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

SIZE APPEAL OF:

Veterans Electrical Group, LLC

Appellant

Appealed from
Size Determination No. 04-2024-026

SBA No. SIZ-6310

Decided: October 2, 2024

APPEARANCES

Timothy L. McGarry, Esq., and Brendan M. Mewhinney, Esq., Henderson, Schmidlin & McGarry Co., LPA, Highland Heights, Ohio, for Appellant.

Marcus R. Sanborn, Esq., Blevins Sanborn Jezdimir Zack PLC, Detroit, Michigan, for Daniels Building Company, Inc.

DECISION¹

I. Introduction and Jurisdiction

On July 11, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting – Area IV (Area Office) issued Size Determination No. 04-2024-026 (Size Determination), concluding that Veterans Electrical Group, LLC (Appellant) is not a small business under the size standard associated with a sealed bid Solicitation No. 36C77623B0042. On appeal, Appellant argues the Size Determination is clearly erroneous, and requests that OHA reverse it and find Appellant is an eligible small business. For the reasons discussed *infra*, the appeal is GRANTED, and the size determination is REVERSED.

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

¹ This decision was originally 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 no requests for redactions. Therefore, I now issue the entire decision for public release.

FOR PUBLIC RELEASE**II. Background****A. Solicitation**

On February 6, 2024, the U.S. Department of Veterans Affairs (VA), Program Contracting Activity Central (PCAC) Contracting Office issued Invitation for Bids (IFB) No. 36C77623B0042 for completion of the Electronic Health Record Modernization (EHRM) Infrastructure Upgrades construction project at the John D. Dingell VA Medical Center in Detroit, MI. The Contracting Officer (CO) designated this acquisition as a 100% Service-Disabled Veteran-Owned Small Business (SDVOSB) Set-Aside and designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$45 million annual receipts size standard.

The Solicitation indicates “[t]he contractor shall provide all tools, equipment, materials, labor, supervision, personnel, and shall do all things necessary that will result in the completion of the EHRM infrastructure Upgrades construction project, in accordance with the attached Specifications and Drawings.” (Solicitation, at 1.) Further, under general construction, the work “includes general construction, alterations, necessary removal of existing structures and construction and certain other items.” (*Id.*, at 6, Lime Item 001.) The Solicitation also states this Line Item 001 “contains all the work for the project”. Bidders must provide a lump sum price for this item, and failure to do so rendered a bid nonresponsive. (*Id.*)

Under contract award, the Solicitation states “Award may only be made with the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the government, considering only price (see FAR 52.214-19). The low price will be evaluated by the Contracting Officer prior to award to confirm that it is ‘a fair and reasonable price that is most advantageous to the Government.’ ” (*Id.*, at 11.)

As for Specifications, the project has extensive requirements for concrete, masonry, carpentry, metal framing and fabrications, firestopping and joint sealants, wood doors, plumbing, heating, ventilating and air conditioning. There is an extensive list of descriptions of the requirements for electrical work. They call for the furnishing and installation of electrical systems, materials, equipment, and accessories in accordance with the specifications and drawings. The Specifications call for the furnishing, installation, connection, and testing of the electrical conductors and cables for use in electrical systems rated 600 V and below, indicated as cable(s), conductor(s) wire, or wiring in the specifications. (*See Attach. 1, Specifications.*)

The CO extended the deadline to submit bids by May 8, 2024. (Solicitation Amend. 0002.) Appellant and Daniels submitted timely bids. On May 8, 2024, the VA publicly opened bids and determined that Appellant was the lowest bidder.

FOR PUBLIC RELEASE**A. Appellant's Offer and Agreement**

Appellant executed a Teaming Agreement with Roncelli, Inc., on May 7, 2024. It refers to the instant Solicitation No. 36C77623B0042. It states Appellant intends to submit a proposal and Roncelli desires to participate as a subcontractor, and so Appellant will be the prime contractor and Roncelli, the subcontractor. Appellant will be the prime contractor responsible for overall submission of the Proposal and program management. The profits are allocated 51% to Appellant and 49% to Roncelli. London Burnett, Appellant's CEO, is to be Project Manager, and is to be responsible for contract performance, overseeing the jobsite, reporting to and implementing the VA's instructions, preparing a daily written log detailing all developments and aspects of the job, and submitting such a log to the VA upon request.

Appellant will submit the Proposal and have the right to decide the form and content of all submissions to the Government and Roncelli has the right of approval, which shall not be unreasonably withheld.

As to Responsibilities and Source of Labor, Exhibit B to the Teaming Agreement provides that Appellant shall provide a bid bond, and Roncelli shall provide its indemnification to support the issuance of bonds. Roncelli is to have a copy of proposed bonds to review prior to providing any indemnity. The cost of the bonds is to be split, 51% for Appellant and 49% for Roncelli. Appellant is to engage Roncelli as a subcontractor, whose scope of work will not be related to electrical and low-voltage scope, but for Roncelli to provide management services with Roncelli's use of its Procore project management system. Both concerns' signatures will be required on all payments. Appellant will provide a quote which includes all costs, labor burden (i.e., direct personnel costs) and overhead costs for all of the electrical and low voltage scope and for at least 15% of the scope of work of the project. Appellant shall hire a project manager and other personnel to perform its scope of work.

Annex 9 to Appellant's Bid lists the subcontractors and the percentage of the work they will perform. Appellant is listed as performing 62.56% of the work, characterized as electrical and low voltage. Other subcontractors are listed as performing various types of construction work. Roncelli is not listed. (Appellant's bid, Annex 9.)

On May 15, 2024, Daniels Building Company, Inc. (Daniels), an unsuccessful bidder, submitted its protest to the VA PCAC challenging Appellant's size. Daniels alleged Appellant lacks the experience, capabilities and finances to perform this contract. Daniels also alleged Appellant had turned to Roncelli, a large business, to perform as its general contractor and construction manager on the project. Daniels thus argued Appellant's relationship with Roncelli for this procurement resulted in the concerns being affiliated under the ostensible subcontractor rule. (Protest, at 2-4.)

FOR PUBLIC RELEASE**C. The Size Determination**

On July 11, 2024, the Area Office issued the subject Size Determination, finding Appellant was not a small business. The Area Office reviewed the Solicitation to determine its primary and vital requirements and found the work is for “general construction, alterations, necessary removal of existing structures and construction and certain other items”. (Size Determination at 5, citing Solicitation at 6.) The Area Office also found this description is consistent with the NAICS code and thus, it is a general construction contract, whose primary and vital requirements are the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed. (*Id.*, at 6, citing 13 C.F.R. § 121.103(h)(3)(iv).)

Appellant asserted that it had no subcontracts in place with any of its proposed subcontractors at the time of bid submission. Appellant had a Teaming Agreement in place with Roncelli at the time of bid submittal, and at its direction, Roncelli provided some incidental services during the bid process. Roncelli was directed to solicit bids from various potential subcontractors, while Appellant selected the primary subcontractor, an other than small concern. Appellant further indicated that it solely prepared and submitted the 156-page bid proposal and will perform a large portion of the work itself. There were no other employment offers, or subcontractor teaming agreements in place at the time of bid submittal. (*Id.*)

After reviewing the Teaming Agreement, the Area Office found it delineates the roles and responsibilities of each member and states Appellant is the prime contractor, and that Roncelli will be its subcontractor. The Teaming Agreement references a supplemental exhibit which specifies Appellant would engage Roncelli as a subcontractor with a scope of work that is not related to electrical and low-voltage work, but for Roncelli to provide management services with its project management system. (*Id.*, citing Exh. B, Teaming Agreement.) The Area Office observed that Procore is proprietary construction project management software and concluded that Roncelli will perform the management services using its software as part of the subcontract. (*Id.*)

During the Area Office investigation, Appellant stated Roncelli would be “primarily involved in the management, supervision and oversight of scopes of work outside of electrical and low-voltage scopes of work”. The project is over 60% electrical and low-voltage work and thus, Appellant argued it will itself be providing over 60% of project management, supervision and oversight for these aspects of the contract. (*Id.*, at 7.)

The Area Office, however, determined that this level of work by Appellant is more consistent with the role of a subcontractor who is only responsible for a portion of the work, and not the actions of a prime contractor with overall management responsibility, including coordinating the work of various subcontractors. The Area Office concluded Roncelli’s role is more consistent with that of a prime contractor, and Roncelli is “the tail wagging the dog.” (*Id.*)

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The Area Office concluded that the instant solicitation is a general construction contract, not an electrical contract. Therefore, the primary and vital requirements are the management, supervision and oversight of the project as a whole, not just the management of the electrical component. The Area Office found the Teaming Agreement indicates that Roncelli is the firm that will be coordinating the work of various subcontractors and therefore, Appellant would not be performing the primary and vital requirements of the contract and was affiliated with Roncelli under the ostensible subcontractor rule. (*Id.*, at 7-10.)

In determining size, the Area Office found that Roncelli is Appellant's ostensible subcontractor, is not a small business for the applicable size standard and is also not Appellant's SBA-approved mentor. Accordingly, Appellant and Roncelli's arrangement does not qualify as a small business. (*Id.*, at 10.)

D. The Appeal

On July 26, 2024, Appellant filed the instant appeal. Appellant states it "has been providing both general contracting and electrical contracting services for nearly a decade." (Appeal, at 1.) Appellant asserts that it has provided general contracting services to the VA on three major projects for the past three years, including the same general construction services to the VA on the same type of project as the instant solicitation. (*Id.*)

Appellant explained that it entered into a Teaming Agreement with Roncelli for this procurement. Under the Teaming Agreement, Appellant is to be the prime contractor and responsible for submission of the overall project and program management. While Roncelli is to be the subcontractor, Appellant will provide the Project Manager and be responsible for contract performance, overseeing the jobsite, reporting to and implementing the VA's instructions, preparing a daily written log detailing all developments and aspects of the job, and submitting such a log to the VA upon request. (*Id.*, citing Exh. A, Teaming Agreement.)

Further, Appellant asserts the Teaming Agreement clearly establishes that Appellant is in control of the project as the Project Manager and is primarily responsible for the project. This should establish Appellant is responsible for performing the primary and vital requirements. (*Id.* at 2.) Nevertheless, the Area Office misunderstood Appellant's responsibility for the project "Detroit VA Electronic Health Record Modernization project" (Detroit EHRM Project) and the relationship between the team members. The procurement, here, primarily involves updating every part of the Detroit Virginia medical campus, so that patient medical information can be electronically stored and tracked. (*Id.*)

Appellant further asserts it will be primary Project Manager for the entire project and provide over 60% of project management, supervision and oversight, and will perform a portion of the actual work. (*Id.*, citing Protest Response at 4.)

Conversely, Appellant finds it inexplicable the Area Office found this level of work more consistent with the actions of a subcontractor responsible for only a portion of the work. The Detroit EHRM Project is a unique project where the electrical upgrade is the project, with some

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construction work necessary to complete the upgrade. Appellant maintains that managing, supervising and overseeing the major aspects of the EHRM Project are the primary and vital requirements of the contract, and managing, supervising and overseeing the electrical and low-voltage aspects of the Project consists of at least 60% of the primary and vital requirements. (*Id.*, at 3.)

Appellant contends it is both a general contractor and an electrical contractor and restates that it is currently a general contractor on three VA projects, one of which is the Cleveland EHRM Project. This establishes its ability to perform this contract. (*Id.*, at 5.)

As support, Appellant stresses the Teaming Agreement provides that:

- [Appellant] is to fulfill the role of “prime contractor and [be] responsible for submission of the overall Project and program management.
- That [Roncelli] will be Appellant’s subcontractor. *Id.*
- [Appellant] shall provide personnel to be “the Project Manager for the Contract.”
- [Appellant] shall be responsible for contract performance, overseeing the jobsite, reporting to and implementing the instructions of the [VA], preparing a daily written log detailing all developments and aspects of the job, and submitting such log to the VA upon request. *Id.*

(*Id.*, at 6-7, citing Teaming Agreement (Exh. D to Protest Response).)

By describing the Teaming Agreement, Appellant maintains that it will be responsible for the management, supervision and oversight of the low-voltage and electrical scopes of work, which constitute over 60% of the Detroit EHRM Project, and Roncelli will be responsible for managing the other scopes of work, which constitute less than 40% of the same project. The Teaming Agreement names Appellant as prime contractor and responsible for submission of the project and program management. (*Id.*, at 7.)

Appellant also stresses that it will manage and control all vital aspects of the contract. Particularly, it will manage the rewiring of the CAT-6A data cabling system, commonly referred to as the structured cabling system. Appellant will solely manage the installation of the complex fiberoptic network, the installation of Uninterruptible Power Supplies, and the fire alarm system for the Detroit VA hospital system. Conti Electric will be performing this work as Appellant’s subcontractor. (*Id.*, at 7-8.)

Therefore, Appellant argues the Area Office misunderstood this contract, finding the work is general construction when the majority of the work is for electrical upgrades. The carpentry and general trades work is minimal and only necessary to accommodate the much more significant electrical and low-voltage upgrades. (*Id.*, at 8.) Contrary to the Area Office’s

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determination, Appellant argues it is the general contractor and the main subcontractors will be Roncelli and Conti Electric. (*Id.*, at 8-9.)

As part of the discussion, Appellant argues the Area Office's reliance on *Size Appeal of Colamette Construction Co.*, SBA No. SIZ-5151 (2010) was misplaced when such a case "actually supports the award of the Detroit EHRM Project to [Appellant]." ² (*Id.*, at 10.) Here, Appellant, like the appellant in *Colamette*, has extensive industry experience in the management, supervision and oversight of electrical and low-voltage work and will employ key employees in furtherance of this work on this contract. In *Colamette*, the alleged ostensible subcontractor was to perform only 3% of the work, and OHA determined it was not an ostensible subcontractor. Here, Roncelli's work will constitute less than 8% of total contract price. (*Id.*, at 10-11.)

Appellant also points to the affidavit of its President and CEO, London R. Burnett, Jr., (Affidavit) submitted as part of its Response to the Protest, in support of the following facts:

- [Roncelli] is not the "incumbent contractor." [Affidavit] at ¶ 29.
- [Appellant] is not hiring any of [Roncelli's] workforce to perform the work. [Affidavit] at ¶ 30.
- [Appellant] does not employ any former [Roncelli's] employees in any capacity, much less in its management. [Affidavit] at ¶ 31.
- [Appellant] is not relying on [Roncelli's] experience to perform the contract. [Affidavit] at ¶ 32.
- [Roncelli] is not in control of [Appellant]. [Affidavit] at ¶33.
- [Roncelli's] work will constitute less than 8% of the total contract price. [Affidavit] at ¶ 34.
- [Appellant] developed the electrical and low-voltage pricing, estimating and scope of work. [Affidavit] at ¶ 35.
- [Appellant] did rely on [Roncelli] to coordinate the other bids for the other aspects of the Project constituting less than 40% of the Detroit EHRM Project. [Affidavit] at ¶ 36.

² The Area Office, however, did not expressly rely upon or discuss *Colamette*. The record shows that Daniels cited to and relied upon *Colamette* in its Protest letter. (Protest letter, at 4.)

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- [Appellant] solely prepared the bid submittal papers, including, but not limited to, the 156-page bid proposal associated with the Detroit EHRM Project. [Affidavit] at ¶ 37.
- [Appellant] has its own [offices and employees.] [Affidavit] at ¶¶ 38, 39.
- [Appellant and Roncelli] have no financial relationship and share no employees. [Affidavit] at ¶¶ 40, 41.
- [Appellant] has never worked with [Roncelli] [and] has never been a subcontractor to [Roncelli.] [Affidavit] at ¶¶ 42, 43.
- [Roncelli] has never been a subcontractor to [Appellant]. [Affidavit] at ¶ 44.
- [Appellant] will be providing its own highly-qualified personnel to the Detroit EHRM Project. [Affidavit] at ¶ 45.
- The bonding company that issued the bid bond to [Appellant] for the Detroit EHRM Project conducted its own due diligence and issued the bid bond in [Appellant's] name. [Appellant] is the primary obligor on the bid bond. [Affidavit] at ¶ 27.
- [Appellant] will be ultimately responsible for the success of the Detroit EHRM Project. [Affidavit] at ¶ 46.

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

Appellant reiterates that the Teaming Agreement establishes it is the prime contractor and is responsible for submission of the overall project and project management. Appellant will provide the Project Manager, and is responsible for contract performance, overseeing the jobsite, reporting to and implementing the VA's instructions, and preparing and submitting to VA a daily written log. (*Id.*, at 13.)

Further, Appellant will be managing, supervising and overseeing the installation of the modifications to the fire alarm system and the access control system, noted as the LENEL system, throughout the Detroit VA hospital system. Appellant asserts that it has the specialized skill set associated with management, supervision and oversight of the electrical and low-voltage, by identifying Divisions 26 (electrical), 27 (structured cabling) and 28 (access control and fire alarm), the aspects of the Detroit EHRM Project. Appellant makes it clear that it is not performing this work but managing the performance of this work. Thus, the Area Office erred in failing to consider all of these factors in reaching its conclusion. (*Id.*, at 14.)

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Lastly, the Area Office referenced that Roncelli uses Procore, a certain type of project management software. However, Appellant claims that it also uses this industry-wide software. Appellant explains that while Roncelli put the use of the software in the Teaming Agreement, Appellant agreed because it uses this software as well. Thus, Appellant finds this reference is irrelevant to the Size Determination. (*Id.*, at 15.)

E. Daniels' Response

On August 16, 2024, Daniels responded to the appeal. Daniels argues the subject procurement is a general construction project and was classified as such by the Solicitation. Daniels notes Appellant describes the contract as an electrical upgrade, with some other work necessary to complete it. Daniels, however, asserts this argument fails because the Solicitation defines the Project as a general construction project where the primary and vital requirements are management, supervision and oversight of the project as a whole, not just management of the electrical component. The Teaming Agreement assigns these management tasks to Roncelli while carving out the electrical portion of the work for Appellant. (Daniels' Response to Appeal, at 1-2.)

In support of a general construction project, Daniels points to the Solicitation and VAAR 852.219-75(a)(1)(ii), reiterating that the Solicitation states this, and so there can be no dispute on the nature of the Project or its primary and vital requirements. Appellant should have filed a pre-bid protest if it had sought to challenge this categorization. (*Id.*, at 3.) Particularly, the primary and vital requirements of a general construction project are "the management, supervision and oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed." (*Id.*, at 4, citing 13 C.F.R. § 121.103(h)(3)(iv).) It is these requirements Appellant intends to subcontract to Roncelli.

Daniels notes the Teaming Agreement is the only document which addresses the division of labor between Appellant and Roncelli. It refers to the question of responsibilities and source of labor to its Exhibit B, which provides that Appellant will use Roncelli as a subcontractor. The subcontract to Roncelli is not related to electrical and low-voltage scope, but for Roncelli to provide management services with the use of its Procore project management system. Appellant was to provide a quote, which would include all costs, labor burden and overhead for all electrical and low voltage scope. Appellant will hire a project manager and other personnel to perform its scope of work. On other hand, Roncelli's scope of work is "management services", to be provided with Roncelli's use of Procore project management system. Roncelli has no scope of work other than management. (*Id.*, at 4-5, citing Teaming Agreement.)

Further, Appellant is to provide a quote for direct labor and overhead for all the electrical and low voltage scope and for at least 14% of the scope of work of the project it is to perform. Appellant is also to hire Project Manager and other personnel to perform its scope of work. Appellant has no other scope of work other than electrical work and direct management of that work. Appellant acknowledged in its Response to the Protest that Roncelli will be primarily involved in management supervision and oversight. Daniels maintains this means the Area

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Office correctly concluded Roncelli will perform the primary and vital requirement and was thus, an ostensible subcontractor. (*Id.*, at 5.)

Daniels points that Appellant's argument this is not a general construction project fails because it has been defined as a general construction project, where the primary and vital requirement is management, supervision and oversight of the project as whole. Daniels further contends Appellant's argument that by managing the electrical portion of the project, it will be providing over 60% of project management, is without support. The Teaming Agreement is inconsistent with this after-the-fact estimate, providing Appellant is to receive 51% of the profit and Roncelli 49%. This is also inconsistent with Appellant's sworn statement that Roncelli's work will constitute less than 8% of total contract price. The Teaming Agreement requires Appellant to provide a quote which includes all costs, including personnel costs and overhead costs for all the electrical and low voltage scope and for at least 15% of the work of the project it is to perform. Thus, the Teaming Agreement percentages are inconsistent with Appellant's after-the-fact percentages in its appeal. (*Id.*, at 5-6.)

Even if Appellant will be performing 60% of the primary and vital requirements, Appellant cites to no authority providing that a prime contractor can satisfy the primary and vital requirements of a general construction project by performing only a fraction of those requirements and hiring a second general contractor to perform the remainder. The Area Office correctly concluded Appellant's level of work is more consistent with the actions of a subcontractor who is only responsible for a portion of the work, and not the actions of a prime contractor with overall responsibility for the management of the project, including coordinating subcontractor work. (*Id.*, at 6-7.)

Daniels alleges Appellant improperly seeks to supplement the division of labor in the Teaming Agreement by stating for the first time in its Appeal, that it would perform several management functions for the Project. (*Id.*, at 7, citing Appeal at 10-11.) Appellant makes mere assertions without support in the record. None of this information was submitted with Appellant's bid or its Response to the Protest. Daniel categorizes this as not even new evidence, because these are mere assertions in the appeal. (*Id.*)

Further contending Appellant's claim to have produced a 156-page proposal is an exaggeration, Daniels states only a lump sum bid was required and most of the documents in the Proposal were from the Solicitation. Nothing in the bid sheds light on the division of labor. Conversely, Appellant already acknowledges it relied on Roncelli for primary and vital requirements in its bid, coordinating other bids from subcontractors. (*Id.*, at 8.)

Daniels also points to emails and affidavits submitted with its Protest, showing Roncelli approached potential subcontractors, gathering quotes and informing them "we are bidding this contract as a prime." (*Id.*, at 9, citing Affidavit of Colin Comfort.) Daniels asserts Roncelli is a general contractor, who could only provide the primary and vital requirements of a construction project. Pointing to Appellant's statement that it would be advantageous to align itself with a local general contractor, Daniels maintains Appellant brought in Roncelli to focus on the primary

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and vital requirements so Appellant could focus on the electrical work. (*Id.*, at 10, citing Appellant's Response to the Protest, at 4.)

As for Roncelli's use of Procore management software, Daniels asserts that it is important because the Teaming Agreement does not state Roncelli will be permitting Appellant to manage the project using Roncelli's software licenses, rather that Roncelli will perform the management services using the software as part of the subcontract. (*Id.*)

Daniels finds Appellant's reliance on *Colamette* is misplaced, because that case turned on the question of power to control, rather than which concern was performing the primary and vital requirements. (*Id.*)

Next, Daniels provides eight reasons why Appellant is unusually reliant upon Roncelli, even though the Area Office did not reach this question. First, Roncelli backed the bid bond for the Project, which Appellant could not have otherwise obtained. This gives Roncelli great bargaining power, as refusal to back the bond would be catastrophic to Appellant's bid. (*Id.*, at 12, citing Teaming Agreement, Exh. B.) Second, Appellant's finances do not reflect it could handle the project without significant financial assistance. (*Id.*, at 12.) Third, Roncelli sought quotes, expressly representing to potential subcontractors that Roncelli would be the prime. Appellant thus relied upon Roncelli to obtain quotes and was dependent upon it to deliver the subcontractors upon whom the bid was based. (*Id.*, at 12-13.)

Fourth, the Teaming Agreement requires both concerns' signatures on all payments, thus, making Appellant reliant on Roncelli to process all payments on the Project. Further, the Teaming Agreement states Roncelli will provide management services with the use of its own Procore project management system. Roncelli will thus have ultimate control of the project management system, and Appellant will be dependent upon it. (*Id.*, at 13.)

Fifth, the 51% to 49% profit distribution, compared with Appellant's representation that Roncelli will perform less than 8% of the total contract price, demonstrates Appellant is dependent upon Roncelli and could not perform without it. Seventh, Daniels takes at issue where Appellant is to submit a quote for the electrical services, suggestion that Roncelli will have authority over the quote provided. (*Id.*)

Eight, Appellant's personnel have a history of playing fast and loose with the rules to obtain federal projects for which they do not qualify. Daniels alleges Appellant's vice president was convicted of numerous federal charges relating to bribery and racketeering schemes in relation to award of public contracts. (*Id.*, at 13-14, citing Exh. C, DOJ Press Release in Daniels Supplemental Letter (Jun. 6, 2024).)

Finally, Appellant's experience was gained by virtue of its joint venture Green-VEG JV Construction Services, LLC, and the "Teaming Agreement here demonstrates that, whatever experience [Appellant] has gained, it is still not capable of performing this Project without undue reliance on a general contractor. Thus, [Appellant] attempts to recreate a joint venture in the form of a Teaming Agreement. However, unlike an authorized joint venture, a Teaming

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Agreement does not protect [Appellant] from the ostensible contractor rule.” (*Id.*, at 14.) For the above reasons, Appellant would be unusually reliant on Roncelli, and therefore, the Area Office’s finding that Appellant violated the ostensible contractor rule must be upheld.

III. Discussion**A. Standard of Review**

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

B. Analysis

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 the 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 Solicitation characterized the procurement with NAICS code 236220, Commercial and Institutional Building Construction. The Solicitation further characterizes the work as General Construction, alterations, and removal of existing structures necessary to complete the EHRM infrastructure upgrades construction project. Thus, this is a construction procurement. Section II.A, *supra*. The regulation defines the primary and vital requirements of a general construction contract:

In a general construction contract, the primary and vital requirements of the contract are the management, supervision and

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oversight of the project, including coordinating the work of various subcontractors, not the actual construction work performed.

13 C.F.R. § 121.103(h)(3)(iv).

This regulation also codifies the definition developed in OHA case law as:

[I]n 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).

Size Appeals of Apogee Group, LLC, et al, SBA No. SIZ-6232, at 17 (2023).

Here, the only document which lays out the responsibilities of Appellant and its subcontractor, Roncelli, is the Teaming Agreement, under Exhibit B. Appellant’s CEO will be Project Manager and is to be responsible for contract performance, overseeing the jobsite, reporting to and implementing the VA’s instructions, preparing a daily written log detailing all developments and aspects of the job, and submitting such a log to the VA upon request. Appellant is to provide a bid bond. The cost of the bond will be borne 51% by Appellant and 49% by Roncelli. Appellant will engage Roncelli as a subcontractor, its scope of work will include that work, which is not electrical. The Teaming Agreement provides that Roncelli’s subcontract will include the non-electrical work, and that it will provide management with its Procure software management system. Appellant is to provide a quote, which includes all costs. Appellant did in fact submit such a quote to VA with its offer, as required by the Solicitation. Section II.B, *supra*.

I find the Teaming Agreement thus gives Appellant’s CEO, as Project Manager, overall management control over contract performance. Whatever management of the subcontractors Roncelli will be performing with its Procure software, the Teaming Agreement gives the Project Manager control over the performance of the contract as a whole and over Roncelli as a subcontractor, and it is Appellant’s CEO as Project Manager who will have overall supervision.

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It is the Project Manager who will oversee the jobsite, keep a written log, report to the VA and implement its instructions and is responsible for contract performance. Further, Appellant itself will be performing the majority of the work. Where a concern has the ability to perform the contract, will perform the majority of the work, and will manage the contract, the concern is performing the primary and vital tasks of the contract and there is no violation of the ostensible subcontractor rule. *Size Appeal of Paragon Tec, Inc.*, SBA No. SIZ-5290, at 12 (2011).

Accordingly, I find the Area Office erred in its determination that Appellant would not be performing the primary and vital requirements of the contract and was in violation of the ostensible subcontractor rule, when record demonstrates otherwise, *supra*.

Daniels argues that Appellant is unusually reliant upon Roncelli, an issue the Area Office did not address, but was raised in Daniels' protest. In considering the issue of unusual reliance, OHA relies upon four key factors set out in *Size Appeal of Dover Staffing, Inc.*, SBA No. SIZ-5300 (2011):

- (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 Logistics Co. Inc., SBA No. SIZ-5975 at 9 (2018).

Here, Roncelli is not the incumbent contractor, Appellant does not plan to hire its workforce from Roncelli, Appellant's management will not come from Roncelli, and there is no evidence that Appellant relied on Roncelli's experience to win the contract, its bid is a lump sum, and Roncelli is not mentioned in its bid. While Appellant will receive assistance from Roncelli to obtain bonding, this alone is not sufficient to establish unusual reliance without other supporting factors.³ *Size Appeal of Westcott Electric Co.*, SBA No. SIZ-5691 (2015).

That Roncelli was soliciting potential subcontractors while purporting to be the prime contractor is irrelevant here. Roncelli is not in fact the prime contractor, and there is no authority for this action by Roncelli to support an ostensible subcontractor finding. Preproposal negotiations between concerns are also not relevant. The size determination must be based upon the proposal and documents prepared for such Solicitation. Accordingly, I conclude that Daniels has failed to establish the Appellant is unusually reliant upon Roncelli.⁴

³ The Area Office failing to address Daniels' allegations of Appellant's unusual reliance is at most, harmless error, as the issue of unusual reliance is not applicable in this case.

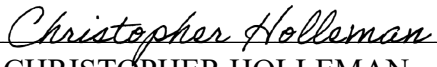
⁴ Daniels' other allegations about Appellant's personnel "playing fast and loose" and

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Accordingly, I conclude the Area Office erred in finding the Appellant, a concern which will perform over 60% of the work on this contract and whose CEO will be the Project Manager responsible for contract performance, in violation of the ostensible subcontractor rule and thus affiliated with its subcontractor, Roncelli.⁵

IV. Conclusion

Appellant has established that the Size Determination is based upon a clear error of fact and law. Accordingly, I GRANT the instant appeal, and REVERSE the Size Determination. Veterans Electrical Group, LLC 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).


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Administrative Judge

Appellant's experience with other ventures appear to be speculative in part and not relevant to this Solicitation and appeal. Section II.E, *supra*. Therefore, I will not consider them.

⁵ The Size Determination found that Appellant was not small due to the ostensible subcontractor violation. Size Determination, at 10. As SBA and the parties do not dispute Appellant's size as a small business, there is no need for OHA to make that calculation here.