Cite as: *Size Appeal of High Desert Aviation, LLC*, SBA No. SIZ-6179 (2022)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: High Desert Aviation, LLC, Appellant, Appealed From Size Determination No. 06-2022-052 The Bureau of Land Management Solicitation No. 140L2622Q0041	SBA No. SIZ-6179 Decided: November 23, 2022

APPEARANCES

Shane J. McCall, Esq., Nicole D. Pottroff, Esq., John L. Holtz, Esq., Stephanie L. Ellis, Esq., Gregory P. Weber, Esq., Koprince McCall Pottroff, LLC, Lawrence, KS, for High Desert Aviation, LLC

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DECISION[1]

I. Introduction and Jurisdiction

On September 14, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2022-052, concluding that High Desert Aviation, LLC (Appellant) is other than small for the subject Procurement due to its ostensible subcontractor affiliation with Thomas Helicopters [TH]. On appeal, Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied, and Size Determination No. 06-2022-052 is affirmed.

[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.

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

II. Background

A. Solicitation, Protest and Response

On July 6, 2022, the Bureau of Land Management (BLM) issued Request for Quotation (RFQ) Solicitation No. 140L2622Q0041. (RFQ, at 1.) The RFQ called for "herbicide application services, and associated herbicides and adjuvants, for areas covering more than 51,000 acres in Owyhee, Elmore, Twin Falls, Minidoka, Blaine, Gooding, and Lincoln counties." (*Id.*) The Contracting Officer (CO) set aside the procurement entirely for small business and assigned North American Industry Classification System (NAICS) code 115112, Soil Preparation, Planting, and Cultivating, with a corresponding $8 million annual receipts size standard. (*Id.*) The factors considered to evaluate offers were (i) Technical Capability, (ii) Prior Relevant Experience/Past Performance, and (iii) Price. (*Id.* at 12.) Quotes were due August 5, 2022. Appellant submitted a timely proposal.

The RFQ's Statement of Work (SOW) explained that "[t]he purpose of this contract is to secure services for herbicide spraying and the herbicides and adjuvant to be applied." (SOW, at 8.) Adjuvant is an inert material added to an herbicide formulation or tank mix to increase the effectiveness of the active ingredient. (*Id.*, at Apdx 4.) The RFQ further explained that the "contractor shall supply all labor, equipment, tools, diluent (water), materials, supervision, supplies, and incidentals; and perform all work necessary to complete applications." (*Id.*) The SOW contained the following provisions pertinent to these proceedings:

> **1.0 GENERAL**
>
> . . .
>
> 1.2 Contractor shall plan accordingly for labor, equipment, tools, materials, diluent (water), supervision, supplies, and incidentals; and perform all work necessary to complete the application.
>
> 1.3 The contractor shall stop operation if inclement weather conditions (wind or rain) occur during the spraying operation. (See section 5.0 Execution of Work) as specified per label.
>
> 1.4 Applicator Logs
>
> A. The contractor shall maintain a daily written log.
>
> B. This log or record shall be signed by the applicator operator and turned into the Project Inspector upon completion of the contract.

1.5 The Government will pay for treatment spraying by the acre upon submission of proper invoices, after acreage is determined to have been sprayed by using the computer-generated shape file from a GPS Differential Guidance System, and a flow control report is given to the Government for verification the correct diluent (water) rate was applied.

1.6 The contractor shall conduct herbicide spraying procedures safely and in accordance with the herbicide label restrictions of the herbicide and the herbicide application restrictions of the State of Idaho. (See Section 7.0 - Safety).

1.7 The contractor shall follow Environmental Protection Agency (EPA) guidelines for application of herbicides.

1.8 The contractor shall strictly adhere to the herbicide label instructions.

1.9 The Government will have the option to inspect the contractor's equipment and work before, during, and after completion of this contract.

. . .

3.0 HERBICIDES and ADJUVANTS

3.1 Herbicide

A. The contractor shall supply imazapic, aminopyralid, and 2,4-D herbicides required to complete the specifications of this contract. The Government will supply the glyphosate herbicide required to complete the specifications of this contract.

. . .

4.0 EQUIPMENT and PERSONNEL

4.1 General - The contractor shall spray designated areas in conformance with these specifications, the Detailed Specifications, and the herbicide label. Unless otherwise specified, the contractor shall furnish herbicides, adjuvants, equipment, labor, supplies, and materials required to complete the schedule. The contractor shall furnish proper equipment with applicators experienced in applying herbicides in rough featureless terrain. The contractor shall service and repair their equipment as necessary to maintain satisfactory progress on work. Contractor shall be responsible for all costs incidental to equipment move-in and move-out associated with the project.

4.2 Equipment

A. The contractor shall furnish sufficient equipment to satisfactorily spray the designated areas in the time specified as required in the Detailed Specifications. Equipment shall be capable of traveling at adequate speed to give proper control and distribution of herbicide. Equipment shall have communications with the Government. Contractor furnished radio(s) shall be provided to the Project Inspector(s) or Contracting Officer's Representative (COR). Contract will not commence until radio communication is established.

. . .

4.3 Spray Equipment

A. Spray tanks, nozzles and boom length shall follow herbicide label requirements.

4.4 Personnel

A. Applicators - See detailed instructions item # 12 Applicators

B. Work Crew - Shall be furnished by the contractor for handling and mixing the herbicide and loading the equipment. Mixers and Loaders shall hold a Mixer/Loader certification of training. The contractor shall furnish qualified mechanic(s) for maintenance and repairs of equipment necessary to complete awarded schedule(s) within required time frames.

4.5 Differentially Corrected Global Positioning System (DGPS)

A. Requirement - contractor shall be required to utilize a Differentially Corrected Global Positioning System (DGPS) for electronic navigation. System must be capable of utilizing ArcMap/ArcGIS Pro shape files created by the Government and given to the contractor by email.

. . .

5.0 EXECUTION OF WORK

. . .

5.4 Spraying

A. Coverage - The entire surface within the designated boundaries of the project area shall receive uniform coverage with the herbicide except for areas excluded by the Government. Areas excluded from the spraying operation within the designated boundaries will not be included in the acreage computed for payment. Any areas not covered by contractor shall be reapplied or compensated by suitable contract

> adjustment, at the option of and at no additional cost to the Government. (See section 5.6 Field Quality Control and Section 5.9 Completion of Contract)

(SOW, at 8-15.)

On August 15, 2022, the CO notified unsuccessful offerors that Appellant was the apparent successful offeror. On August 19, 2022, Crop Jet Aviation, LLC (Crop Jet) filed a size protest and asserted numerous grounds. Crop Jet alleged, among other things, that Appellant's affiliation with TH violated the ostensible subcontractor rule. (Protest, at 6-10.)

On August 30, 2022, Appellant filed a response to the Protest and rejected the allegations. Appellant alleged, among other things, that it is in a vendor relationship with TH where TH is merely the lessor, not a subcontractor. (*Id.* at 5-7.) Appellant further alleged that it intended to perform the primary and vital requirements of the contract and is not unusually reliant on TH. (*Id.* at 7-10.)

B. Size Determination

On September 14, 2022, the Area Office issued a size determination, finding Appellant and TH to have an ostensible subcontractor relationship, and finding Appellant other than small for the Procurement. (Size Determination, at 1.) Appellant is owned 50% by Dale Thomas, and 50% by Rod Thomas, his brother. The brothers also each own 50% of High Range Aviation (HRA).

The Area Office first determined Appellant to be affiliated with HRA based on common ownership and common management under 13 C.F.R. § 121.103(c)(1) & (e). (*Id.* at 4-5.) Combining the receipts of Appellant and HRA, the Area Office also determined Appellant to be within the $8.5 million size standard. (*Id.* at 11.) The Area Office also acknowledged Appellant's past relationship with TH and found Appellant to not have ownership or management over TH as of August 3, 2022. (*Id.* at 9.)

The Area Office then considered whether Appellant was affiliated with TH under the ostensible subcontractor rule. Considering the CO's opinion, the Area Office reviewed the Solicitation and determined the primary and vital elements of the contract was "the spraying of herbicide in accordance with the SOW." (*Id.* at 16.) The Area Office found that TH would supply "the application equipment, aircrafts, and much of the labor" for the performance of the contract. (*Id.* at 17.) Of the [XXX] pilots, [XXX] come from Appellant, while [XXXXXXXXXXXXXXX]. (*Id.* at 17-18.) Of the [XXX] crewmen identified, [XXX] are identified as Appellant's employees, while [XXX] are identified as [XXX] employees. (*Id.*) The Area Office concluded that "at least half of the pilots and ground crew with expertise come from TH and its affiliate." (*Id.* at 18.) The Area Office also observed that the proposal fails to show Appellant's experience, while highlighting TH's experience, equipment, and supplies in various sections. (*Id.* at 19.) The Area Office concluded that TH would perform the primary and vital contract requirements.

The Area Office then assessed whether Appellant will be unusually reliant upon TH to perform the Procurement, as alleged in Crop Jet's protest. (*Id.*) OHA case law has outlined four key factors (*Dover Staffing* factors) that may be indicative of unusual reliance. (*Id.*) The factors to determine unusual reliance are:

> (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.*, citing *Size Appeal of Dover Staffing, Inc.*, SBA No. SIZ-5300 (2011); *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716 (2016).)

Regarding the first factor, the Area Office determined, while this Procurement does not have an incumbent contractor, "a similar, parallel logic applies to the relationship between [Appellant] and its subcontractor." *(Id*. at 19.) Therefore, the first factor is met because TH is ineligible for the instant Procurement due to the size standard. (*Id.* at 20.) Regarding the second factor, the Area Office determined Appellant would hire a "significant number [of] contract employees of TH, or its pilots and groundcrew that have had significant experience working for TH," and found factor two as partially met. (*Id.*) Regarding the third factor, the Area Office determined that the Solicitation did not have an incumbent contractor; however, Rod Thomas was a previous owner and manager at TH. (*Id.*) Therefore, the third factor is met. Lastly, regarding the fourth factor, the Area Office noted that Appellant's Proposal purports to use TH's employees, facilities and equipment; the Proposal highlights [XXXXXXXXXXXXXXXX]; and Past Performance list [XXXXXXXXXXXXXXXXXXXXXXXXXXXXX]. (*Id.*) The Area Office determined that the fourth factor is met finding "sufficient substantiation to conclude that [Appellant] would not have won the procurement without the employees, equipment, past performance and technical approach of TH." (*Id.*)

Lastly, the Area Office dismisses Appellant's argument that it intends to use vendors and lessors that are not subcontractors, finding the terms "indistinguishable," especially because Appellant's Proposal appears to rely "heavily on TH's reputation, connections with BLM, employees, and past experience and has been found to be performing primary and vital requirements of a contract." (*Id.* at 21.)

The Area Office found that, because TH will perform the primary and vital elements of the contract, and Appellant is unusually reliant on TH, Appellant holds an ostensible subcontractor relationship with TH under 13 C.F.R. § 121.103(h)(2). (*Id.*)

C. Appeal

On September 29, 2022, Appellant filed the instant appeal. Appellant argues the Area Office made a clear error of fact and law in its determination; specifically, by "inaccurately determining the primary and vital roles of the Solicitation, inadequately evaluating the primary and vital roles High Desert proposed to perform, and inexplicably applying an incorrect legal standard when examining unusual reliance." (Appeal, at 5.)

First, Appellant argued the Area Office incorrectly identified the primary and vital task of the Solicitation as the aerial application of the herbicide. (*Id.*) Appellant rejects the Area Office's reasoning that the application of herbicide is the primary and vital requirement, and Appellant would only manage the work. Appellant argues the Area Office fails to support this conclusion with legal standard or precedent, citing only that "it was their opinion" and the CO "agreed with this opinion." (*Id.* at 7, citing Size Determination, at 17.) Appellant argues the Area Office failed to consider OHA precedent that the "mere fact of a requirement in a Solicitation is substantial, does not make it primary and vital" and failed to consider the complexity and importance of other qualitative factors associated with the contract. (*Id.* at 7, citing *Size Appeal of Navarro Research and Engineering, Inc.*, SBA No. SIZ-6065 (2020); *Santa Fe Protective Servs.*, SBA No. SIZ-5312 (2012).) Appellant argues that Rod Thomas's sworn declaration identifies essential managerial duties without whose performance the aerial spraying could not be accomplished. Appellant is further responsible for all equipment other than the aircraft, "including all herbicide storage, transportation, safeguarding, and scheduling, as well as all management, planning, communication, and logistical tasks associated with the contract." (*Id.* at 9.) Appellant concludes the Area Office erred when it failed to give greater weight to Rod Thomas's sworn declaration and to consider the complex work Appellant would perform. (*Id.*)

Second, Appellant contends the Area Office incorrectly determined that Appellant would not perform the primary and vital tasks of the contract. (*Id.*) Appellant would incur most of the cost of procuring the herbicides, which Appellant maintains is the majority of the cost of performance, together with coordinating use of the airfields. (*Id.* at 10.) Appellant relies upon *NEIE Medical Waste Services, LLC*, SBA No. SIZ-5547 (2014), where the solicitation called for medical waste disposal services, and OHA determined that although the subcontractor was responsible for the disposal aspect of the contract, the contractor's performance should have been given greater weight because the "collection duties are the most complex and delicate part of the contract." (*Id.* at 11, citing *NEIE Medical Waste Services, LLC*, SBA No. SIZ-5547, at 8 (2014).) Appellant also relies upon *TLC Catering*, SBA No. SIZ-5172 (2010), where the solicitation called for a contractor to provide lunches including sandwiches to the United States Army. OHA determined while the sandwiches were an important part of performance, it was the entire process, including assembling lunches, serving lunches and clean up afterwards that was the heart of the contract. (*Id.*, citing *TLC Catering*, SBA No. SIZ-5172, at 4 (2010).) Referencing the Solicitation in this instant appeal, Appellant argues the SOW was devoted to details of the type of spray and location as opposed to the aviation process, pilots or planes. (*Id.* at 12.) Appellant concludes that its role is vital and primary because it would provide "highly complex labor, equipment, storage, materials, logistics, planning, and management"; and the Area Office misinterpreted the Solicitation.

Further, the Area Office incorrectly analyzed the relationship between Appellant and TH. (*Id.* at 13.) Appellant maintains that it holds a vendor and supplier relationship with TH as opposed to a contractor and subcontractor relationship. (*Id.*) In support, Appellant cites to precedent where OHA determined "if a business is simply leasing equipment to a contractor that the contractor then uses for performance, or simply providing items or service, that vendor business relationship does not make that business a subcontractor, and the ostensible subcontractor rule does not apply." (*Id.*, citing *Tiger Enterprises, Inc.*, SBA No. SIZ-4647 (2004).) Appellant argues that there is no written contractor subcontractor agreement, and it is "industry practice to use pilots and their planes as vendors and lessors supplying the service of applying the spray." (*Id.* at 14.) Appellant concludes the Area Office erred when it failed to consider Appellant's argument that it intends to have a supplier/lessor relationship, not a contractor/subcontractor relationship.

Lastly, Appellant contends the Area Office incorrectly determined Appellant was unusually reliant on TH. (*Id.* at 15.) Specifically, the Area Office misapplied and incorrectly analyzed two of the four key factors to determine unusual reliance. The third factor of the *Dover Staffing* test requires the prime contractor's proposed management to have previously served with the subcontractor on the incumbent contract. (*Id.* at 16, citing *Dover Staffing, Inc.*, SBA No. SIZ-5300; *Modus Operandi, Inc.*, SBA No. SIZ-5716.) However, there is no incumbent contract. Appellant argues the Area Office's determination that Appellant meets the third factor is an assumption not based on facts and a misapplication of the four-factor test. (*Id.*) The fourth factor of the *Dover Staffing* test requires a showing that the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract. (*Id.* at 17, citing *Dover Staffing, Inc., supra; Modus Operandi, Inc., supra*.) Appellant argues the Area Office "discounts the vast experience of High Desert's owners, Rod Thomas and Dale Thomas, which they gained while they owned Thomas Helicopters, and use at High Desert to complete performance on contracts." (*Id.* at 17.) Further, Appellant listed over 50 years of experience relevant to the subject contract. (*Id.* at 18-19). Appellant concludes the Area Office ignored the fact that two of the four parts of the *Dover Staffing* test were unmet and insufficient to conclude unusual reliance by Appellant upon TH.

D. Crop Jet Aviation's Response

On October 16, 2022, Crop Jet filed a response to the size appeal. (Response, at 1.) Crop Jet argued the Area Office correctly determined that Appellant and HRA are affiliated. Crop Jet argues Appellant fails to provide any evidence to rebut the Area Office's finding that Rod and Dale Thomas are brothers who hold common ownership in Appellant and HRA. (*Id.* at 4.) The Area Office provided Appellant the opportunity to rebut this presumption; however, Rod and Dale Thomas failed to do so. (*Id.* at 5.) Crop Jet maintains the Area Office correctly applied an adverse inference to determine Rod and Dale Thomas's ownership interest in HRA and Appellant. (*Id.*)

Further, Crop Jet argues Area Office properly determined Appellant and TH were affiliated under the ostensible subcontractor rule. Crop Jet maintains Appellant's arguments are "nothing but a disagreement with the Area Office's outcome." (*Id.* at 7.) According to Crop Jet, Area Office considered Appellant's argument but gave greater weight to the proposal's content

and reliance on TH's reputation. Crop Jet cites to precedent where OHA has determined the Area Office "must give greater weight to the information submitted in the concern's offer and the factors and conditions affecting the Company as of the date the proposal was submitted, as opposed to the information submitted in response to this size protest." (*Id.* at 8, citing *Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815, at 10 (2017); *Size Appeal of Tech. Assocs., Inc.*, SBA No. SIZ-5814, at 12 (2017).) Crop Jet concludes the Area Office properly gave greater weight to the Proposal as opposed to any subsequent post proposal representation or response by Appellant. (*Id.* at 8.)

Crop Jet also argues the Area Office provided enough evidence to support its determination that the primary and vital elements of the contract was the "spraying of herbicide." (*Id.* at 9.) Crop Jet contends the Area Office and the "cognizant" CO agreed upon the vital and primary elements of the contract, and it is "counterintuitive for the Government to develop the statement of work, develop the technical and evaluation aspects of the proposals but [Appellant] now decides what the primary purpose of the contract, in its view, should be." (*Id.* at 9.) According to Crop Jet, the goal of the Procurement cannot be accomplished without the aerial spraying of herbicides and use of TH pilots to accomplish that task. (*Id.* at 9-10.) "Without those crucial aspects, there would be no resultant mission accomplishment." (*Id.* at 10.) Crop Jet highlights Area Office's analysis and concludes that "OHA should not substitute or disturb the Area Office (and Contracting Officer's) assessment of what constitutes the primary and vital parts of the contract." (*Id.* at 12.)

Lastly, Crop Jet argues the Area Office properly determined that Appellant was unusually reliant on TH. (*Id.* at 13.) Crop Jet maintains "SBA also found sufficient substantiation to conclude that [Appellant] would not have won the procurement without the employees, equipment, past performance and technical approach of TH." (*Id.* at 14.) Crop Jet argues Appellant fails to provide facts or evidence in its Proposal to contradict the Area Office. (*Id.*) Crop Jet concludes the Area Office properly determined Appellant to be affiliated with TH under the ostensible subcontractor rule, citing 13 C.F.R. § 121.103(h)(2). (*Id.* at 15.)

E. Appellant's Reply to Crop Jet Aviation's Response

On November 1, 2022, Appellant filed motion for leave to reply and argues that Crop Jet brought new arguments that are out of the scope of the specific size appeal. (Motion to Reply, at 1-2.) Appellant filed a reply to Crop Jet's response and argues that "Crop Jet's Response shows a misunderstanding of High Desert's size appeal." (*Id.* at 4.) Appellant acknowledges its affiliation with HRA and rejects the use of adverse inference. "High Desert simply acknowledged to SBA that High Desert and High Range are affiliated." (*Id.*)

Appellant contends that Crop Jet's arguments (1) present a misunderstanding of the size determination, (2) are new to the proceedings, (3) represent inaccurate conclusions, and (4) are irrelevant or moot to the instant appeal. (*Id.* at 4.) Appellant acknowledges that Rod and Dale Thomas have an ownership and management interest in Appellant and HRA, these companies are affiliates, and this issue is not in dispute. (*Id.* at 5.) Appellant maintains that Crop Jet's arguments would be "untimely," if they are attempting to relitigate failed affiliation arguments made in the size protest; and Crop Jet's arguments would be "misguided," if they are attempting

to state that the affiliation between Appellant and HRA affects or impacts the ostensible subcontractor finding in this appeal between Appellant and TH. (*Id.* at 7.) Appellant concludes by urging that "OHA reject Crop Jet's arguments related to affiliation between High Desert and High Range. OHA should focus on the faulty finding of ostensible subcontractor affiliation finding between High Desert and Thomas Helicopters." (*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 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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

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 the interest of a complete record and a full discussion of the issues, I ADMIT Appellant's Reply into the record.

B. Analysis

After reviewing the size determination and the record, I cannot find that the Area Office erred in its finding that Appellant's relationship with TH violates the ostensible subcontractor rule, and thus Appellant is other than small for the Solicitation.

A contractor and its ostensible subcontractor are treated as joint venturers for size determination purposes. 13 C.F.R. § 121.103(h)(2). An analysis 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 Appeal of Leumas Residential, LLC*, SBA No. SIZ-6103, at 16 (2021); *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. 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., Navarro Research and Engineering, Inc.*, SBA No. SIZ-6065, at 20. 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. Thus, identifying the primary and vital requirements of a contract requires a comprehensive assessment of the entire solicitation in order to ascertain the principal purpose. Frequently, the primary and vital requirements are those which account for the bulk of the effort, or of the contract dollar value. *Id.* at 10. It is, however, also appropriate to consider qualitative factors, such as the relative complexity and importance of requirements. *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5098, at 6 (2009) (recognizing that primary and vital requirements may be "measured by either quantity or quality"). 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.

Here, the SOW states in plain language: "[t]he purpose of this contract is to secure services for herbicide spraying and the herbicides and adjuvant to be applied In the present case." Section II.A, *supra*. The SOW goes on to discuss the contract's requirements, all involving the work of spraying the herbicides over the designated areas. The SOW states that a contractor must furnish, "all labor, equipment, tools, diluent (water), materials, supervision, supplies, and incidentals; and perform all work necessary to complete applications." *Id.* All the other requirements of the contract, the administrative support, and the acquiring of herbicides (some of which are Government-furnished) are all in the service of the primary and vital requirement, the spraying of herbicides. From a complete and objective reading of the PWS, it is clear that the labor, supervision, management, tools, materials, equipment, facilities, and transportation are merely ancillary requirements of the contract, while the "spraying of the herbicide" is the primary and vital part of the Solicitation. Further, the CO supported the conclusion that the spraying of herbicide was the primary and vital requirement of the procurement. Section II.B, *supra*. While the CO's opinion of the question of primary and vital requirement is not conclusive, it is entitled to some weight. *Size Appeal of BCS, Inc.*, SBA No. SIZ-5681, at 11 (2015; *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290 (2011). The Area Office thus determined "the spraying of herbicide in accordance with the SOW" to be the primary and vital elements of the contract. Section II.B., *supra*.

Appellant contends the primary and vital requirements of the contract are procuring herbicides and providing "highly complex labor, equipment, storage, materials, logistics, planning, and management." Section II.C., *supra*. Appellant argues that these are complex requirements that must be provided for aerial spraying to occur. *Id.* This argument, however, is not supported by a comprehensive assessment of the entire Solicitation. As noted above, the plain language of the Solicitation states "[t]he purpose of this contract is to secure services for herbicide spraying and the herbicides and adjuvant to be applied." Section II.A., *supra*. Accordingly, I conclude that the Area Office was correct. The plain language of the SOW makes clear that the primary and vital requirement of this procurement is the spraying of herbicides on designated areas.

As observed by the Area Office, Appellant intends to lease most of the equipment, including aircraft, from TH and employ the majority of pilots and ground crewmen from TH. Section II.B., *supra*. As further analyzed by the Area Office, the expertise and experience

provided by the pilots and crewmen weighs heavily in the primary and vital requirement to spray herbicides. *Id.* The Area Office considered both the quantity of TH employees, and the quality of experience provided by these individuals.

Appellant mentions that the SOW devoted details to the type of spray and location as opposed to the aviation process, pilots or planes; however, this is a superficial factor which have no bearing on the substantive question of which requirements are primary and vital. *See Santa Fe Protective Servs.*, SBA No. SIZ-5312, at 11 (2012). Thus, I find the Area Office did not err in this conclusion that the primary and vital requirements of the Solicitation was the "spraying of herbicide."

Additionally, Appellant contends that it has a vendor and lessor relationship with TH as opposed to a contractor and subcontractor relationship. I find Appellant's argument unconvincing. Appellant relied on *Tiger Enterprises, Inc.*, SBA No. SIZ-4647, which held a contractor-subcontractor relationship did not exist because the alleged business concern was not designated as a subcontractor nor selected to perform any work under the contract. *Tiger Enterprises* is distinguishable from the instant appeal because although not formally designated as a subcontractor, Appellant intends to hire TH to perform what was previously determined the primary and vital elements of the contract, the "spraying of herbicide" (i.e., aircrafts, pilots, and crewmen). Whether considered industry practice or not, designating TH as a vendor does not alter the fact that it has been engaged by Appellant to perform the primary and vital requirement of this procurement, putting it in the category of an ostensible subcontractor. It is TH which will be performing the aerial spraying, with its aircraft and pilots.

I find the Area Office did not err in its conclusion that TH would perform the vital and primary requirement of "spraying the herbicide," thus establishing an ostensible contractor relationship exists between Appellant and TH.

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. *Dover Staffing, Inc., supra; Modus Operandi, Inc., supra; Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017); *Size Appeal of Prof'l Sec. Corp.*, SBA No. SIZ-5548 (2014).

Appellant contends that two of the four *Dover Staffing* factors cannot be met. I find the record supports Appellant's argument. Section II.C., *supra*. First, there is no incumbent subcontractor associated with the Solicitation, therefore the third factor cannot be met. Second, Rod and Dale Thomas previously owned and operated TH. The record further reflects that Rod and Dale Thomas hold almost 50 years of experience managing federal contracts. *Id.* Due to Rod and Dale Thomas's extensive experience, the fourth factor cannot be met. Area Office contends that Rod Thomas's experience and five previous contracts pertains to his time while at TH. Section II.B., *supra*. Appellant's relevant experience is not negated by the fact that this

experience involved another concern. *Size Appeal of Leumas Residential, LLC*, SBA. No. SIZ-6103 (2021). 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. I find the Area Office's analysis to be meritless on this issue. Thus, with less than three of the four *Dover Staffing* factors present, the record does not support a finding that Appellant was unusually reliant upon TH.

Nevertheless, as previously determined, the Area Office did not err in finding TH would perform the primary and vital requirements of the contract. A finding that concerns are joint venturers, and thus affiliated, under the ostensible subcontractor rule must be based either upon a finding the subcontractor is performing the primary and vital requirements of the contact, or the contractor is unusually reliant upon the subcontractor. 13 C.F.R. § 121.103(h)(2). The regulation is disjunctive, and thus a finding of either primary and vital performance by the subcontractor or unusual reliance by the contractor will result in a finding that the rule applies. Accordingly, while I conclude that Appellant was not unusually reliant on TH, the fact that TH will perform the primary and vital requirements of the contract means that it is affiliated with Appellant under the ostensible subcontractor rule.[2]

IV. Conclusion

Appellant failed to prove the size determination was based upon clear error of fact or law. Accordingly, this appeal is DENIED, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge

[2] The fact that Appellant does not contest the Area Office's finding that Appellant is affiliated with HRA means that issue is not before us here. *Size Appeal of DRI, Inc*. SBA No. SIZ-6150 (2022).