Cite as: *Size Appeal of Diversified Elevator Service and Equipment Company*, SBA No. SIZ-6283 (2024)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Diversified Elevator Service and Equipment Company, Appellant, RE: Black and Loans, LLC Appealed From Size Determination No. 3-2023-023	SBA No. SIZ-6283 Decided: May 10, 2024

APPEARANCES

Matthew T. Schoonover, Esq., Matthew P. Moriarty, Esq., John M. Mattox II, Esq., Ian P. Patterson, Esq., Timothy J. Laughlin, Esq., Schoonover & Moriarty, LLC, Olathe, Kansas, for Diversified Elevator Service and Equipment Company

Cyril Iyasele, CEO, Black and Loans, LLC, Atlanta, Georgia

DECISION[1]

I. Introduction and Jurisdiction

On December 19, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2023-023 (Size Determination), concluding that Black and Loans, LLC (B&L) is a small business under the size standard associated with the subject procurement. The Area Office rejected protest allegations filed by Diversified Elevator Service and Equipment Company (Appellant) that B&L is violating the ostensible subcontracting rule. On appeal, Appellant argues the Size Determination is clearly erroneous, and requests that OHA reverse it and find Appellant is not an eligible small business. For the reasons discussed *infra*, the appeal is denied.

[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded B&L 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 appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation

On April 10, 2023, the U.S. Army Mission Installation and Contracting Command (MICC) issued a Request for Proposals (RFP) No. W911SF23R0006 for elevator repair and maintenance services. The Contracting Officer (CO) set the procurement entirely aside for small business and designated North American Industry Classification System (NAICS) code 811310, Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance with a corresponding $12.5 million annual receipts size standard.[2] Proposals were due on May 9, 2023.

B. Proposal and Qualifications

The RFP required proposals to include a completed Standard Form 1449, a completed Schedule of proposed/prices, a signed or other acknowledgement of all amendments, and submission of completed Representation and Certifications. Proposers[3] were to furnish unit prices and extended total for all items listed on the schedule of bid items. (Solicitation, at 3.)

Further, the RFP instructed the proposal schedule contains Base Bid and Four Option Period Bid Items with pricing for all proposed items to be considered responsive to the Solicitation and eligible for contract award. In turn, MICC intended to award all Base Proposal Items to the successful proposer at the proposed prices provided under its winning proposed schedule. (*Id.*)

Under the Evaluation Factors for Award, the RFP stated the "[a]ward will be made to lowest responsive and responsible bidder having submitted an acceptable bid." (*Id.*, at 4.) Prospective contractors were notified that before an award is made, the Government may require them to submit a detailed statement of facts itemized from (1) through (9). (*Id.*)

Additionally, the RFP incorporated FAR 52.219-14, Limitations on Subcontracting and a Performance Work Statement (PWS). (*Id.*, at 72, 85-98.) Under General, Special Qualifications, "[t]he contractor shall be regularly engaged in the installation and servicing of elevators of the general type indicated for maintenance and repair service," "[t]he contractor shall maintain a fulltime service and warehouse operation within 50 miles of Ft. Benning Georgia." (*Id.*, at 88.)

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[2] The Solicitation listed the size standard as $11 million. The Area Office used the correct $12.5 million annual receipts size standard in making its size determination.

[3] The RFP identifies offerors as "proposers."

For Contractor's Responsibilities, among other clauses, the RFP states that "[t]he Contractor shall furnish all supplies, equipment, facilities and services required to perform work under this contract that are not listed under Section 3 of this PWS." (*Id.*, at 96.) Further, "[t]he contractor must have a sufficient stock of repair parts especially common repair parts, a variety of circuit boards, elevator light bulbs and materials to prevent extended down time for Fort Benning's elevators. The contractor must include in their proposals a list of repair parts in stock and on hand for repairs." (*Id.*)

Appellant and B&L submitted timely offers. On August 17, 2023, MICC notified unsuccessful offerors that B&L was the apparent successful offeror.

C. Protest and Size Determination

On August 24, 2023, Appellant submitted a protest to MICC challenging B&L's size. Appellant also filed a GAO protest. The Area Office suspended the size protest pending the outcome of the GAO protest. On November 21, 2023, GAO denied Appellant's protest. *Diversified Elevator Service and Equipment Company*, B-421925.2 (Nov. 21. 2023) (*Diversified Elevator I*). The Area Office renewed its processing of the protest and Appellant's protest allegation that B&L is in violation of the ostensible subcontractor rule, that B&L lacks the experience to perform the contract, and therefore, it must be unusually reliant upon a large business subcontractor to perform the contract's primary and vital requirements.

On November 28, 2023, Appellant filed additional information to supplement its protest. In its letter, Appellant offered additional facts and reading of the GAO decision to support its allegation that B&L will rely on an ineligible large business to perform the contract and "to assist the SBA in its investigation of [B&L]," including a copy of GAO's public decision. (Suppl. Protest, at 1-2.)

On December 19, 2023, the Area Office issued its Size Determination, finding B&L was an eligible small business. The Area Office found the primary and vital requirement of the contract is to inspect, repair, monitor and replace elevators at Fort Moore and Fort Benning. (Size Determination, at 6.) The Area Office noted B&L's statement, that it had no subcontracting or teaming arrangements in place for this contract and that B&L plans to hire qualified mechanics from various readily available pools of eligible subcontractors. As part of the protest response, the Area Office remarked that B&L submitted correspondences from Appellant, the incumbent contractor, and **[Entity A]** offering qualified mechanics for the work. (*Id.*)

The Area Office found that B&L's proposal offer included a letter from a concern, **[Company A]**, an other than small business, outlining their experience and capability regarding the inspection, maintenance and repair of elevators. B&L stated in response to the Area Office's inquiry that it currently had no relationship with **[Company A]**. While preparing its offer, B&L made multiple calls developing resources. **[Company A]** had mailed the letter to B&L showcasing its capabilities, and B&L included it in its proposal to demonstrate its ability to obtain resources and develop an adequate workforce to perform the contract. (*Id.*)

B&L stated that it intends to perform 51% of the value of the contract with in-house labor. B&L has not yet extended any employment offers or teaming agreements. The Area Office found there was no basis for finding any concern other than B&L was performing the primary and vital contract requirements. (*Id.*, at 7.)

Turning to the question of whether B&L was unusually reliant upon another concern to perform the contract, the Area Office applied the four-factor test OHA articulated to determine unusual reliance in *Size Appeal of Dover Staffing, Inc.*, SBA No. SIZ-5300 (2011) (*Dover Staffing*):

> (1) Is the proposed subcontractor the incumbent and ineligible to compete for the procurement.
>
> (2) Does the prime contractor intend to hire the large majority of its workforce from the subcontractor.
>
> (3) Was the prime contractor's proposed management previously employed by the subcontractor on the incumbent contract.
>
> (4) Does the prime contractor lack the relevant experience and must rely on the subcontractor to win the contract.

In applying these factors, the Area Office found Appellant is the incumbent and is not a proposed subcontractor, is eligible to compete for the procurement, and, indeed, has. B&L has no hiring agreements in place and does not plan to hire the majority of its workforce from the incumbent contractor. Appellant's program manager will be its CEO and principal, Cyril Iyasele, who has no relationship with the incumbent contractor. MICC did not require past experience references as part of the evaluation criteria, and therefore B&L did not rely upon the experience of a subcontractor to win the contract. The Area Office noted Mr. Iyasele's resume indicates 15 years of experience in engineering, facilities maintenance and repairs, and project management from Fortune 500 companies. (*Id.*, at 7.)

The Area Office thus found B&L was not unusually reliant upon its subcontractor to perform the contract, because there was no identified subcontractor upon whom B&L would be unusually reliant. Therefore, B&L was not affiliated with any other concern based upon the ostensible subcontractor rule. (*Id.*, at 8.) The Area Office then calculated B&L's annual receipts and found it was an eligible small concern. (*Id.*, at 9-10.)

D. The Appeal

On January 2, 2024, Appellant filed the instant appeal. Appellant notes that upon GAO issuing *Diversified Elevator I*, it notified the Area Office of the decision, and filed a supplemental protest including a copy of the decision. Appellant argues GAO found that B&L's proposal indicated that all maintenance and repair work would be performed by a subcontractor:

> the final two pages of the awardee's proposal consisted of a statement from a subcontractor that all elevator maintenance and repair services would be provided by that firm's employees, using its nearby facilities, its tools, and its stock of spare parts.
>
> Diversified points to a 2-page letter in Black & Loans's proposal, written on the letterhead of a large business, stating that all elevator maintenance and repair services would be provided by that firm's employees, using that firm's facilities, tools, and stock of spare parts.

(Appeal, at 5.)

Appellant asserts that its supplemental protest bolded and underlined explicit statements that all elevator maintenance and repair would be performed by B&L's large business subcontractor. (*Id.*, at 5.) Appellant maintains that primarily, the Area Office "allowed the self-serving statements of the challenged concern made during the heat of litigation to outweigh the clear and compelling evidence in the record: [B&L's] proposal." (*Id.*, at 8.)

Appellant first argues the Area Office erred by failing to adequately weigh the proposal in its decision. The challenged concern's proposal is the most important piece of evidence in an ostensible subcontractor case. Appellant argues the Area Office abandoned that standard, failing to consider that B&L's proposal said a contractor would be performing the primary and vital work. (*Id.*, at 9, citing *Size Appeal of High Desert Aviation, LLC*, SBA No. SIZ-6179 (2022).)

Appellant relies upon language quoted above from *Diversified Elevator I* to support its claim that all the work on the elevators will be performed by a large business subcontractor. Yet, Appellant contends the Area Office relied upon B&L's self-serving statements. Appellant claims that the letter is no mere capability statement, but directly addresses the work and explained how the subcontractor will perform it. (*Id.*, at 10, citing *Diversified Elevator I*).

Appellant further argues the Area Office erred by relying exclusively on the *Dover Staffing* test without considering all aspects of the relationship. Appellant argues the Solicitation requires that the contractor here must be regularly engaged in elevator maintenance and repair, have an office or warehouse within 50 miles of the fort, and have a stock of spare parts. B&L does not meet these requirements, that its subcontractor, **[Company A]**, does, and this establishes B&L's unusual reliance upon **[Company A]**. Appellant claims the Area Office's "mechanical reliance" upon *Dover Staffing* is not an adequate analysis. Appellant indicates, the Government told GAO during the protest that **[Company A]**'s letter was the only reason B&L's proposal was acceptable. Thus, Appellant argues it does not matter whether a subcontract is in place now, **[Company A]** was the proposed subcontractor at the time of the offer and that is all that matters. (*Id.*)

Next, Appellant contends the Area Office erred in relying exclusively on *Dover Staffing* for its unusual reliance analysis without considering all aspects of the relationship between B&L and **[Company A]**. Appellant again argues the Solicitation requires the contractor here must be regularly engaged in elevator maintenance and repair, have an office or warehouse within 50

miles of the fort, and have a stock of spare parts, and all three requirements were met not met by B&L, but by **[Company A]**. This is a quintessential case of unusual reliance, but the Area Office concluded otherwise because it did not fit into the *Dover Staffing* criteria. (*Id.*, at 11-12.)

Appellant maintains that *Dover Staffing* does not work for every case of unusual reliance. (*Id.*, at 13, citing *Ideogenics, LLC v. U.S.*, 138 Fed. Cl. 672, 692 (2018).) Appellant points out that within the past year, SBA amended the ostensible subcontractor rule to incorporate two of the factors, but also stating that no one factor is determinative. SBA wanted area offices to have the freedom to consider any facts in the record not be limited to mechanical application of *Dover Staffing*. (*Id.*, at 13, citing 88 Fed. Reg. 26164, 26166 (Apr. 27, 2023).)

In Appellant's view, had the Area Office looked more thoroughly at the relationship, it would have found B&L relied on **[Company A]** to meet several key Solicitation terms. Further, even in the *Dover Staffing* framework, B&L will have **[Company A]**'s workers perform the services. While B&L's CEO will be the manager, he has no experience in elevator maintenance and repair. While the Solicitation did not require corporate experience or past performance examples, it did require the contractor be regularly engaged in elevator maintenance and repair. Appellant alleges B&L had no such experience and relied upon **[Company A]** for that requirement. Thus, Appellant argues a non-mechanical application of *Dover Staffing* would find B&L unusually reliant on **[Company A]**. (*Id.*, at 14.)

Appellant also claims the Area Office improperly switched the burden of proof from the challenged concern to the protestor. The Area Office relied upon unsworn statements from B&L that it intends to perform 51% of the contract with "in-house labor" and plans to hire qualified mechanics to perform the work. There were no contracts in place at the time of proposal submission, and the analysis must be based on the relationship between challenged firm and ostensible subcontractor at the time of proposal submission. (*Id.*, at 15.)

Furthermore, the Area Office failed to consider Appellant's supplement to the protest. Appellant filed a Supplement to its protest on November 28, 2023. This explained that *Diversified Elevator I* established that B&L's subcontractor would be performing all the elevator maintenance and repair work, that B&L relied upon its subcontractor to satisfy solicitation requirements that the contractor be regularly engaged in elevator maintenance and repair, that it has an office or warehouse near the base, and that it has a stock of spare parts. Despite the Area Office confirming that it received the information, it did not mention the supplement in the size determination. The Area Office abused its discretion by failing to consider the supplemental protest. (*Id.*, at 16-17.)

Finally, Appellant argues that if allowed to stand, this size determination would establish a loophole making the ostensible subcontractor rule too easy to violate. All a prime contractor would have to do is wait to sign an agreement until after an area office has issued a size determination. (*Id.*, at 17.)

E. B&L's Motion to Dismiss and Appellant's Response

On January 1, 2024, B&L moved to dismiss the appeal. B&L accuses Appellant of lying in its appeal, by stating that B&L's subcontractor would perform 100% of the maintenance and repair work. B&L states that its proposal does not say this, and the Appellant cannot point to anywhere in the proposal where any such statement is made. Appellant has failed to state the "terms of the proposal" it alleges the Area Office ignored. (Motion to Dismiss, at 1-2.)

B&L argues Appellant had the burden to prove the elements of its protest and failed to meet it. B&L further argues the Area Office did not ignore the Supplement to the Protest. B&L asserts the Area Office requested it to respond to the supplemental protest, and so it knows it was not ignored. (*Id.*, at 3-4.) B&L contends that Appellant lost the award due to its high price. (*Id.* at 8-9.) Further, B&L moved for sanctions against Appellant's counsel.

On January 26, 2024, Appellant responded to the Motion to Dismiss. Appellant argues that the Motion is really an argument on the merits. Appellant states it did not point to a specific portion of B&L's proposal that GAO's decision referred to, because it did not yet have access to it. Further, that the Area Office knew of its supplemental protest does not mean that it considered it in its analysis. Appellant also added that it was not aware of any correspondence between Appellant and B&L, where Appellant made an offer to provide workers for the contract.

On January 29, 2024, B&L requested Leave to Reply to Appellant's Response to the Motion. On February 7, 2024, I granted that permission. B&L replied that same day and asserted that Appellant's arguments were "smoke and mirrors." Its size appeal has no factual basis. (B&L's Reply.)

Further, B&L renewed its Motion for Sanctions against Appellant's counsel on the grounds that it was Hunter Ziegler, who is one of the only two Principals and Directors of Appellant, who in fact contacted B&L on multiple occasions about an offer to continue the services, after being notified that B&L was awarded the contract and prior to filing a size protest. (*Id.*, at 17-19.) B&L offered copies of emails and transcripts between Mr. Iyasele and Mr. Ziegler as support. (*Id.*, at 25-29.)

On February 14, 2024, I found Appellant had met the regulatory requirements for an appeal and denied the Motion to Dismiss.

F. B&L's Response

On February 29, 2024, B&L Responded to the Appeal. B&L first addresses Appellant's contention that the Area Office erred in failing to give adequate weight to B&L's proposal in its decision. B&L argues the sole basis of Appellant's argument is its "distorted and blemished" reading of *Diversified Elevator I*. Appellant's references to the proposal all reference GAO's descriptions of it in *Diversified Elevator I*. B&L then accuses Appellant of making a false statement when Appellant argued, "The proposal, according to GAO, said that 'all elevator maintenance and repair services would be provided by **[Company A]** employees, using its nearby facilities, its tools, and its stock of spare parts."' (B&L's Response, at 2, citing Appeal at

9.) B&L also accuses Appellant that "[E]ven though the proposal said that a subcontractor would do 100 percent of the elevator maintenance and repair work" is false. (*Id.*, citing Appeal at 1.)

First, B&L asserts the appeal is based upon false statements and points out that GAO has indicated that their review of the record shows no basis to conclude that B&L's proposal stated an intention not to comply with the limitations on subcontracting clause. (*Id.*, at 3, citing *Diversified Elevator I*, at 6.)

B&L maintains Appellant's contentions are based on imprecise citations to *Diversified Elevator I*, which merely refer to "*Id.*" as the source for their statements. Appellant refers to "facts" established in *Diversified Elevator I* when the GAO decision did not establish any of the facts alleged in the appeal. (*Id.*, at 4-5, citing Appeal at 5-6.)

Next, B&L alleges seven instances of false statements by Appellant's counsel, asserting that it warrants sanctions under 13 C.F.R. § 134.219(b)(2) & (3). First, an allegation in the protest naming potential large business subcontractors for B&L. Second, that GAO confirmed that B&L had an ostensible subcontractor and stated that subcontractor would perform all maintenance and repair. Third, in *Diversified Elevator I*, the CO affirmed that B&L's proposal met the requirements of knowledge and experience. Fourth, the Appeal stated that B&L's subcontractor would perform 100% of the work. Fifth, B&L alleges a "scheme" by Appellant in its protest. Sixth, Appellant claimed not to have contacted B&L about subcontracting for them. Seventh, Appellant stated certain "facts" were established by *Diversified Elevator I* — that B&L would subcontract to a large business which would perform all the work and would rely upon it to meet all the requirements of the solicitation — which B&L contends are not true. (*Id.*, at 5-7.)

B&L further states the Area Office correctly applied the *Dover Staffing* factors. While Appellant has the burden of proving the elements of its appeal, their arguments are misguided and lack legal and factual support. (*Id.*, at 8-11.)

In addition, B&L disputes Appellant's allegation the Area Office failed to consider Appellant's supplemental protest. B&L argues that the size determination includes language that shows the Area Office carefully considered all of Appellant's arguments. Further, it was based upon consideration of B&L's proposal, which is the most important evidence. B&L explains that it responded to the Supplemental Protest on December 6, 2023, with a further memo on December 15th. In that memo, B&L explained that it submitted **[Company A]**'s letter with its proposal as a statement of its capability to obtain resources and adequate workforce to perform the contract. B&L submitted the CO's statement of facts, which were submitted earlier to GAO, and which denied that certain provisions in the Solicitation were definitive responsibility criteria, and concluded B&L's proposal, on its face, did not indicate noncompliance with the Limitations on Subcontracting clause. (*See* Appeal File (AF), Tab 2 — KO Suppl. Statement, at 1-4.) Also, B&L submitted the Army's Memorandum of Law to GAO in *Diversified Elevator I* arguing the Solicitation's requirements — that the awardee maintain a full service warehouse within 50 miles of the Fort, that it be engaged in regular elevator maintenance, and that it have parts and materials on hand — were not definitive responsibility criteria, and that B&L's proposal did not indicate noncompliance with the Limitations on Subcontracting clause. (*Id.*, at 12-15.)

B&L finally maintains Appellant's argument that the Size Determination creates a "loophole" in the ostensible subcontractor rule is speculative and incoherent. The rule was not promulgated to encourage speculative unsupported protests like Appellant's and the Limitations on Subcontracting clause, i.e., FAR 52.219-14, 13 C.F.R. § 125.6(a)(1), supports the purpose of small business set-asides. (*Id.* at 14-16.)

G. Opposition to Sanctions

On February 22, 2024, Appellant filed an Opposition to B&L's motion for sanctions against counsel. Appellant asserts its counsel has not knowingly made false statements or otherwise acted in bad faith challenging B&L's subcontracting approach. Further Appellant has not knowingly or recklessly misrepresented communications between B&L and itself. Lastly, Appellant indicates that after accessing the record and reviewing the correspondences in question, it is clear that B&L misunderstood the nature of the communications in question and Appellant never offered to provide mechanics for hire. Appellant claims that throughout these communications, Appellant was consistent about seeking subcontracting opportunities and at no point did Appellant offer employees for hiring to B&L. Further, Appellant and "its counsel simply had no idea to what [B&L] was referring. When the Size Determination mentioned hiring opportunities, it did not provide cross references to specific emails." (*Id.*, at 7-8, citing Size Determination, at 6-7.) Thus, Appellant claims that at most, B&L has identified an instance where the parties misunderstood each other.

H. The Supplemental Appeal

On February 29, 2024, Appellant filed a Supplemental Appeal. Appellant reviewed the Area Office file under the Protective Order.[4] Appellant first asserts that B&L plainly told the Area Office that its plan was to perform none of the primary and vital work. The Area Office asked B&L to list the specific services to be performed by it and by each subcontractor. B&L responded that it would perform the majority of the work, including the primary and vital requirements. B&L's CEO would serve as Project Manager, and hire an Assistant Project Manager, as needed. B&L described the role of the Project Manager as management, supervision and oversight over contract performance. The Area Office concluded the primary and vital work of the contract was to inspect, repair, monitor and replace the elevators at Fort Moore and Fort

[4] On February 27, 2024, Appellant's counsel sought the Area Office's Vaughn Index and claim of privilege under 13 C.F.R. § 134.206(b)(4). Counsel misapplied this regulation, when Section 134.206(b)(4) is only applicable to situations where SBA is the "respondent" and submits a formal "answer or response" accompanied by a certified "administrative record" to a "petitioner." Generally, this regulation does not apply to size appeals, such as the instant case, when SBA has not intervened and is not participating in the litigation. Instead, Subpart C states the Area Office must immediately send to OHA the entire case file relating to that determination. 13 C.F.R. § 134.306. Under OHA's authority, I directed the Area Office to furnish a Vaughn Index for review. 13 C.F.R. § 134.218(b). Appellant was given an opportunity to review the Vaughn Index and object, but it did not do so. As I find the Area Office's assertions of privilege were not excessive or unreasonable, they remain exempted from disclosure. 13 C.F.R. § 134.205(e).

Benning. Appellant maintains that B&L's description of its role does not include the terms "inspect," "monitor," "replace," "repair" or "elevator." B&L's only worker will be the Project Manager. Appellant argues it was unreasonable for the Area Office to ignore that B&L informed the Area Office it would have no role in the primary and vital work of the contract. If the prime contractor has no role in the primary and vital work, it is reasonable to assume the subcontractor will be performing it. (Supplemental Appeal at 2-4, citing *Size Appeal of Estrategy Consulting, LLC*, SBA No. SIZ-6109 (2021).)

Appellant notes that B&L informed the Area Office it would hire qualified individual mechanics from different firms to perform the requirements. Appellant asserts B&L's proposal does not say that and is "substance free." Appellant states **[Company A]**'s letter included in the proposal describes the elevator mechanics as remaining **[Company A]**'s employees, which would mean B&L would be hiring **[Company A]** as a subcontractor. Appellant maintains the only evidence in the record of what B&L intended to do on this contract made no mention of the primary and vital work, and it was unreasonable of the Area Office to know this and not conclude B&L had an ostensible subcontractor. (*Id.* at 5.)

Appellant asserts B&L had a relationship in place with **[Company A]** when it insisted to the Area Office that it had no relationship. B&L wrote the Area Office on December 15, 2023, that it had no relationship with **[Company A]** related to performance of this contract. The record shows that B&L and **[Company A]** had some form of agreement in place when it told the Area Office otherwise. B&L promised **[Company A]**'s workers a right of first refusal to work on the contract. This was communicated several times to the Area Office. Further, B&L referred to **[Company A]** as a subcontractor, gave it a right of first refusal. (*Id.*, at 7-8, citing Response to Protest, Sept. 15, 2023, response SBA clarification question Dec. 15, 2023, Response to Supplemental Protest.)

Appellant argues B&L's intention has always been to subcontract the primary and vital work. Appellant points to its own communications with B&L, where it never offered B&L the opportunity to hire members of its staff but sought to have discussion about a subcontract. They do not offer employees for B&L to hire, and B&L asked whether Appellant would bid on the entire job. Appellant asserts this shows B&L aways intended to subcontract the primary and vital work. (*Id.*, at 8-10, citing Hunter Ziegler correspondence in Area Office files.)

I. The Proposal

B&L's Proposal and offer consisted of itemized price and acknowledgment of compliance to clauses and parts of the Solicitation with its signature or "concurrence" in the margin. (Proposal, at 1-108.) At the end of the proposal, B&L included a 2-page letter from **[Company A]**, that was unaddressed to a recipient and undated. (*Id.*, at 109-110.) The first included **[Company A]**'s header, list of local mechanics, and office support locations and key individuals. (*Id.*, at 109.) The second page consists of a maintenance ability letter, signed by **[Individual A]**, indicating:

> In our local office we have all the tools necessary to run a Full-service elevator company. Repairs, Modernizations, Maintenance & Construction with a

> good supply of parts and room to stock anything we need. The original local business was started in **[Year]** and has maintained a strong local presence in **[X]**, Ga ever since. The Original Co. **[XX]** installed many elevators at Ft. Benning and **[XXXXXX]**. The original owners sold it to **[XXXX]** and then **[X]** merged with **[Company A]** in **[Year]**. The merger has only strengthened our footprint in Ga. We now have **[XX]** mechanics living in Ga beyond the local mechanics listed above with Decades of experience available to our customers. Response times required can be met with the local staff and a 2-man team can also be provided by local staff in emergencies. We currently maintain many (if not all) the **[XXXXX]**. Laptops already have programs for **[XXX]** to be specific. We already have almost all available programs needed in the trade and will obtain anything new if necessary. The local stock of parts is good, but we will certainly add to our supplies if awarded. Depending on the thoughts of management at Ft. Benning. **[Company A]** might decide to divide the campus among multiple technicians and cross train on all equipment, so all local mechanics are familiar with the equipment. This will just depend on what facilities management would like to see.

(*Id.*, at 110.)

J. Offers to B&L

As part of B&L's response to the protest, the Area Office Files included letters from firms offering services to B&L after the award. Particularly, Hunter Ziegler who identified himself as service manager for Appellant, reached out to B&L's Principal, after learning that B&L won the award, stating:

> We have had the service contract for elevators for the past 15 years at fort Benning and we were made aware yesterday that you guys were awarded the new contract that will be starting soon. We would love to give you a price for us just to continue doing the service on base. The base likes our mechanic that is out there now and it would make things on easy for you guys.

(E-mail from H. Ziegler, (Aug. 18, 2023, 12:30 P.M.).

In another e-mail, Mr. Ziegler asked:

> If u have gotten any other quotes can you tell me what they quoted? You don't have to tell me the price just if they quoted a full time man 40 hrs a week on site of not. And if not how many hours do I can quote the same.
>
> That way you can compare like for like.

(E-mail from H. Ziegler, (Aug. 18, 2023, 4:29 P.M.).

Upon B&L's request to provide a quote that satisfies the contract requirements, Mr. Ziegler indicated that it would submit a quote over to B&L. (E-mail from H. Ziegler, Aug. 21, 2023.)

Similarly, another firm also contacted B&L to offer its contractors or mechanics. (E-mail and Voicemail from **[Entity A]** (Sep. 1, 2023.)).

With firms offering work to B&L, its principal explained to the Area Office that there is no relationship between B&L and **[Company A]**. B&L clarified that:

> It is a [B&L's] policy not to enter into a negotiation or agreement until a purchase order (PO) is at hand. The 'proposed' contract is what it is — proposed, and not yet a definitive purchase order — as the Army currently has the contract on hold — given the GAO bid protest and SBA size protest.
>
> [B&L] only included the capability letter from **[Company A]**, to demonstrate to the Government that pursuant to FAR 9.104-1(f), [B&L] has the ability to obtain resources and source adequate supplemental labor workforce, to facilitate successful performance of the contract.
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> During the offer preparation period, [B&L] made multiple phone calls developing resources and labor sourcing strategy. **[Company A]** mailed its capability letter to [B&L] showcasing its capabilities, just as Diversified and **[Entity A]** reached out, showcased, offered their capabilities and services to [B&L].
>
> It is worthy to note that [B&L] suspended its resources and labor sourcing plan the moment it was notified of the SBA size protest — which was but a few days after been notified of the contract award. So, [B&L] had not even finished rejoicing of winning its first Federal Government contract award, when it was slammed with SBA size protest. Subsequently, [B&L] suspended its resources and labor sourcing plan, and entered into a legal defense mode.

(B&L's Response to Area Office, (Dec. 15, 2023.)

III. Discussion

A. Standard of Review and Motion for Sanctions

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. (*Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).)

B&L's motion for sanctions does not identify a misconduct by Appellant's representatives that warrants sanctions but identifies vigorous advocacy by counsel. The statements B&L alleges as false are arguable, based upon GAO's language in *Diversified Elevator I*. As for Appellant's counsel and its client "having no idea" to what B&L referred when the Size Determination mentioned hiring opportunities without Appellant's cross references to specific emails, I find it disingenuous. Clearly, one of Appellant's principals made numerous attempts to offer work without making distinctions between subcontractors, mechanics or workers, prior to filing the initial size protest against B&L, and Appellant's counsel had the opportunity to review those emails directly from Mr. Ziegler if wished so. Section II.E, *supra*. However, I do not see a violation of the rules and procedures at OHA that would warrant the imposition of sanctions. Accordingly, the Motion for Sanctions is DENIED.

B. Analysis

Appellant has not demonstrated that the Area Office clearly erred as a matter of fact or law in the Size Determination. As a result, I must deny this appeal.

It is settled law that a contractor and its ostensible subcontractor are treated as joint venturers for size determination purposes. An ostensible subcontractor is a firm which is not a similarly situated entity, and which will perform the primary and vital requirements of the procurement, or upon which the challenged concern is unusually reliant. 13 C.F.R. § 121.103(h)(3). An analysis of a concern based on the ostensible subcontractor rule thus requires an assessment of (1) whether a concern will perform the primary and vital requirements of the subject procurement, or (2) whether the prime contractor is unusually reliant on its subcontractor to perform the functions required under the contract. 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 B&L's proposal, and anything submitted therewith. 13 C.F.R. § 121.404(d). An ostensible subcontractor analysis is "extremely fact specific and is undertaken on basis of the solicitation and the proposal at issue." [It must be based] "solely on the relationship between the parties at the time of the proposal, which is best evidenced by [the challenged concern's] Proposal, and anything submitted therewith." *Size Appeal of High Desert Aviation, LLC*, SBA No. SIZ-6179, at 9 (2022) (citing *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 first step in an ostensible subcontractor analysis is to determine the primary and vital requirements of the subject solicitation. Here, the primary and vital requirements are clear, they are the inspection, monitoring, repair and replacement of the elevators at Fort Moore and Fort Benning, Georgia. Appellant argues that B&L will perform none of this work and will subcontract all of it to **[Company A]**. Appellant relies upon statements quoted in *Diversified Elevator I* to support its argument. However, statements in the GAO's case are the result of its review of B&L's proposal. Rather than relying upon the secondary source of GAO's review of the proposal, OHA's analysis must rely upon the proposal itself and any statements and documents furnished to the Area Office.

The proposal consists of returning the Solicitation, signed by B&L's president, with prices filled in next to item numbers, a signature next to certain items in the Solicitation, "Concurrence" written next to each paragraph in the Performance Work Statement, and the two-page letter from **[Company A]** attached. **[Company A]**'s letter does not have a date or an addressee, and it appears to boast and offer elevator services. Section II.I, *supra*.

Though B&L's proposal does not have a description of how it plans to perform the contract, MICC did not request it. Sections II.B, II.I, *supra*. In looking at **[Company A]**'s undated letter, it is not addressed to the procuring agency on B&L's behalf, or any party in particular, but rather describes its services to the "management at Ft. Benning." Because **[Company A]**'s letter was not clear, upon the Area Office's request, B&L filed a second protest response, clarifying that **[Company A]** mailed the letter to B&L. B&L then attached it to its proposal to demonstrate its capability to obtain labor sourcing. Section II.J, *supra*. B&L stated that it had no agreement in place with **[Company A]**. *Id.* Although the inclusion of **[Company A]**'s letter in B&L's proposal is not as clear as it might be, OHA has held that a post-award declaration or statement is admissible if it merely clarifies the underlying proposal and does not contradict it. *See Size Appeal of Contego Environmental, LLC*, SBA No. SIZ-6073 (2020); ("It is well-settled law that "documents created in response to a protest may not be used to contradict an offeror's proposal." quoting, *Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815, at 10 (2017)). Here, B&L's statements to the Area Office do not contradict its proposal. The statements clarify that **[Company A]**'s undated and unaddressed letter is merely an offer from **[Company A]** to B&L discussing its resources. Such letter does not appear to be a description of how **[Company A]** would perform as a subcontractor. Therefore, B&L's proposal does not establish that B&L is unusually reliant on **[Company A]**, or that **[Company A]** will be performing the contract's primary and vital requirements. MICC awarded to B&L based on the "lowest responsive and responsible bidder having submitted an acceptable bid." Section II.B, *supra*. The deciding factor here was price, and the parties do not dispute that B&L offered the lowest responsive price.

OHA has reviewed unusual reliance and fourth factor violations of the *Dover Staffing* test and recognized that in cases where an RFP's evaluation scheme provided that an offeror could be selected for award without any relevant past performance because price is ultimately dispositive, that the inclusion of a more experienced proposed subcontractor "could not have materially enhanced [the offeror's] prospects for award." *Size Appeal of Emergent, Inc*. SBA No. SIZ-5875, at 9 (2017), *Size Appeal of J.W. Mills Mgmt., LLC*, SBA No. SIZ-5416, at 9 (2012). Based on the instant RFP, then, it is clear that B&L did not rely upon **[Company A]** to win the contract. B&L's proposal without **[Company A]** would still have been "responsive" and eligible for award even if B&L had not incorporated **[Company A]**'s letter as part of the proposal. The evaluation of proposals and source selection was clearly noted, and award was made to the lowest responsive and responsible bidder, B&L.

As for Appellant's contention that B&L lacks capability to meet the contract requirement, this is a responsibility argument. During the protest, B&L proffered a statement from the CO about definitive responsibility criteria, geographical restriction, being regularly engaged in elevator maintenance and repair, parts and materials, as not a definitive responsibility criterion, with a statement that B&L's proposal on its face did not indicate noncompliance with the

Limitations on Subcontracting clause. The CO thus seemed satisfied with B&L's responsibility. Section II.F, *supra*. It is settled law that responsibility determinations are the province of the CO, not SBA's Area Offices, therefore Appellant's argument is inapposite here. *Size Appeal of Loyal Source Government Services, LLC*, SBA No. SIZ-5662, at 12 (2015).

Appellant's contention that the Area Office erred in relying exclusively on *Dover Staffing* for its unusual reliance analysis without considering all aspects of the relationship between B&L and **[Company A]**, is merely conclusory, speculative and without support for its contention that B&L will violate the ostensible subcontractor rule. *See* Appellant's Protest, at 1-3; Sections II.D, II.H, *supra*. The Area Office investigated and found that B&L appeared to have no other ties to **[Company A]**, except for **[Company A]'**s letter introducing the company and offering its services to B&L. The record at the time B&L submitted its proposal contains no evidence of any contractual relationship between B&L and **[Company A]**, and therefore, the Area Office could not find there was an ostensible subcontractor relationship between the two concerns, because an ostensible subcontractor determination is made as of the date of the challenged concern's final proposal revisions. 13 C.F.R. § 121.404(d). Because the ostensible subcontractor issue was the basis of the underlying protest, the Area Office reasonably determined that B&L had no relationship with **[Company A]**, and thus was not in violation of the ostensible subcontractor rule.

As to Appellant's above contention and speculations about potential loopholes in the rule, it is settled law that "[a]n area office has no obligation to investigate issues beyond those raised in the protest." *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012); *see also Size Appeal of Perry Mgmt., Inc.*, SBA No. SIZ-5100, at 3-4 (2009) ("Contrary to [the protester's] assertion, it was not the responsibility of the Area Office to investigate all of [the challenged firm's] possible affiliations. It was the Area Office's responsibility to investigate those allegations presented to it by [the] protest.").[5]

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[5] The record reflects that Appellant timely submitted its underlying protest on August 24, 2023, asserting that B&L will subcontract the work to a large business, is affiliated with and will be unusually reliant upon it. 13 C.F.R. § 121.1004(a)(2). It was not until November 28, 2023, that Appellant first submitted supplemental information to the Area Office to assist with the investigation with factual arguments and arguable interpretations of the GAO's public decision. Because this information was brought to the attention of the Area Office after the protest deadline for the procurements at issue, it was untimely, and the Area Office was under no obligation to consider it. *See Size Appeal of Excalibur, Inc.*, SBA No. SIZ-5317, at 4 (2012); *Size Appeal of Silver Enters. Assocs., Inc.*, SBA No. SIZ-5124, at 5 (2010) (explaining the size protest process and noting that "the regulation contemplates no role for the protestor in the process after the protest is filed" and the protestor has "no further submissions to make after filing its protests"); *Size Appeal of South Ga. Servs. Joint Venture*, SBA No. SIZ-5024, at 5 (2009) (recognizing that, if a protestor were allowed to file supplemental allegations and evidence after the prescribed protest deadline, "a protestor could directly supply protest allegations to an area office up until a size determination is issued and . . . [such an approach] would allow a protestor to file a new protest well beyond the five day limit. Such action violates the regulations governing the protest process."); *Size Appeal of Kara Aerospace, Inc.*, SBA No. SIZ-4584 (2003), *recons. denied*, SBA No. SIZ-4595 (2003) (PFR) (finding that a supplemental size

I conclude that Appellant has failed to establish that the Area Office's Size Determination was based upon error of fact or law, and I must therefore deny the appeal.

IV. Conclusion

Appellant has not established that the Size Determination is based upon a clear error of fact and law. Accordingly, I DENY the instant appeal, and AFFIRM the Size Determination. B&L is an eligible small business for the instant procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge

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protest filed after the deadline set forth in the regulation was untimely). Therefore, I cannot find that the Area Office abused its discretion.