the size standard. (*Id.* at 8.)

The Area Office first discussed QED's allegation that Appellant is affiliated with Belcan. The Area Office observed that Appellant "was acquired by Belcan after [Appellant's] initial offer, but prior to selection for award." (*Id.* at 4.) Appellant's size, though, is assessed as of April 1, 2020, the date of Appellant's offer for the instant task order. The Area Office found no reason believe that the merger, or any agreement in principle to merge, was in effect as of April 1, 2020. (*Id.*) As such, Belcan's acquisition of Appellant does not impact Appellant's size for this procurement.[3]

The Area Office next turned to QED's allegations that Appellant and Sev1Tech are affiliated under the ostensible subcontractor rule. (*Id.*) The ostensible subcontractor rule provides that when a subcontractor that is not a similarly situated entity 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 treated as joint venturers and affiliates for size determination purposes. (*Id.*) A "similarly situated entity" is a subcontractor that has the same small business program status as the prime contractor. (*Id.* at 5, citing 13 C.F.R. § 125.1.) In the instant case, Sev1Tech and Appellant are not similarly situated entities, because Sev1Tech is not small. (*Id.*)

The Area Office considered whether Appellant would self-perform the "primary and vital" contract requirements. The CO informed the Area Office that the primary purpose of this order is to "provide Systems Engineering and Technical Assistance Support (SETA)." (*Id.*) The Area Office found, however, that the RFP also placed significant weight on managerial responsibilities. Therefore, the Area Office reasoned, "the primary and vital requirement of the solicitation is the provision of the management personnel responsible for supervising the individuals providing the SETA." (*Id.* at 6.) Appellant's proposal stated that the proposed Program Manager, [Program Manager], will be an employee of Appellant, so the Area Office determined that Appellant will manage the order, and thus will self-perform the primary and vital contract requirements. (*Id.*)

The Area Office then assessed whether Appellant will be unusually reliant upon Sev1Tech to perform the order, as alleged in QED's protest. (*Id.*) OHA case law has outlined "four key factors" that may be indicative of unusual reliance. (*Id.* at 6-7.) The four factors are:

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[3] On appeal, Appellant challenges only the portion of the Area Office's analysis relating to the ostensible subcontractor rule, so further discussion of the Area Office's findings pertaining to Belcan and other unrelated matters is unnecessary. *E.g., Size Appeal of Envt'l Restoration, LLC*, SBA No. SIZ-5395, at 6 (2012) (when issue is not appealed, the area office's determination "remains the final decision of the SBA.").

> (1) the proposed subcontractor is the incumbent contractor and is ineligible to compete for the procurement;
>
> (2) the prime contractor plans to hire the large majority of its workforce from the subcontractor;
>
> (3) the prime contractor's proposed management previously served with the subcontractor on the incumbent contract; and
>
> (4) the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract.

(*Id.* at 7, citing *Size Appeal of Charitar Realty*, SBA No. SIZ-5806, at 13 (2017).) 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." (*Id.*, citing *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5785, at 10 (2016).) The Area Office asserted that Sev1Tech "will be performing up to 49%" of the instant order. (*Id.*)

With regard to the four factors, the Area Office found that the first factor is met, because Sev1Tech is the incumbent for the predecessor PdM Radars SETA contract. (*Id.*)

Turning to the second factor, the Area Office observed that Appellant "will be hiring less than half of its personnel from Sev1Tech." (*Id.* at 8.) More specifically, according to the data Appellant provided to the Area Office, "[less than 50]% of [Appellant's] employees will be hired from Sev1Tech without a surge," and "[less than 50]% of [Appellant's] employees will be hired from Sev1Tech" in the surge scenario. (*Id.*) These percentages, though, do not reflect that Sev1Tech also "is part of [Appellant's] team" that will perform the instant order. The Area Office found that "[a majority] of the employees will be either hired by [Appellant] from Sev1Tech or provided by Sev1Tech directly as a subcontractor without a surge." (*Id.*) With a surge, "[a majority] of the employees will be either hired by [Appellant] from Sev1Tech or provided by Sev1Tech directly as a subcontractor." (*Id.*) Thus, "the total percentage of current Sev1Tech employees that will be performing on the [order] after award" is between [XX]% and [XX]%. (*Id.*) The Area Office concluded that the second factor was met, "although not overwhelmingly so." (*Id.*)

With regard to the third factor, the Area Office determined that [Program Manager], a current Sev1Tech employee, will be Program and Operations Manager for the new order. (*Id.* at 8-9.) Further, he will be responsible for the performance of the entire team, the team will report directly to him, and he is authorized to make decisions on behalf of Appellant. (*Id.*) The Area Office concluded that [Program Manager] will not be "supervised or under the control of [Appellant] in any meaningful way," and consequently, this factor is met. (*Id.* at 9.)

Lastly, the Area Office noted that, of the two prior projects discussed in Appellant's proposal, one was for Appellant itself and the other was for Sev1Tech. (*Id.*) The CO provided the Area Office "a copy of [Appellant's] technical evaluation highlighting where [Appellant] had the

experience on [its] own and where [Appellant was] entirely reliant on Sev1Tech's experience." (*Id.*) Based on this information, the Area Office determined:

> In the Program Management section [Appellant] was not reliant on Sev1Tech; in the Systems Engineering section [Appellant] was entirely reliant on Sev1Tech's experience for all factors; in the Integrated Logistics Support section [Appellant] was entirely reliant on Sev1Tech's experience for all factors; in the Planning, Programming, Budgeting, and Execution (PPBE) Support section [Appellant] was entirely reliant on [Sev1Tech's] experience for two of the four functions.

(*Id.*) The Area Office asserted that, according to the CO, "none of the technical expertise related experience is from [Appellant]." (*Id.*) The Area Office concluded that Appellant lacks relevant experience and relied heavily on Sev1Tech to win the order. (*Id.*)

The Area Office found that, because all four unusual reliance factors are present to at least some degree, and because Sev1Tech "will perform 40% or more" of the instant order, Appellant's relationship with Sev1Tech violates the ostensible subcontractor rule. (*Id.* at 9-10.)

F. Appeal

On March 8, 2021, Appellant filed the instant appeal. Appellant argues that the Area Office clearly erred in finding that Appellant will be unusually reliant upon Sev1Tech to perform the instant order. (Appeal at 3.) Appellant "ACCEPTS and is NOT appealing" the portion of the Area Office's decision relating to Belcan, and Appellant likewise does not dispute Area Office's determination that Appellant will self-perform the primary and vital requirements of the order. (*Id.*, emphasis Appellant's.)

Appellant argues that the Area Office failed to consider all aspects of the relationship between Appellant and Sev1Tech. Accompanying its response to the protest, Appellant provided a copy of a Teaming Agreement between Appellant and Sev1Tech, but the Area Office does not appear to have examined or considered the document. (*Id.* at 5.) Appellant argues that a review of the Teaming Agreement would have further clarified that Appellant will serve as the prime contractor, and that Appellant alone will be responsible for managing the order. (*Id.* at 5-6.)

With regard to the issue of unusual reliance, Appellant argues that only one of the four factors is present in this case. (*Id.* at 7.) Specifically, the first factor is met because Sev1Tech is the incumbent and is not a small business. (*Id.*)

The second factor, though, is not met, as "Appellant is only hiring a minority of its workforce from Sev1Tech." (*Id.* at 7-8.) Based on the data Appellant provided, the Area Office correctly recognized that "Appellant will be only hiring [less than 50]% of its workforce from Sev1Tech without a surge and on[ly] [less than 50]% with a surge." (*Id.* at 8, emphasis Appellant's.) Thus, Appellant will, under all circumstances, hire less than half of its workforce from Sev1Tech. (*Id.*) The Area Office improperly inflated these percentages by "add[ing] in and count[ing] Sev1Tech's personnel as if they were Appellant's employees." (*Id.*) Subcontractor personnel, though, are not "hired" by the prime contractor, and Sev1Tech's personnel thus are

not relevant to the legal issue of "what percent of Appellant's workforce are being *hired* from Sev1Tech to be employed by Appellant." (*Id.*, emphasis Appellant's.) Further, even if OHA were to conclude that the Area Office properly combined Sev1Tech's personnel with those of Appellant, the combined percentages of [XX]% - [XX]% still do not represent a "large majority" of the workforce under OHA case law. (*Id.* at 8-9.)

For the third factor, Appellant argues that it will supervise, manage, and control the task order. (*Id.* at 9.) OHA has held that when key personnel, even if hired from the subcontractor, remain under the supervision and control of the prime contractor, there is no violation of the ostensible subcontractor rule. (*Id.* at 10, citing *Size Appeal of Residential Enhancements, Inc.*, SBA No. SIZ-5931, at 15 (2018).) Here, the proposed Program Manager, [Program Manager], will become an employee of Appellant, and will be fully supervised and controlled by Appellant, not by Sev1Tech. (*Id.*) This conclusion is supported by the Teaming Agreement between Appellant and Sev1Tech, as well as by the organizational chart and accompanying narrative in Appellant's proposal. (*Id.* at 11-12.) In addition, the Area Office itself found, earlier in the size determination, that Appellant alone will manage the order, and that Appellant thereby will self-perform the primary and vital requirements. (*Id.* at 10.)

With regard to the fourth factor, Appellant maintains that it has "deep experience" in systems engineering, integrated logistics support, and all other areas required by the RFP. (*Id.* at 12-13.) Further, in selecting Appellant for award, the Army evaluated Appellant's corporate experience and found it sufficient. (*Id.*) The Area Office improperly substituted its own judgment for that of the procuring agency. (*Id.* at 14.)

Accompanying its appeal, Appellant moved to introduce new evidence. (*Id.* at 16.) Specifically, Appellant seeks to introduce descriptions of six contracts Appellant has performed for Federal customers involving systems engineering and/or integrated logistics support. (*Id.* at 20-22.) Good cause exists to consider the new evidence because the Area Office incorrectly concluded that Appellant lacks experience in such matters. (*Id.* at 16.) Further, until it received the size determination, Appellant was unaware, and could not reasonably have anticipated, that the Area Office would mischaracterize Appellant's experience in these areas. (*Id.* at 16-17.)

G. QED's Response

On March 24, 2021, QED responded to the appeal. QED argues that the Area Office correctly found that Appellant will be unusually reliant upon Sev1Tech to perform the order. The appeal therefore should be denied. (Response at 3.)

Appellant admits that the first unusual reliance factor is present. (*Id.* at 4.) With regard to the second factor, QED maintains that this factor essentially considers "whether the subcontractor's incumbent employees will transition *en masse* to the proposed prime contractor to perform the required work." (*Id.*) Viewed in this context, it was appropriate for the Area Office to conduct a "holistic analysis" by combining Sev1Tech's direct employees with the proportion of Appellant's workforce that will be hired from Sev1Tech. (*Id.*)

QED highlights that Appellant has not pointed to any OHA precedent or regulation that prohibits this sort of aggregation, and SBA regulations generally instruct that "all aspects" of the relationship between the prime contractor and subcontractor should be considered. (*Id.* at 5, quoting 13 C.F.R. § 121.103(h)(2).) In QED's view, staff associated with Sev1Tech, "both as direct employees and as transfers to [Appellant]," will provide Sev1Tech an "outsized ability to control performance." (*Id.*) Further, it would be poor precedent to allow a prime contractor to avoid ostensible subcontractor violation simply by "creatively drafting its proposal to minimize direct employment of subcontractor personnel." (*Id.*)

QED argues that Appellant's proposal does not establish that Appellant will individually evaluate specific staff when hiring incumbent employees. (*Id.* at 6.) Rather, Appellant and Sev1Tech "worked to make the employment distinctions between the two companies non-existent so employees could freely move between the firms." (*Id.*) This includes "harmonized company compensation," whereby Appellant agreed to adopt Sev1Tech's compensation structure. (*Id.*)

For the third unusual reliance factor, QED observes that Appellant proposed to hire Sev1Tech's incumbent Program Manager, [Program Manager], for leadership of this task order. (*Id.* at 8.) Although an organizational chart in Appellant's proposal indicated that [Program Manager] would report to Appellant's COO and CEO, the proposal was vague as to what role the COO and CEO would have in performing the work. (*Id.* at 9.) OHA precedent recognizes that when a proposal does not assign a major role to a prime contractor's leadership, the leadership does not control the project. (*Id.* at 10, citing *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716, at 13 (2016).) Here, Appellant's proposal did not specify what Appellant's leadership will do, and indicated that the Program Manager would be "responsible for overall performance and quality of the entire team including subcontractors" with the "authority to make decisions and commitments on behalf of [Appellant]." (*Id.*, quoting Proposal, Vol. I at 24.)

As for the fourth factor, QED argues that the Area Office was correct to conclude that Appellant relied on Sev1Tech's experience to win the order. (*Id.* at 12.) Sev1Tech has abundant radar engineering experience, but the proposal made "no mention of [Appellant] previously providing direct radar support." (*Id.* at 11-12.) QED argues that, to avoid the ostensible subcontractor rule, a prime contractor must have relevant experience pertaining to the specific subject matter of the procurement. (*Id.* at 12, citing *Modus Operandi*, SBA No. SIZ-5716, at 15.)

QED further disputes Appellant's contention that the Area Office improperly substituted its own judgment for that of the procuring agency. (*Id.* at 13.) OHA has repeatedly held that an area office may appropriately assess the prime contractor's experience in examining compliance with the ostensible subcontractor rule. (*Id.*, citing *Size Appeal of Wichita Tribal Enters., LLC*, SBA No. SIZ-5390, at 13 (2012).)

QED next argues that there are additional indicia of unusual reliance beyond those discussed by the Area Office. (*Id.* at 14.) In particular, the Teaming Agreement between Appellant and Sev1Tech provides evidence of unusual reliance. (*Id.* at 14-15.)

QED claims that the Teaming Agreement "essentially handed the keys to Sev1Tech to develop the proposal." (*Id.* at 15.) Under the Teaming Agreement, Appellant agreed to permit Sev1Tech to "take the lead in developing pricing and teaming strategies, as well as technical content." (*Id.*, quoting Teaming Agreement at 10.) Further, QED argues, the Teaming Agreement allowed Sev1Tech to set the compensation for incumbent staff. (*Id.*) OHA has previously found that proposal development assistance may be indicative of unusual reliance. (*Id.*, citing *Size Appeal of Logistics & Tech. Servs., Inc.*, SBA No. SIZ-5482, at 8 (2013).)

The Teaming Agreement further stated that Sev1Tech would perform up to 50% of the work, and that any additional small business subcontractors would reduce Appellant's workshare. (*Id.* at 16, citing Teaming Agreement at 11.) Because Appellant proposed to engage three other subcontractors in addition to Sev1Tech, QED maintains that "Sev1Tech (more than likely) is performing the single greatest percentage of work out of all of the team members, including [Appellant]." (*Id.*)

Finally, QED opposes Appellant's motion to introduce new evidence regarding Appellant's prior experience. (*Id.* at 17.) QED's size protest directly questioned Appellant's experience, so Appellant knew, or should have known, that its experience would be at issue in this case. Appellant thus could, and should, have supplied information about its experience to the Area Office. (*Id.*)

H. Appeal Addendum and Motion to Strike

On March 25, 2021, after determining that certain documents had been incorrectly withheld as privileged, OHA released copies of those documents to counsel admitted under an OHA protective order. On April 2, 2021, Appellant moved to supplement its appeal with an Appeal Addendum. Appellant argues that the newly-available materials show that Appellant does have relevant experience of its own, and that Appellant did not rely on Sev1Tech to win the task order. (Addendum at 1-2.)

Appellant highlights that the size determination concluded that Appellant lacks relevant experience in both systems engineering and integrated logistics support. These findings are contradicted and undermined by one of the newly-released documents. (*Id.* at 2.) Specifically, during the course of the size review, the CO provided the Area Office a colored-coded version of the RFP, where green highlights connoted Sev1Tech experience and yellow highlights connoted Appellant's experience:

[XXXXXXXXX]

(*Id.*, quoting CO's highlighted RFP, at 5.) There are several yellow highlights within the sections pertaining to [XXXXXXXXX]. Contrary to the size determination, then, the CO did not indicate that Appellant lacks relevant experience in these matters. (*Id.*) The Area Office's conclusion that Appellant was entirely reliant on Sev1Tech for such experience is thus unsupported and clearly erroneous. (*Id.* at 2-3.) The highlighted RFP further demonstrates that the CO advised the Area Office that Appellant has significant program management experience. (*Id.* at 3.) The Area

Office should have considered the CO's views in deciding whether the third unusual reliance factor was met.

Appellant additionally argues that the highlighted RFP shows that Appellant's experience matches the RFP requirements. (*Id.*) While the RFP did contain a "few radar specific requirements," the RFP requirements primarily called for general SETA experience, which Appellant does have.

Also on April 2, 2021, Appellant moved to strike the portion of QED's Response contending that there are additional indicia of unusual reliance beyond those discussed by the Area Office. (Motion to Strike at 1-2.) Appellant maintains that QED should have raised these matters in its own appeal, but did not do so. (*Id.*)

I. QED's Supplemental Response

On April 2, 2021, QED supplemented its Response to address the newly-released documents. QED argues that these documents further confirm that Appellant was unusually reliant on Sev1Tech for experience.

QED points to an e-mail exchange between the Area Office and the CO. (Supp. Response at 2.) In her e-mail, the CO stated that Appellant would not have met the RFP's minimum requirements without Sev1Tech's experience:

[XXXXXXXXX]

(*Id.* at 3, quoting e-mail from [CO] (Feb. 19, 2021).) In QED's view, "[t]his email, alone, was sufficient to establish that [Appellant] was unusually reliant on the experience of its subcontractor." (*Id.*)

In addition to her e-mail, however, the CO also provided the Area Office a color-coded version of Appellant's technical evaluation to identify whether Appellant or Sev1Tech experience supported each of the technical requirements. (*Id.* at 4-5.) The Area Office, again, appropriately relied on the CO's opinions rather than attempting to substitute its own judgement for that of the CO. Moreover, even if OHA finds that the Area Office should have sought clarification from the CO, or otherwise erred in relying on the CO's comments, any such error would be harmless because the record supports the conclusion that Appellant will be unusually reliant upon Sev1Tech. (*Id.* at 5-6.)

J. QED's Opposition to Motion to Strike

On April 9, 2021, QED opposed Appellant's Motion to Strike. QED argues, first, that QED could not have filed its own appeal of the size determination. (Opp. at 2.) Pursuant to 13 C.F.R. § 134.302(a), only a party "adversely affected" by a size determination may file a size appeal. (*Id.*) Because QED's size protest against Appellant was successful, QED could not have appealed the size determination, even if QED disagreed with certain aspects of the Area Office's reasoning. (*Id.* at 2-3.)

Moreover, both the size determination and the ensuing appeal relate to the question of affiliation under the ostensible subcontractor rule. (*Id.* at 3.) Discussion of additional indicia of an ostensible subcontractor relationship is thus well within the scope of these proceedings. (*Id.* at 3-4.) QED claims that OHA need not, and should not, restrict its review only to the "four key factors" suggestive of unusual reliance. (*Id.*)

QED further argues that OHA's rules of practice generally permit parties to supplement their pleadings after having an opportunity to review the record for the first time under an OHA protective order. (*Id.* at 5.) Here, the Teaming Agreement discussed in QED's Response was in the protected record, so QED could not have voiced any arguments pertaining to the Teaming Agreement prior to reviewing the record. (*Id.*)

Finally, QED argues that Appellant has not demonstrated that Appellant was materially prejudiced by the arguments raised in QED's Response. (*Id.* at 5-6.) Appellant could have requested an opportunity to refute QED's arguments concerning the Teaming Agreement, but has not done so. (*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)(2). 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, the Area Office determined, and no party disputes, that Appellant will self-perform a majority of the "primary and vital" requirements for the instant task order. Section II.E, *supra*. The central issue in this case, then, is whether Appellant nevertheless will be usually reliant upon Sev1Tech to perform the order. As the Area Office correctly recognized, prior OHA case decisions have outlined "four key factors" that may 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 Equity Mortgage Solutions, LLC*, SBA No. SIZ-5867, at 18 (2017); *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850, at 15 (2017); *Size Appeal of Charitar Realty*, SBA No. SIZ-5806, at 13 (2017); *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716, at 12 (2016); *Size Appeal of Prof'l Sec. Corp.*, SBA No. SIZ-5548, at 8 (2014); *Size Appeal of Wichita Tribal Enters., LLC*, SBA No. SIZ-5390, at 9 (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, having reviewed the record and the arguments of the parties, I must agree with Appellant that at least two of the "four key factors" — the second and the third — are not present, and the fourth factor also appears questionable based on the facts presented. Further, there is no indication that Sev1Tech will perform 40% or more of the instant task order.[4]

[4] According to Appellant's proposal, in a non-surge scenario, [XXX] of [XXX] FTEs, or [less than 40]%, would be Sev1Tech employees, and the proposal similarly estimated that the Sev1Tech subcontract would comprise [less than 40%] of total dollar value in a non-surge scenario. Section II.B, *supra*. These percentages become lower in the surge scenario, where [XXX] of [XXX] FTEs, or [less than 40]%, would be Sev1Tech employees. *Id.* I therefore see no basis to conclude that Sev1Tech will perform at least 40% of the instant order. Although the 40% threshold is not dispositive, OHA typically has declined to find unusual reliance when the alleged ostensible subcontractor will not perform 40% or more of the contract. *E.g., Size Appeal of NorthWind-CDM Smith Advantage JV, LLC*, SBA No. SIZ-6053, at 25-26; *Size Appeal of*

Consequently, the record does not support the conclusion that Appellant will be unusually reliant upon Sev1Tech.

Appellant acknowledges that Sev1Tech is the incumbent on the predecessor PdM Radars SETA contract, and that, as a large business, Sev1Tech would have been ineligible to submit its own proposal for the subject procurement. Sections II.B and II.F, *supra*. Thus, the first of the four key factors is met. The first factor, though, is not by itself sufficient to show unusual reliance. *E.g., Size Appeals of Maywood Closure Co., LLC and TPMC-EnergySolutions Envt'l. Servs. 2009, LLC*, SBA No. SIZ-5499, at 9 (2013) ("Incumbency alone cannot establish unusual reliance.").

The second factor is not met, because Appellant did not propose to hire the large majority of its workforce from Sev1Tech. Indeed, the Area Office expressly determined, and the record confirms, that Appellant "will be hiring less than half of its personnel from Sev1Tech." Section II.E, *supra*. Specifically, former employees of Sev1Tech will account for [XXX] of Appellant's [XXX] FTEs — or [less than 50%] — in non-surge scenarios, and [XXX] of Appellant's [XXX] FTEs — or [less than 50%] — in surge scenarios. Sections II.D and II.E, *supra*. Since Appellant will hire less than a majority, and certainly not the large majority, of its workforce from Sev1Tech, the second factor is not present.

In reaching its decision, the Area Office observed that, when the employees that Appellant will hire from Sev1Tech are combined with Sev1Tech's own personnel, the percentage of the total workforce connected, in some manner, to Sev1Tech rises to [greater than 50%]. Section II.E, *supra*. While this may be true, the second key factor asks whether "the prime contractor plans to hire the large majority of its workforce from the subcontractor," or stated differently, whether the prime contractor "will staff its portion of the contract almost entirely with personnel hired from [the subcontractor]." *Equity Mortgage Solutions*, SBA No. SIZ-5867, at 18; *Charitar Realty*, SBA No. SIZ-5806, at 13. As Appellant emphasizes in its appeal, a prime contractor does not "hire" personnel who are, and will remain, subcontractor employees, nor are such personnel working on the prime contractor's "portion of the contract." I therefore must agree with Appellant that the Area Office should have focused on what proportion of Appellant's workforce will be hired from Sev1Tech, in order to staff Appellant's portion of the instant order.[5]

Nationwide Pharm., LLC, SBA No. SIZ-6027, at 17 (2019); *Human Learning*, SBA No. SIZ-5785, at 10.

[5] It is worth noting that several prior OHA decisions attach considerable weight to whether the prime contractor, in making its hiring decisions, will review personnel individually, as opposed to hiring them *en masse* or transferring them unilaterally from the alleged ostensible subcontractor. *Size Appeal of NorthWind-CDM Smith Advantage JV, LLC*, SBA No. SIZ-6053, at 27 (2020); *Size Appeal of Inquiries, Inc.*, SBA No. SIZ-6008, at 23 (2019); *Size Appeal of Elevator Serv., Inc.*, SBA No. SIZ-5949, at 9-10 (2018). Such decisions presuppose that the prime contractor is "hiring" personnel from the alleged ostensible subcontractor in the first instance, and thus might be largely invalidated if OHA were to find that the pertinent issue is not what proportion of the prime contractor's own employees are former employees of the alleged ostensible subcontractor, but rather what proportion of the total workforce is associated in some way with the alleged ostensible subcontractor.

The Area Office clearly erred by combining Sev1Tech's employees with those that Appellant expected to hire from Sev1Tech in order to assess Appellant's compliance with the second unusual reliance factor.

The Area Office's analysis of the third factor also was flawed. There is no dispute that Appellant did propose to hire its Program Manager, [Program Manager], from Sev1Tech, where he holds a similar position on the incumbent contract. Sections II.B and II.E, *supra*. OHA has recognized on numerous occasions, however, that "when key personnel, even if hired from the subcontractor, remain under the supervision and control of the prime contractor, there is no violation of the ostensible subcontractor rule." *Size Appeal of NVE, Inc.*, SBA No. SIZ-5638, at 10 (2015); *see also Size Appeal of Leumas Residential, LLC*, SBA No. SIZ-6103, at 21 (2021); *Size Appeal of Residential Enhancements, Inc.*, SBA No. SIZ-5931, at 15 (2018); *Size Appeal of Hanks-Brandan, LLC*, SBA No. SIZ-5692, at 9 (2015); *Size Appeal of GiaCare and MedTrust JV, LLC*, SBA No. SIZ-5690, at 12 (2015); *Maywood Closure Co.*, SBA No. SIZ-5499, at 9; *Size Appeal of J.W. Mills Mgmt.*, SBA No. SIZ-5416, at 8 (2012). Here, Appellant's proposal made clear that [Program Manager] would be subordinate to, and supervised by, Appellant's executive leadership, specifically Appellant's COO and CEO. Section II.B, *supra*. Further, the proposal indicated that Appellant's executives would play an active role in managing the task order. The proposal stated, for example, that Appellant's executives would "participate[] in a weekly status review" with [Program Manager], thereby enabling them to "proactively address obstacles to performance," and that Appellant's Corporate Program Management Office — a group which would report to the COO, rather than to [Program Manager] — would "work[] closely" with [Program Manager] to "provide program administration and oversight." *Id.* Because Appellant will retain ultimate control over decision-making, then, the fact that Appellant proposed to hire [Program Manager] from Sev1Tech does not suggest unusual reliance.

Lastly, the Area Office's analysis of the fourth factor is questionable based on the available record. The Area Office appears to have based its decision primarily on information from the CO, in which she stated that Appellant relied on Sev1Tech to demonstrate prior experience with systems engineering and integrated logistics support. Sections II.D and II.E, *supra*. As Appellant observes, however, the CO contemporaneously provided the Area Office a highlighted version of the RFP, indicating that Appellant does have significant relevant experience in both systems engineering and integrated logistics support. Section II.H, *supra*. It thus would have been appropriate for the Area Office to seek clarification from the CO as to her views of Appellant's experience.

Moreover, the Area Office neglected to consider that the terms of the RFP imposed substantial limitations on offerors' ability to describe their relevant experience in their proposal. Under the RFP, offerors were restricted to a maximum of four examples of relevant past experience, and such examples were further limited only to procurements with "at least 65 full time equivalent (FTE) employees, per year" and which did not involve "a base IDIQ contract or a Blanket Purchase Agreement (BPA)." Section II.A, *supra*. Offerors also were confined to 25 written pages for their entire technical proposal, which included the offerors' manpower and management plan in addition to corporate experience. *Id.* In light of these limitations in the RFP, the Area Office could not reasonably assume that Appellant had no other relevant experience

beyond the one example set forth in Appellant's proposal. At a minimum, the Area Office should have considered the additional examples of relevant experience that Appellant provided with its response to the protest. Section II.D, *supra*.

In sum, the second and third of the "four key factors" are not present in this case, and the fourth factor also appears questionable. In addition, according to Appellant's proposal, Sev1Tech will not be responsible for at least 40% of the instant order. The record thus does not support the conclusion that Appellant will be unusually reliant upon Sev1Tech. *E.g., Leumas Residential*, SBA No. SIZ-6103, at 20-22 (granting appeal and reversing size determination when "only the first" of the four unusual reliance factors was met).

IV. Conclusion

Appellant has established that the Area Office clearly erred in concluding that Appellant will be unusually reliant upon Sev1Tech to perform the instant order. There is no dispute that Appellant qualifies as a small business if it is not affiliated with Sev1Tech. Accordingly, this appeal is GRANTED, and the size determination is REVERSED. Appellant is an eligible small business for the instant task order. In light of this outcome, it is unnecessary to rule on Appellant's motion to strike portions of QED's Response, or Appellant's motion to introduce new evidence on appeal. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge