

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEALS OF:

Apogee Group, LLC, and RPM Partners,
LLC,

Appellants,

RE: K2 Construction Consultants, Inc.
d/b/a K2 Consulting

Appealed From
Size Determination Nos. 2-2021-071, -072

Solicitation No. 70RWMD20R00000012

U.S. Department of Homeland Security

SBA No. SIZ-6232

Decided: July 27, 2023

APPEARANCES

Nicole D. Pottroff, Esq., Shane J. McCall, Esq., John L. Holtz, Esq., Stephanie L. Ellis, Esq., Koprince McCall Pottroff LLC, Lawrence, Kansas, for Apogee Group, LLC and RPM Partners, LLC

Robert Tompkins, Esq., Kelsey Hayes, Esq., Holland & Knight, Washington, District of Columbia, for K2 Construction Consultants, Inc. d/b/a K2 Consulting

DECISION¹

I. Introduction and Jurisdiction

On May 9, 2022, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) Size Determination Nos. 2-2021-071 and 2-2021-072, concluding that K2 Construction Consultants, Inc. d/b/a K2 Consulting (K2) is a small business for the subject procurement. On appeal, Apogee Group, LLC (Apogee) and RPM

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.

Partners, LLC (RPM) (Appellants), having previously protested K2's size status and eligibility, contend that the size determinations are clearly erroneous, and request that SBA's Office of Hearings and Appeals (OHA) reverse or remand.² For the reasons discussed *infra*, the appeals are DENIED, and the Size Determinations are AFFIRMED.

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. Appellants filed the instant appeals within 15 days after receiving the size determinations, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, these matters are properly before OHA for decision.

II. Background

A. Solicitation, Evaluation, Statement of Work, and Protests

On October 16, 2020, the U.S. Department of Homeland Security (DHS) issued an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract, Request for Proposal (RFP) Solicitation No. 70RWMD20R00000012. (RFP, at 1.) The RFP called for Radiation Portal Monitor Program deployment services for the Countering Weapons of Mass Destruction (CWMD) office. The Contracting Officer (CO) set aside the procurement entirely for small business and designated North American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding \$39.5 million annual receipts size standard. (*Id.*)

As a background information, the Solicitation states the Pacific Northwest National Laboratory (PNNL) performed Radiation Portal Monitor (RPM) deployment and installation since the beginning of the RPM program for Countering Weapons of Mass Destruction (CWMD). This Statement of Work (SOW) consisted of capabilities for RPM site surveys, site designs, construction including site manager, ancillary equipment installation, calibration, configuration management (CM), commissioning, and RPM acceptance from U.S. Customs and Border Protection (CBP). CWMD's contract line-item number (CLINs) identify the contract requirements to provide complete and useable RPM lanes including the ancillary equipment. This capability required unique resources, expertise, and flexibility. (Solicitation Amend. 04, at 7.)

In the Scope of Work, the Solicitation stated “[t]he Contractor shall perform the tasks described in this [SOW]. CWMD is procuring from the contractor the following deployment services, which are described in greater detail in Section 4.” (Solicitation Amend. 04, at 12.) The work sought will be specified on the individual task orders (TO) issued by the CO. A TO issued may incorporate multiple sites, regions, or other logical groupings. Additionally, Program-wide TOs will be issued to cover Program-level Management and other requirements that are not directly allocable to a single effort. (*Id.*, at 14.)

² On June 7, 2022, OHA issued an order consolidating the two appeals involving the same solicitation, the same challenged concern, and the same issue. *See Size Appeals of G&C FAB-CON, LLC*, SBA No. SIZ-5649, at fn. 3 (2015) (consolidating three appeals “[b]ecause the issues presented in the cases are substantively identical and involve the same challenged firm and size standard”).

Following the requirements of Section 4, the Program Management and Integration of Section 4.1 specifically states:

The primary objective of this contract is to deploy RPM systems. While most of the effort will involve RPM deployment CLINs, *the contractor will need to manage the projects as a portfolio (sea, land, and air) and perform overall program management activities.* Program and portfolio management will include management of schedule, cost controls, subcontractors, stakeholders (identification and coordination with all stakeholders), acquisition (ancillary lane equipment), configuration (both hardware and POE sites), quality, and other management and oversight tasks as needed. Oversight tasks include management studies such as logistics and strategic fielding studies. These activities will support all deployments and will not be directly attributable to any single deployment.

(*Id.*, at 14-15, emphasis added.)

The Contractor is to effectively manage its services to the CWMD RPM programs and serves as the coordinator and integrator for assigned site installation activities for the RPM programs. The Contractor will provide program and sub-contract management for RPM deployments and supports strategic and operational planning for RPMP and related RDE activities, including development of intermediate and long-term plans to support acquisition, deployment, and operations of RPMs. The Contractor will also provide technical support for program planning activities, such as the cause and effect results from system upgrades. (*Id.*, at 15.)

The procuring agency chose a two phased source selection process to evaluate best value using the tradeoff process. The factors considered for Phase One were (1) RPM Site Design, Construction and Installation Experience, (2) Program Management Approach, (3) Design-Build and Design-Bid-Build Experience, (4) Corporate Experience, and (5) Past Performance. (*Id.* at 132.) Evaluation Factor 1 was significantly more important than Factors 2, 3, 4 and 5. (*Id.*)

For Phase Two, the factors considered were (1) Sample Task Order Design, Engineering, and Technical Services for Installation/Relocation of Radiation Portal Monitors (RPM) for the Pier J, Port of Los Angeles/Long Beach (LA/LB), CA. Technical Solutions, (2) Project Management Approach, (3) Key Personnel/Qualifications, and (4) Sample Task Order Technical Solution Cost. Further, the Evaluation Factor 1 was significantly more important than Factors 2 and 3. When combined, Evaluation Factors 1, 2 and 3 were significantly more important than Evaluation Factor 4. (*Id.*, at 132-133.)

Proposals for Phases One and Two were due November 16, 2020, and February 9, 2021, respectively. K2 and Appellants submitted timely proposals.

On March 17, 2022, the CO issued a notice that K2 was the apparent successful offeror. On March 24, 2022, the Appellants filed separate size protests alleging K2's affiliation with **[Subcontractor 1]** in violation of the ostensible subcontractor rule. In response to the

protests, K2 denied the allegations, asserting that it has prime federal contracts experience and Appellants' arguments are built on faulty premises and lack of information.

B. Size Determinations

On May 9, 2022, the Area Office issued the Size Determinations Nos. 2-2021-071 and 2-2021-072 and determined that K2 will perform the primary and vital requirements of the contract and is not unusually reliant on the subcontractor.

As the only issue was of affiliation, the Area Office reviewed K2's response that it has three subcontractors for this contract, one of which is [**Subcontractor 1**], and identified the other as Sub 2 and Sub 3. (Size Determinations, at 3.) Then, the Area Office ascertained whether the ostensible subcontractor rule is applicable to the proposed subcontractors, given that similarly situated entity (SSE) subcontractors, having the small business program status as the prime contractor, are excluded from consideration under 13 C.F.R. §§ 125.1, 125.6(c). The Area Office found that [**Subcontractor 1**] and Sub2 are not small businesses, are not SSEs for the instant solicitation, and are eligible for consideration under the ostensible subcontractor rule. (*Id.*, at 5.)

In reviewing the SOW, Section 4.1, the Area Office concluded that the primary and vital requirement of the solicitation is the program and portfolio management. (*Id.*, at 6.) The Area Office noted that in K2's proposal, K2 will be “responsible for program management and integration and lead task areas such as information security.” (*Id.*, citing K2 Phase 1, Vol 1, p. 14.) Further, K2 has over twenty years of experience in project management and scheduling, stakeholder engagement, and deployment of systems similar to Appellants at more than 400 airports and U.S. POE. (*Id.*, citing K2's Protest Response, at 4.) K2's proposal identified the proposed Senior Program Manager (PM) with a Bachelor of Science degree and a Ph.D. in Chemistry, a Master of Business Administration (MBA) degree and 30 years of radiation detection experience, and as a K2 employee that has been with the firm for several years and is not a former employee of any of the proposed subcontractors. (*Id.*, at 6-7.)

Additionally, K2 proposed that its own employees will account for [**X**] % of the labor cost for CLIN 1 (Program Management) and [**X**] % of the labor cost for CLINS 2-7 (Site Survey, Site Management, Design and Engineering, Construction and Installation, Commissioning, and Decommissioning). (*Id.*, at 7, citing K2 Phase II, FRP Cost.) Further, those percentages have increased from its estimate provided in the proposal. Finally, K2 will perform [**X**] of the 22 SOW requirements and has extensive experience as a subcontractor performing on similar projects. (*Id.*, citing K2 Phase 1, Vol 1.) Ultimately, K2 is responsible for the program management function for the portfolio of projects and will have on-site presence. K2's Senior Program Manager has the expertise and experience to oversee the portfolio of projects. The Area Office concluded that K2 demonstrated throughout its proposal that it has significant prior experience performing on similar projects which indicated that the employees it is providing as labor for non-program management CLINs are qualified to perform the roles they are being assigned. Given these findings, the Area Office concluded that K2 is performing the majority of the primary and vital requirements under this solicitation. (*Id.*)

Next, the Area Office considered the issue of unusual reliance. It reviewed the “four key factors” which *Size Appeal of Dover Staffing, Inc.*, SBA No. SIZ-5300 (2011) found “may be suggestive of unusual reliance and found that none of them are met here. (*Id.*, at 7-8.) The CO stated this is a new requirement, and there is no incumbent. K2 has not hired, nor did it propose hiring, any **[Subcontractor 1]** or Sub2 employees or directors for purposes of performing the Contract. K2's proposed management did not serve with the subcontractor on the incumbent contract, because this was a new procurement. Lastly, K2 has employees with the experience and expertise as well as past performance of its own as a firm that indicate K2 was not unusually reliant on **[Subcontractor 1's]** experience to win the contract, nor unusually reliant on Sub2, which duties only covered **[X]** of the 22 SOW requirements. (*Id.*, at 8-10.)

In addition, the Area Office considered whether K2 was unusually reliant upon its non-SSE subcontractors. While K2 has a long history of working with **[Subcontractor 1]**, the work from **[Subcontractor 1]** only accounts for approximately **[X]**% of K2's receipts from 2016 to 2020. Thus, the Area Office agreed that duration alone is not sufficient to establish affiliation in general and the small percentage of receipts derived from **[Subcontractor 1]** in recent years is not indicative of financial reliance. Similarly, the scope of the relationships between K2 and each of its subcontractors did not appear to be any long-term or established relationship with Sub2. (*Id.*, at 11-12.)

K2 proffered the Declaration of its President and CEO, Bruce Neiswender, affirming that none of K2's owners or any of their immediate family members have any ownership stake in or management position with any of the proposed subcontractors, nor have any of them ever been employed by any of these firms. (*Id.*, at 8, 11.) The Area Office agreed that it does not appear that K2 is affiliated with **[Subcontractor 1]** or Sub2 in general and their relationship is not indicative of unusual reliance. (*Id.*, at 11-12.)

To determine size, the Area Office reviewed K2's provided federal income tax returns for itself for the applicable years prior to its offer for this procurement, and the five-year average was below \$39.5 million. (*Id.*, at 13.)

C. Appeals

On May 24, 2022, Appellants appealed the size determinations and proffered Exhibits A through K. The two appeals are filed by the same counsel and are substantially identical. Appellants argue the Area Office erroneously found that K2 would perform the primary and vital requirements of the Solicitation, when K2's own proposal evidenced that **[Subcontractor 1]** would perform the primary and vital requirements of the contract, if K2 receives the award the, and in any event, K2 is unusually reliant on **[Subcontractor 1's]** experience to win the contract. (Appeals, at 1.)

K2 is a small business, located in Bethesda, Maryland. Based on public information available on SAM.gov, USA Spending and LinkedIn, K2 has 11 to 50 employees, its primary NAICS code is 541611, Administrative Management and General Management Consulting Services, which has a corresponding \$15 million annual receipts size standard. K2 has received only two federal awards since 2009, with apparently no receipts resulting from those awards.

(*Id.*, at 3.) In turn, [**Subcontractor 1**] is a large business corporation headquartered in Centreville, Virginia.

Appellants revisit the procuring agency's best value trade off process and the factors for consideration under Phases 1 and 2. (*Id.*, at 4-6.) In review of these factors and the SOW, Appellants claim the Area Office erred by: (1) incorrectly finding the primary and vital requirements of the Solicitation to be “program management,” rather than construction and design management, and finding K2 would perform the primary and vital requirements; and (2) ignoring K2's overreliance on [**Subcontractor 1's**] experience in its proposal. Under either ground, K2 and [**Subcontractor 1**] are affiliated under the ostensible subcontractor rule. (*Id.*, at 10.)

Arguing that this is a contract for the construction, design, and installation of RPMs and “[t]he primary objective of this contract is to deploy RPM systems,” Appellants claim the “Program Management Approach” is considered secondary in terms of evaluation criteria to the offeror's ability to provide design, installation, and construction services as evidenced by their experience. (*Id.*, at 12, citing Solicitation at 11-12.) For this Solicitation, “most of the effort will involve RPM deployment CLINs.” (*Id.*, at 13, citing Solicitation at 12.) Further, the program management work supports the main requirements of the Solicitation; they are not the primary and vital requirements themselves. The primary and vital requirements of the contract are the construction, design, and installation of the RPMs. (*Id.*, at 13.)

Appellants rely on *C.E. Garbutt Const. Co.*, SBA No. SIZ-5083 (2009), where OHA upheld an area office's decision, finding that a subcontractor would receive nearly 50% of the administrative/management costs of the contract and thus that appellant was unusually reliant on its subcontractor. Further, “OHA has held that the on-site project superintendent, responsible for day-to-day decision-making, is a crucial position for management of any construction contract.” (*Id.*, citing *Iron Sword Enterprises, LLC*, SBA No. SIZ-5503, at 6 (2013).) Here, Appellants contend that K2 assigned the actual management of the construction, design, and implementation of the RPMs to [**Subcontractor 1**]. K2's proposal acknowledges the senior construction manager and senior technical manager will be [**Subcontractor 1**] employees, who are crucial for management of the construction, design, and installation work and will directly manage the primary and vital requirements and conduct the day-to-day management of the work. (*Id.*, at 13-14.)

In Appellants' view, the Area Office's findings regarding K2 employees accounting for the labor cost are irrelevant, because they do not address the Area Office's own observation that the “primary role of a prime contractor in a construction project is to superintend, manage, and schedule the work[.]” (*Id.*, at 14.) Appellants maintain that what matters is who is conducting the day-to-day management of the construction, design, and implementation of the RPMs, not whether K2 has the experience or what percentage of work is conducted by K2. (*Id.*, at 14-15.) Further, nothing suggests K2 will directly manage the construction, design, and implementation work for this RFP, when the construction and technical managers would be [**Subcontractor 1's**] employees. Thus, [**Subcontractor 1**] would perform the primary and vital requirements of the RFP and the ostensible subcontractor rule applies, supporting the conclusion that K2 is affiliated with [**Subcontractor 1**]. (*Id.*)

Even if the Area Office correctly determined that K2 would perform the primary and vital requirements of the RFP, Appellants maintain K2 would be unusually reliant on **[Subcontractor 1]**. (*Id.*, at 15-16.) Appellants claim the Area Office failed to find that K2 lacks experience in managing construction, installation, and design work that forces it to rely on **[Subcontractor 1]** to conduct such work. While K2 has experience in program management, it does not have prime contractor experience in construction, installation, and design management. (*Id.*, at 16-17.) K2's submission of **[X]** past performances with **[Subcontractor 1]** proves that it is relying on **[Subcontractor 1]** to acquire the contract and will rely unusually on **[Subcontractor 1]** to perform it. (*Id.*, at 17.) This is the sort of unusual reliance the ostensible subcontractor rule contemplates, and OHA should find it applies here. (*Id.*)

Finally, Appellants maintain that K2 and **[Subcontractor 1]** affiliated exceed the size standard, and thus, K2 is a large business ineligible for award under the RFP. (*Id.*, at 17-18.)

D. K2's Response³

On May 17, 2023, K2 filed a response in these appeals and asserts the Area Office correctly found that K2 is a small business eligible for the award of the procurement at issue, and Appellants have failed to show the Area Office's size determinations are based on a clear error of fact or law. (K2's Response, at 2.)

As noted by the Area Office, the Solicitation assigned NAICS Code 237990, Other Heavy and Civil Engineering Construction, making clear that this is a construction contract. The Area Office then reviewed the Solicitation, including the SOW and correctly found the SOW identified the following tasks as the deliverables: "program management, site survey, design, site management, construction and installation, commissioning, decommissioning, and security requirements." (*Id.*, at 2, citing Solicitation at 6.) The Area Office also reviewed Section 4.1 of the Solicitation. (*Id.*, at 3, citing Solicitation at 11-12.) Based on this information, the Area Office properly concluded that for this construction procurement "the primary and vital requirement of the solicitation is the program and portfolio management." (*Id.*) K2 states that no challenges were made concerning the assignment of this NAICS code to the instant procurement.

After issuance of the Size Determination, the procuring agency completed a corrective action in the procurement, which resulted in bid protests by the Appellants at the GAO. K2 explains that On April 21, 2023, GAO denied Apogee's protest. (*Id.*, at 7; *see SeaTech Security*

³ Initially, OHA stayed the proceedings on two occasions. First, on June 7, 2022, when the procuring agency placed a Stop Work order to undertake corrective action. Then, on January 25, 2023, when the Appellants filed a bid protest with the U.S. Government Accountability Office (GAO), challenging the award to K2 under the same solicitation. (GAO docket number B-419969.7.) On April 28, 2023, the CO proffered a redacted copy of the GAO decision for public release, which denied the bid protest, and requested OHA to move forward with this proceeding. On May 2, 2023, OHA lifted the stay in this matter and directed K2 to file a response to the appeal no later than May 17, 2023.

Sols.; *Apogee Group, LLC*, B-419969.6, B-419969.7, Apr. 21, 2023, 2023 WL 3222412.) More specifically, K2 states:

At GAO, Apogee argued, among other things, that K2 lacked relevant prior experience and should have received a lower past performance rating as a result. GAO rejected Apogee's contentions and found that there was no basis "to question the evaluators' judgment that, while less complex, K2's [past performance] reference was sufficiently similar to the RFP's requirements to be relevant." *Id.* at *8. The issues before GAO and the SBA turn on the same operative facts as laid out in K2's proposal. GAO, like the Area Office, concluded that K2's actual proposal demonstrated it had relevant experience.

(*Id.*, at 7-8, fn. 4.)

In response to the appeals, K2 argues the Area Office correctly determined that the primary and vital contract requirements are the program and portfolio management, based on the Solicitation and SOW. (*Id.*, at 9-10.) Despite this, Appellants argue the primary and vital requirements are "RPM construction, design, and implementation," based on Section M of the RFP. (*Id.*, at 10.) K2 characterizes Appellants' contentions as disagreement. (*Id.*, at 11.) K2 explains the Area Office found this is a construction contract under NAICS code 237990, Other Heavy and Civil Engineering Construction and elaborated that as a clear rule of law in construction contracts, and the primary and vital requirements are to "superintend, manage, and schedule the work", i.e., the program management. (*Id.*, citing *Size Determination* at 6.) The Area Office's determination is well-grounded in the law and Appellants cannot demonstrate any clear error of law.

K2 maintains that under OHA precedent, compliance with the ostensible subcontractor rule is analyzed differently in the context of construction procurements, as opposed to ordinary services procurements. Unlike services, in construction contracting, OHA has recognized that subcontractors often perform a majority of the actual construction work because the prime contractor frequently must engage multiple subcontractors specializing in a variety of trades and disciplines. (*Id.*, citing *Size Appeal of J.R. Conkey & Associates, Inc. d/b/a Solar Power Integrators*, SBA No. SIZ-5326, at 8 (2012)). Accordingly, consistent with the Area Office's determination, OHA has determined the "primary and vital" requirement of a construction contract is to superintend, manage, and schedule the work, including coordinating the work of the various subcontractors and not necessarily perform the majority of the actual construction work. (*Id.*, at 12, citing *Size Appeal of Milani Construction, LLC*, SBA No. SIZ-5898 (2018); *Size Appeal of C&C Contractors, LLC*, SBA No. SIZ-5990 (2019) (analysis using the same NAICS Code 237990 at issue here); *Size Appeal of Martin Bros. Constr., Inc.*, SBA No. SIZ-5945 (2018); *Size Appeal of Iron Sword Enterprises, LLC*, SBA No. SIZ-5503 (2013) (the mere fact that Appellant proposed to self-perform a comparatively small portion of the actual construction work is not sufficient to establish a violation of the ostensible subcontractor rule).)

K2 makes a point that Appellants do not deny that this is a construction contract, but they ignore this fact and that a construction NAICS code was assigned to this procurement. The Area Office noted that Appellants agree that OHA case law has consistently held that "[t]he primary

role of a prime contractor in a construction project is to superintend, manage, and schedule the work, including coordinating the work of the various subcontractors.” However, Appellants continue to simply ignore this extensive caselaw, including that cited case laws in their own protest and appeals that supports the primary and vital requirements here are for management of the contract, as opposed to the actual construction work. (*Id.*, at 12-13.) Thus, Appellants have failed to demonstrate the Area Office's determination that the primary and vital requirements of the Solicitation are the program and portfolio management was a clear error of fact or law and this appeal ground must be denied in its entirety. (*Id.*)

Based on the arguments above, K2 states the Area Office correctly concluded that K2 would perform the actual primary and vital portions of the work, and Appellants continue to ignore the primary and vital requirements are the program and portfolio management. (*Id.*, at 13-14.) K2 highlights that its proposal clearly demonstrates it will have an on-site presence and perform the work comprising the primary and vital requirements. (*Id.*, at 15.) A deeper examination of K2's proposal further validates the Area Office's findings and determination, in addition to the Senior Program Manager's role and responsibilities that demonstrate K2 is ultimately in charge of the primary and vital requirements, not **[Subcontractor 1]**. (*Id.*)

While Appellants argued that “[n]othing suggests that K2 is to directly manage the construction, design, and implementation work for this RFP,” K2 notes that given the IDIQ nature of the contract, the specific sites and site requirements have yet to be identified and were not called out in the Solicitation. Therefore, it was reasonable for the Area Office to determine, based on the above information and the content of K2's proposal, that K2 will be performing the primary and vital requirements including day-to-day management. Further, K2 states that its role is therefore similar to or exceeds that of other firms who have been found compliant with the ostensible subcontractor rule when they had firm control of the management of the subject contract. (*Id.*, at 16-17, citing *Size Appeal of Milani Construction, LLC*, SBA No. SIZ-5898 (2018); *Size Appeal of Martin Bros. Constr., Inc.*, SBA No. SIZ-5945 (2018).) Accordingly, Appellants have not shown that the Area Office erred in concluding that K2 would manage the contract, and therefore would perform the primary and vital contract requirements. (*Id.*, at 17.)

Next, K2 contends that it is not unusually reliant on **[Subcontractor 1]** to perform the work. While Appellants take issue with K2's subcontracting experience, the Area Office noted that “OHA case law has long held that a concern may rely upon its past experience as a subcontractor.” (*Id.*, at 18, citing *Size Appeal of Alphaport, Inc.*, SBA No. SIZ-5799, at 12 (2016).) The Area Office properly noted that the cases cited by Appellants' proposition were inapplicable and distinguishable. Specifically, the Area Office correctly noted that *Size Appeal of Smart Data Solutions, LLC*, involved a firm with “no experience and heavy delegation to the much more experienced subcontractor” and *Size Appeal of Taylor Consultants, Inc.*, involved an “‘unproven’ firm and the case involved the newly organized concern rule.” (*Id.*) In contrast, the Area Office noted that unlike *Size Appeal of Smart Data Solutions, LLC*, “K2 has a significant amount of experience and will be providing both project management and a significant percentage of the labor for performance.” (*Id.*, at 19.) Additionally, the Area Office concluded that unlike *Size Appeal of Taylor Consultants, Inc.*, K2 is not newly established and in fact has a long track record of 30 years of performance. (*Id.*)

In their appeal, Appellants do not challenge the Area Office's conclusion that none of the *Dover Staffing* factors were met, instead Appellants' entire argument is premised on their disagreement with the Area Office's conclusion that K2's lack of experience as a prime contractor was not *de facto* indicative of unusual reliance. (*Id.*, at 19.) Appellants' arguments are based on the incorrect conclusion that the primary and vital requirements of the work are construction, installation, and design management, and claim that because K2 does not have prime contractor experience performing this type of work, it is unusually reliant on **[Subcontractor 1]** to conduct such work. (*Id.*, citing Appeals at 16-17.) However, OHA has made clear that “[a] concern may rely upon its past experience as a subcontractor and be found not to be unusually reliant upon its large business subcontractor.” (*Id.*, at 20, citing *Size Appeal of Milani Construction, LLC*, SBA No. SIZ-5898 (2018) (citing *Alphaport, Inc.*, *supra.*) It therefore was not improper for the Area Office to consider K2's experience as a subcontractor. As a relevant point, K2 states that Appellants do not dispute the Area Office's key finding that K2 does have relevant experience as a subcontractor. (*Id.*)

Moreover, even if Appellants could establish the Area Office unreasonably found K2 to have demonstrated its own past performance, OHA has explained that a lack of relevant past performance is “only one among other factors in the ostensible subcontractor analysis.” (*Id.*, at 21, citing *Size Appeal of Milani Construction, LLC*, *supra.* (citing *Size Appeal of Logistics & Tech. Servs., Inc* SBA No. SIZ-5482, at 8 (2013)); *see also* *Size Appeal of Navarro Research and Eng'g, Inc.*, SBA No. SIZ-6065 (2020).) Thus, even if assuming that K2 lacks relevant prime experience, this would not by itself be sufficient to establish unusual reliance, without other strong indicia of affiliation. The Area Office examined this issue and concluded such indicia did not exist here, a finding which Appellants do not challenge. (*Id.*)

K2 concludes that it is not affiliated with **[Subcontractor 1]** and therefore remains small under the applicable size standard. (*Id.*, at 21.)

With its response, K2 objects to Appellants' proffered new evidence on appeal. Specifically, K2 refers to Appellants' Exhibits E, F, G, which are **[Subcontractor 1]** Annual Report 2021, **[Subcontractor 1]** SAM.gov Registration, and **[Subcontractor 1]** USASpending.gov information. K2 maintains this new evidence must be excluded from the record, because Appellants did not file a motion to introduce new evidence, as required by 13 C.F.R. § 134.308(a) and there is no good cause to admit these exhibits, which consist of publicly available information that could have been, but were not, provided to the Area Office during the size review. K2 notes that OHA “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). (*Id.*, at 2, fn. 2.)

E. Apogee's Supplemental Appeal and Motion

On May 17, 2023, Apogee also filed a Motion to Supplement Size Appeal and Supplemental Appeal after reviewing the record from the Area Office. Apogee argues that it has reviewed this record and has found additional facts and support for the arguments raised in its initial appeal. In particular, the supplemental appeal further supports and strengthens the arguments raised in the initial appeal regarding **[Subcontractor 1]** acting as an ostensible

subcontractor. (Apogee's Motion, at 1.) As these facts could not have been known prior to review of the Area Office case file, and this motion is timely filed by the close of record, OHA should admit and review the supplemental appeal filed with this motion. (*Id.*, at 2.)

In its supplemental pleading, Apogee takes issue with K2's performing just [X]% of the work under CLIN 1. Apogee begins with the argument that K2 is still not performing the required amount nor the significant features of that work, regardless of the Area Office's categorization that the RFP is “portfolio and program management” and even if that is accepted, the record shows K2 will not even perform all of the portfolio and program management work it originally claimed it would perform here. Apogee claims “[b]oth of these facts alone would establish that K2 is not going to perform the primary and vital requirements of the RFP—and combined, these facts make that point even more clear.” (*Id.*, at 1-2.)

Apogee argues the work of program management will be shared between K2 and [Subcontractor 1], and since K2 and [Subcontractor 1] will be performing the same types of work under the RFP, [Subcontractor 1] simply performing dramatically more of said work under the RFP will be performing the primary and vital work. Apogee maintains the Area Office itself previously confirmed this point, “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.’” (*Id.*, at 4, citing *XOtech, LLC*, SBA No. SIZ-5957, at 7 (2018) (quoting *A-P-T Research, Inc.*, SBA No. SIZ-5798, at 11 (2016)).

Further, Apogee claims that from a monetary perspective, no one contractor appears to be set to perform a majority of the work under that CLIN. With this, the language from *XOtech* makes it clear that K2 is therefore not in control of what the Area Office described as the primary and vital requirement of the RFP. K2 may be performing some amount of the program management work under the RFP, but it is not performing a majority of said work. (*Id.*) As the proposal indicated, K2 will be performing a maximum of [X]% of said work, not performing the most significant or substantive features of said work, and “delegating far more than the allowed “discrete functions” of this work to a large business subcontractor.” (*Id.*, at 6.)

Apogee relies on OHA case law, such as *Synaptek Corp.*, SBA No. SIZ-5954 (2018) (finding the ostensible subcontractor rule does not apply as the prime contractor's “share of the primary and vital requirements far exceeds that of” the subcontractor's and the prime contractor “intends to perform the majority of the contract's primary and vital requirements), to assert that when the prime will not perform the majority of primary and vital requirements and the most important part of those requirements—the ostensible subcontractor rule should be applied to ensure the work instead goes to an eligible small business. (*Id.*) With K2 performing [X]% of CLIN 1, and [Subcontractor 1] apparently performing [X]% of the value under CLIN 1, Apogee claims the ostensible subcontractor rule applies here. (*Id.*, at 7-8.)

Apogee also reasons that if program management is the primary and vital requirement of the RFP, then successful performance of the primary and vital requirement of the RFP is heavily reliant on [Subcontractor 1]. If [Subcontractor 1] is essential to successfully carrying out the primary and vital requirements of the contract, then the ostensible subcontractor rule applies.

(*Id.*, at 8, citing *PacArctic, LLC*, SBA No. SIZ-6105 (2021) (“The “ostensible subcontractor’ rule provides that when a non-similarly situated subcontractor is performing the primary and vital requirements of the contract...the firms are affiliated for purposes of the procurement at issue.”).) K2 and **[Subcontractor 1]** are affiliates for the purposes of this contract and therefore are ineligible for award under the RFP.

Next, Apogee takes issue with K2's Senior Program Manager role and claims **[Subcontractor 1]** is performing the primary and vital requirements, relying on Phase II Addendum, which allegedly shows that “practically all management duties will be undertaken by the [XXX], [XXX], and [XXX], all **[Subcontractor 1]** employees.” (*Id.*, at 8.) In K2's proposal, **[Subcontractor 1]** will actually conduct most of those activities. In reference to its Phase II addendum, K2 provided Table 1-FPR-1, titled “Mapping of Key and Non-key Staff by Labor Category to SOW and Contract Deliverables,” showing the responsibilities of Key and non-key staff as lead (L) or support (S) preparation of initial program/contract deliverables and subsequent work defined by TO.” (*Id.*, citing Exh. 6 of Protested Firm Response, at 29, 31-32.) In this table, the Senior Program Manager will take “the lead on the Program Management Plan and plans and schedules and will provide support for some regular status reports and studies.” (*Id.*) Beyond that, however, “the Senior Program Manager will have no involvement with any other deliverable.” (*Id.*, at 9.)

In contrast, Apogee makes note that **[Subcontractor 1]** employees will take either the lead or a support role on practically every other deliverable: (1) the [XXX], (2) the [XXX], and (3) the [XXX]. (*Id.*, citing Exh. 6 of Protested Firm Response, at 31-32.) Further, there is no duty the Senior Program Manager apparently does not share with at least the [XXX], [XXX], and [XXX], or in combination. Apogee finds it odd that there is no duty that is apparently held solely by the Senior Program Manager. (*Id.*, at 9-10.)

In Apogee's view, “the Senior Program Manager will have little involvement in the deliverables for the work—and apparently, he will be sharing all of his duties with employees of **[Subcontractor 1]** and other subcontractors.” As such, K2 is truly not performing much of the “program and portfolio management” work that the Area Office determined is the primary and vital requirement of the RFP. Apogee claims that “[a] general review of the proposal documents shows the Senior Program Manager is treated as little more than an afterthought.” Instead, **[Subcontractor 1]**, through its **[X]** key employees will be carrying out most of the program management work. Qualitatively, the majority of key personnel labor hours are assigned to **[Subcontractor 1's]** personnel. (*Id.*, at 10.) This demonstrates the heavy involvement that **[Subcontractor 1]** employees will have with program management—and thus, the primary and vital work—in violation of the ostensible subcontractor rule. (*Id.*)

F. K2's Opp. Motion and Supplemental Response

On June 1, 2023, K2 timely filed an Opposition Motion to Apogee's Motion to Supplement Size Appeal and Response to Supplemental Appeal. K2 argues that Appellant's Motion to Supplement Appeal and its Supplemental Appeal should be dismissed or denied as Appellant is merely restating arguments already made, and relies on facts that were reasonably apparent from the Area Office's decision but not raised in its initial appeal. Should OHA

Appellant's contention that preparation of deliverables is among the “major program management activities,” is not supported by the record. (*Id.*, citing Supp. Appeal, at 8.) Notably, providing deliverables is not identified as part of a major component of the program and portfolio management activities. (*Id.*, at 7.) Appellant's reliance on the proposed deliverable table in K2's proposal is misguided, as the table does not reflect the source of labor for the primary and vital requirements of the contract. Instead, the table simply outlines the assignment of certain deliverables required under the IDIQ. While Appellant incorrectly claims that “the majority of key personnel labor hours are assigned to **[Subcontractor 1's]** personnel,” K2 will perform least **[majority]**% of the hours listed in Table 1-10 of K2's cost proposal. (*Id.*)

Furthermore, K2 has and is entitled to delegate some of the deliverables to personnel other than the Senior Program Manager, including to **[Subcontractor 1's]** personnel, and nothing in their various responsibilities, as it relates to these deliverables, suggests an unusually high degree of responsibility or unusual reliance, or any violation of the ostensible subcontractor rule. (*Id.*) In fact, K2 asserts that it makes sense for the Senior Program Manager to share or delegate the responsibility for many of the deliverables as he will be too busy actually managing the contract. (*Id.*, at 8.) The Senior Program Manager's role in these deliverables is consistent with his role as explained in K2's Technical Volume and his lack of assigned responsibility for some of the other deliverables does not demonstrate that K2 is not performing the actual primary and vital requirements. (*Id.*)

K2 concludes that there is simply no basis for Appellant to argue that the Area Office committed clear error here in finding that K2 is not unusually reliant on **[Subcontractor 1]**, and that K2 is performing the primary and vital requirements of the contract. (*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).

B. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not first presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximium Demolition, Inc.*, SBA No. SIZ-5071, at 2 (2009) (“I cannot find error with the Area Office based on documents that Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not

unusually enlarge the issues, and clarifies the facts on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). OHA “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

In this case, Appellants did not submit a motion to admit Exhibits E, F, and G, which were not part of the Area Office's protest materials and have not established good cause to admit them now on appeal. Appellants having failed to file a motion and provide a good cause reason, K2's objections to Exhibits E, F, and G, are GRANTED and these exhibits are EXCLUDED from the record.

As for Appellant's motion to file a supplemental appeal after review of the Area Office's files for the first time, I find good cause here, when Appellants did not have access to K2's proposal and materials submitted to the CO and the Area Office, and these additional facts may support or strengthen Appellants' arguments raised on initial appeal. Accordingly, I GRANT Appellant's motion to file the supplemental appeal, ADMIT the supplemental appeal, and further ADMIT K2's Supp. Response to it.

C. Analysis

Having reviewed the record and the arguments presented by the parties, I find that Appellants have not shown clear error in the Size Determinations. As a result, the appeals must be denied.

The initial step in an ostensible subcontractor analysis is to determine whether the prime contractor will perform the contract's primary and vital requirements or if the prime contractor is unusually reliant upon the subcontractor. 13 C.F.R. § 121.103(h)(2). OHA has carved an exception to the ostensible subcontractor rule for construction contracts in recognition that in construction contracting, subcontractors often perform a majority of the actual construction work, because the prime contractor frequently must engage multiple subcontractors specializing in a variety of trades and disciplines. *J.R. Conkey & Associates, Inc.*, *supra*, at 8. This exception accounts “[t]he primary role of a prime contractor in a construction project is to superintend, manage, and schedule the work, including coordinating the work of the various subcontractors.” *C.E. Garbutt Construction Company*, *supra*. So long as the prime contractor retains management of the contract, a small business prime contractor on a construction contract may delegate a large portion of the construction work to its subcontractors without contravening the ostensible subcontractor rule. *J.R. Conkey & Associates, Inc.*, *supra*; *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383, at n.6 (2012); *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 6 (2010).

I find the Area Office correctly found the instant procurement is a construction contract and the primary role of a prime contractor in this construction project is the program and portfolio management. Sections II.A, II.B, *supra*. The Area Office found that K2 will be “responsible for program management and integration and lead task areas such as information security. . . .” In particular, K2's seasoned employee with a Bachelor of Science degree and a Ph.D. in Chemistry, a Master of Business Administration (MBA) degree and 30 years of

radiation detection experience, will be the Senior Program Manager. K2's own employees will account for [X]% of the labor cost for CLIN 1 (Program Management) and [X]% of the labor cost for CLINS 2-7 (Site Survey, Site Management, Design and Engineering, Construction and Installation, Commissioning, and Decommissioning). K2 will also perform [X] of the 22 SOW requirements and has extensive experience as a subcontractor performing on similar projects. On this record, the Area Office reasonably concluded that K2 would manage the contract, and therefore would perform the primary and vital contract requirements. Section II.B, *supra*.

Additionally, the Area Office found the *Dover Staffing* “four key factors,” suggestive of unusual reliance, were not present in this case, which Appellants do not challenge. These factors 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. *Size Appeal of Veterans Care Medical Equipment, LLC*, SBA No. SIZ-6210, at 12 (2023).

As the Solicitation is a new requirement, there is no incumbent contractor. K2 will not be hiring any of its employee from its subcontractors, and because this is a new requirement, K2's proposed management did not serve with any subcontractor on the incumbent contract. As to K2's experience, it is clear that it is a 30-year-old firm with experience as a subcontractor in [X] of the 22 Statement of Work requirements. It is settled precedent that a concern may rely upon its past experience as a subcontractor and be found to not be unusually reliant upon its large business subcontractor. *Alphaport, Inc.*, *supra*, citing *Size Appeal of Human Learning Systems, LLC*, SBA No. SIZ-5785 (2016). Accordingly, K2 is clearly not unusually reliant upon its subcontractors under the *Dover Staffing* test.

Further, I find no error in the Area Office's consideration of the fact that [**Subcontractor 1**] only accounted for approximately [X]% of K2's receipts from 2016 to 2020, and that and the duration of their relationship is not sufficient to establish affiliation in general between the concerns and the small percentage of receipts derived from [**Subcontractor 1**] in recent years is not indicative of financial reliance.

Appellants' contention that the primary and vital requirement of this Solicitation is “construction and design management” while “Program Management Approach” is considered secondary, is unpersuasive in light of the explicit language of the Solicitation, the SOW, Section 4.1, and the NAICS code selection. The language in the Solicitation makes it clear that the contractor will manage “the projects as a portfolio (sea, land, and air) and perform overall program management activities. Program and portfolio management will include management of schedule, cost controls, subcontractors, stakeholders (identification and coordination with all stakeholders), acquisition (ancillary lane equipment), configuration (both hardware and POE sites), quality, and other management and oversight tasks as needed. . . .” Section II.A, *supra*.

Appellants take issue with K2's proposal to perform [X]% of the labor cost for CLIN 1, and the Senior Program Manager's role when compared to Parson's [X] key employees for this contract. In doing so, they fail to recognize the OHA's established precedent that in considering

whether the prime contractor in a construction contract is performing the primary and vital requirements, the primary and vital requirement is to superintend, manage, and schedule the work, including coordinating the work of the various subcontractors, and not necessarily to perform the majority of the actual construction work. Commonly in construction work, subcontracting accounts for the majority of work. OHA also found where there are a number of subcontractors, but with no one subcontractor having a majority of the work, control over the management of the contract can lead to finding of no violation of the ostensible subcontractor rule even where the challenged concern is not performing the majority of the work. *J.R. Conkey & Associates, Inc., supra*, at 7, citing *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 14 (2011). Yet, K2 accounts for the majority of the labor cost for CLIN 1 and for CLINS 2-7, whereas **[Subcontractor 1]** will perform **[X]**% of the labor cost for CLIN 1. K2 employees also accounts for the majority of the labor hour performance. Sections II.B, II.F, *supra*.

Appellant has failed to establish any error of fact or law in the Size Determination, and I must deny its appeal.

IV. Conclusion

Appellants have not demonstrated clear error of fact or law in the Area Office's size determinations. Accordingly, the appeals are DENIED, and the size determinations are AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge