

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

SIZE APPEAL OF:

Red River Computer Co., Inc.,

Appellant,

Appealed From
Size Determination No. 1-SD-2013-12

SBA No. SIZ-5512

Decided: November 1, 2013

APPEARANCES

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for Appellant

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DECISION¹

I. Introduction

On May 24, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 1-SD-2013-12 finding that Red River Computer Co., Inc. (Appellant) is not a small business for the procurement at issue. The Area Office specifically determined that Appellant is affiliated with its large business subcontractor, Cisco Systems, Inc. (Cisco), under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).

Appellant maintains that the size determination is fundamentally flawed, and should be

¹ This decision was initially issued on November 1, 2013. Pursuant to 13 C.F.R. § 134.205, I afforded counsel an opportunity to request redactions if desired. OHA received no requests for redactions, and OHA now publishes the decision in its entirety.

reversed or vacated. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

SBA's Office of Hearings and Appeals (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. The record reflects that the size determination was issued May 24, 2013, but not received by Appellant until May 30, 2013. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation

On May 10, 2012, the U.S. Defense Information Systems Agency-Defense Information Technology Contracting Organization (DISA-DITCO) issued Request for Proposals (RFP) No. HC1028-12-R-0045 seeking maintenance of Cisco brand name hardware and software acquired by the U.S. Department of the Army (Army) in prior procurements. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System code 541519, Other Computer Related Services. NAICS code 541519 ordinarily is associated with a size standard of \$25.5 million, but the RFP indicated that the work fit within the exception for Information Technology Value Added Resellers, which utilizes a size standard of 150 employees.² Proposals were due May 24, 2012. The RFP stated that the contract would be awarded to the offeror with the lowest-price, technically-acceptable proposal. (RFP at 55.) On June 28, 2012, DISA-DITCO awarded the contract to Appellant.

² According to SBA regulations, the Information Technology Value Added Reseller exception is appropriate under the following circumstances:

An Information Technology Value Added Reseller provides a total solution to information technology acquisitions by providing multi-vendor hardware and software along with significant services. Significant value added services consist of, but are not limited to, configuration consulting and design, systems integration, installation of multi-vendor computer equipment, customization of hardware or software, training, product technical support, maintenance, and end user support. For purposes of Government procurement, an information technology procurement classified under this industry category must consist of at least 15% and not more than 50% of value added services as measured by the total price less the cost of information technology hardware, computer software, and profit. If the contract consists of less than 15% of value added services, then it must be classified under a NAICS manufacturing industry. If the contract consists of more than 50% of value added services, then it must be classified under the NAICS industry that best describes the predominate service of the procurement.

B. Performance Work Statement

The RFP included a Performance Work Statement (PWS) outlining contractual requirements. The PWS stated that the contractor will “provide 100% SMARTnet maintenance coverage for the Army's Cisco assets” at Army locations worldwide, and will furnish an Inventory Collection and Reporting System (ICRS) for monitoring these assets. (PWS at 9-10.) A list of the software and equipment to be supported was provided with the solicitation. (RFP Attachment 1.) The RFP stipulated that the prime contractor must be an “authorized Cisco Federal Gold Partner.” (*Id.*, Amendment 0002, at 2.) According to the RFP, “[t]he objective of this requirement is to provide 100% maintenance coverage for the Army's Cisco assets.” (*Id.* at 4.)

The PWS divided the requisite services into six task areas: (1) Program Management, (2) Cisco SMARTnet Maintenance, (3) ICRS Tool, (4) Reconciliation, (5) Determining Installed Base (IB) Range, and (6) Value Added Support. (*Id.*, Amendment 0001, at 5-11.) The “Program Management” function included quality assurance, progress reporting, scheduling, risk mitigation, and program reviews. (*Id.* at 5-6.) For “Cisco SMARTnet Maintenance”, the contractor must “provide hardware and software support for 100% of the Army's inventory of Cisco equipment.” (*Id.* at 6.) Such support includes “unlimited, direct access to the Cisco Technical Assistance Center (TAC) for technical support,” “direct access” to Cisco software updates and upgrades, and “direct customer access to the knowledge base and tools available at www.cisco.com.” (*Id.*)

For the “ICRS Tool”, the contractor must furnish an internet-based portal “to manage the inventory of Cisco equipment in support of this enterprise agreement.” (*Id.* at 7.) Under “Reconciliation”, the contractor will annually revise and update the Army's list of Cisco equipment to “incorporate additional quantities for software licenses, hardware, and maintenance support” and to ensure accuracy. (*Id.* at 9-10.) For “Determining IB Range”, the contract price may be adjusted due to increases or decreases in the Army's inventory of Cisco hardware and software. Finally, under “Value Added Support”, the contractor would provide “engineering support, technical support, and consulting services to assist the Army in making the best use of emerging technologies.” (*Id.* at 10.)

Accompanying the RFP, DISA-DITCO executed a “Justification for Other than Full and Open Competition” to authorize the procurement of Cisco brand name hardware and software maintenance. The justification explained that the Army had already invested \$4.2 billion in Cisco hardware and software, and such equipment comprises approximately “80% of the Army's network and switching capability.” (Justification at 1, 4.) It would be “cost prohibitive”, and pose unacceptable risks, for the Army to convert to a different network equipment manufacturer. (*Id.* at 4.) Cisco's hardware and software maintenance program is “commonly known as SMARTnet”, and DISA-DITCO must acquire SMARTnet support either from Cisco itself or from a “Cisco Federal Gold Partner” because only “authorized resellers can maintain Cisco equipment in order to preserve the warranties and ensure critical security updates are timely provided to the Government.” (*Id.* at 2-4.)

C. Protest

On December 18, 2012, nearly six months after Appellant began performance of the contract, the Director of SBA's Office of Government Contracting (D/GC) filed a size protest disputing whether Appellant qualifies as a small business concern for the instant procurement. The D/GC alleged that Appellant “is affiliated with Cisco, because Cisco is [Appellant's] ostensible subcontractor.” (Protest at 2.) The D/GC further asserted that Appellant will be unusual reliant upon Cisco for contract performance.

In his protest, the D/GC asserted that “Cisco will be performing most if not all the services required by the solicitation with Cisco employees.” (*Id.*) The D/GC emphasized that the Army already owns the hardware and software at issue. Thus, “[w]hat is being procured are services to help repair and maintain that hardware.” (*Id.* at 3.) The D/GC summarized the six task areas identified in the RFP, and asserted that, with the exception of the Value Added Support task area, “almost all of the work that will be performed under the other tasks will be performed by Cisco and Cisco personnel.” (*Id.*) For example, “Cisco's Technical Assistance Center (TAC) is staffed with actual engineers that can help [Cisco's customers] troubleshoot problems 24x7x365.” (*Id.*) Because it is Cisco, and not Appellant, that will be performing the primary and vital requirements of the contract, the D/GC alleged that Cisco is Appellant's ostensible subcontractor, thereby creating affiliation between the two concerns.

The D/GC went on to allege that Appellant will be unusually reliant upon Cisco for the performance of the contract. In particular, the D/GC asserted that Cisco will be performing 100% of task 2, Cisco SMARTnet Maintenance. (*Id.* at 4.) The D/GC recognized that the RFP may have required the prime contractor to subcontract with Cisco; however, SBA's regulations permit “no exception for being mandated to use a large subcontractor to perform most if not all of the contract.” (*Id.*)

With regard to task 3, the ICRS Tool, the D/GC considered it improbable that Appellant would develop its own tool given that “Cisco already produces tools to manage inventory.” (*Id.* at 5.) Even if Appellant wished to produce its own ICRS tool, however, Appellant could not actually do so without cooperation and assistance from Cisco. As a result, Appellant will be dependent upon Cisco to perform this task. Tasks 4 and 5 likewise relate heavily to the ICRS tool, so Appellant cannot perform those tasks without relying on Cisco.

The D/GC stated that he was basing his protest on “the terms of Solicitation No. HC1028-12-R-0045” and other publicly-available information, including DISA-DITCO's “Justification for Other than Full and Open Competition” and descriptions of SMARTnet from Cisco's website. (*Id.* at 7.)

D. Motion to Dismiss

On February 8, 2013, Appellant asked the Area Office to dismiss the D/GC's protest on grounds that the protest is, in essence, “a procurement protest not a size protest.” (Motion at 1.) Appellant maintained that the D/GC did not raise allegations pertaining specifically to Appellant,

and did not review, or have access to, Appellant's proposal. Rather, the D/GC objected to DISA-DITCO's decision to conduct this procurement as a small business set-aside:

In [his] protest, the [D/GC] did not allege that [Appellant] lacked the capability, experience or qualifications to comply with the requirements. The [[D/GC] did not attack any choice made by [Appellant] about how it would perform the contract. Indeed, the [D/GC] admitted to not knowing anything about [[Appellant], its proposal, or its plans for performance. The [D/GC] candidly acknowledged that [his] protest was “based on information available with the solicitation. . . .” The allegations made by the [D/GC] applied equally to any small business prime contractor. The [D/GC] is challenging [DISA-DITCO's] decision to procure Cisco SMARTnet support through a solicitation that was expressly set-aside for small businesses.

(*Id.* at 8.)

Appellant proceeded to argue that, because the protest relates to procurement issues rather than size issues, the D/GC is not an “interested party” with standing to bring the protest. (*Id.* at 10-11.) Further, the protest is untimely because a challenge to the terms of a solicitation must be filed within 10 days after issuance of the solicitation. (*Id.* at 12-16.) Appellant emphasized that, if not dismissed, the D/GC's protest could have “negative ramifications” for other procurements involving small business resellers, because the protest implies that “every reseller would necessarily be unduly reliant upon its supplier.” (*Id.* at 16-18, 23.)

In the event that the Area Office refused to dismiss the protest, Appellant also contended that it was not affiliated with Cisco under the ostensible subcontractor rule. Appellant asserted that “[t]he primary and vital requirements on this contract include program management, training, and value-added support” and that Appellant will perform these requirements. (*Id.* at 18-23.) Appellant denied that it is unusually reliant upon Cisco, noting that “Cisco would not be able to participate in this procurement at all without [[Appellant].” (*Id.* at 23.)

On February 25, 2013, DISA-DITCO submitted a letter to the Area Office concurring with Appellant's arguments. DISA-DITCO stated that an SBA Procurement Center Representative (PCR) had reviewed and approved the acquisition strategy before the RFP was issued, and had voiced no concern regarding the decision to set aside the procurement for small businesses. (Letter at 1-2.) DISA-DITCO echoed Appellant's contention that the D/GC's protest, if sustained, could have adverse consequences for small business resellers in Federal procurements:

Finding [Appellant] to be unduly reliant upon Cisco in this case would have far reaching ramifications for the small business community. In this regard, any such decision would have the consequence of requiring such procurement be reserved only for the original equipment manufacturer (OEM) or for large business resellers, for which the ostensible subcontractor rule does not apply. In essence, authorized small business resellers would be effectively removed from the market Sustaining this protest would essentially create a windfall for large business

brand name resellers or the OEMs, which could not have been the intent of SBA's ostensible [sub]contractor and unduly reliant regulations.

(*Id.* at 3-4.)

E. Size Determination

On May 24, 2013, the Area Office issued Size Determination No. 1-SD-2013-12 finding that Appellant is affiliated with Cisco under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4).

The Area Office began by considering the jurisdictional issues raised in Appellant's motion to dismiss. The Area Office found that SBA, acting through the D/GC, did have authority to file the original protest, and as such, the protest was proper, contrary to the arguments advanced by Appellant and by DISA-DITCO. The Area Office quoted from the D/GC's protest, and determined that the protest met the minimum criteria for specificity set forth at 13 C.F.R. § 121.1007. The Area Office found that the protest addressed the RFP in order to ascertain the procurement's primary and vital requirements, not because the D/GC sought to challenge DISA-DITCO's procurement strategy. Additionally, the Area Office found that the applicable regulations do not specify a time limit for a size protest initiated by the D/GC, so the protest here was timely. In the Area Office's view, "the language of the protest demonstrates that [the D/GC] protests [Appellant's] size status based on evidence that Cisco its ostensible subcontractor." (Size Determination at 3.)

The Area Office proceeded to examine the relationship between Appellant and Cisco, regarding the performance of the instant procurement. The Area Office rejected Appellant's contention that program management, training, and value-added support services are primary and vital contract requirements. Instead, the Area Office found such functions "ancillary to and supportive of the contract's primary purpose." (*Id.* at 6.) The Area Office determined that the primary purpose of the solicitation is "maintenance services for Cisco hardware and software." The key requirement associated with this primary purpose, according to the Area Office, is task 2, Cisco SMARTnet Maintenance. (*Id.*)

The Area Office cited *Size Appeal of Anadarko Industries, LLC*, SBA No. SIZ-4708 (2005), for the proposition that ancillary services necessary to perform a contract are not primary and vital requirements. Here, the Area Office found that program management, training, and value-added support services are ancillary to the primary and vital requirements. (*Id.*)

The Area Office next examined whether Appellant or Cisco is performing the primary and vital requirements. Based on Appellant's protest response, the Area Office found that Appellant does not perform a majority of the work within any of the six task areas identified in the RFP. In correspondence with the Area Office, Appellant conceded that Appellant "does not perform" Tasks 2 and 3, and that "no other firm [besides Cisco] is performing these tasks"; that although Appellant and Cisco are both involved with Tasks 4-6, Appellant "cannot assert that [Appellant] performs the majority of Tasks 4-6"; and that it is "probably more correct to say that the Army performs the majority of Task 1." (*Id.* at 7.) The Area Office also found that the

contract contains only two Contract Line Item Numbers (CLINs), which apparently are associated with Tasks 2 and 3. Because Cisco, and not Appellant, performs Tasks 2 and 3, the Area Office determined that Cisco performs the contract's primary and vital requirements. (*Id.* at 8.) Furthermore, based on an agreement between Appellant and Cisco, “[i]t does not appear that it was contemplated that [Appellant] would provide services with its own personnel, related to maintenance, as part of its value added [reseller] services.” (*Id.*) Rather, the agreement suggests that Appellant's main contributions to the effort are “its credentials, Cisco Gold partner status, and small business size status.” (*Id.*) The Area Office estimated that 94% of the dollars Appellant might expect to earn over the course of the contract would ultimately be paid to Cisco. (*Id.*) Although this high percentage does not by itself show an ostensible subcontractor rule violation, it is consistent with other evidence indicating that Cisco is performing the contract's primary and vital requirements.

The Area Office also found that Appellant is unduly reliant upon Cisco because Appellant could not provide the services required by the solicitation without Cisco. The Area Office considered Appellant's and DISA-DITCO's claims that a finding of affiliation would create a harmful precedent whereby every small business reseller would violate the ostensible subcontractor rule. However, the Area Office found the instant case distinguishable because this procurement involves services, not the resale of goods or equipment. “A small business could acquire the skills and knowledge necessary to perform the majority of work on a contract to provide maintenance services for previously purchased goods that were manufactured by an other than small firm and thus eliminate the need for an other than small business subcontractor [that] performs the majority of the primary and vital requirements.” (*Id.* at 9.)

F. Appeal

On June 13, 2013, Appellant filed the instant appeal with OHA. In its appeal petition, Appellant does not argue that its relationship with Cisco complies with the ostensible subcontractor rule. Rather, Appellant reiterates the arguments, raised in its motion to dismiss, that the Area Office should have dismissed the D/GC's protest as untimely and/or for lack of standing.

Appellant asserts that the D/GC's protest, in effect, contests the terms of the RFP, not Appellant's size. (Appeal at 10.) Appellant asserts that the protest rests on the premise that “no small business, including [Appellant], can perform the contract without violating the ostensible subcontractor rule, and therefore, the procurement should not have been set-aside for small businesses.” (*Id.* at 12.) Appellant observes that the D/GC referenced the RFP several times throughout his protest, and did not identify any flaw in Appellant's particular approach. Thus, Appellant contends, the protest challenged the solicitation and not Appellant's size.

Appellant asserts that, because the D/GC's protest objected to the use of set-aside authority for this procurement, the protest could only have been filed at the U.S. Government Accountability Office (GAO) or other bid protest forums. Appellant identifies several bid protest cases which have considered whether procurements should have been set aside for small businesses. (*Id.* at 11-12.) Appellant argues that the D/GC had no standing to challenge the RFP's terms, because SBA is not an actual or prospective offeror for the procurement. (*Id.* at 14-16.)

Further, Appellant insists that the D/GC did not timely file the protest. (*Id.* at 16-19.) Appellant observes that bid protests challenging purported defects in a solicitation must be filed before proposals are due. In this case, though, the D/GC lodged his protest months after performance of the contract began, so the protest should be deemed untimely.

Appellant concludes that the D/GC filed a procurement protest attacking the terms of the RFP under the guise of a size protest. As a result, the size determination, which is based on an invalid protest, should be vacated.

G. SBA Response

On June 28, 2013, the day before the initial close of record, SBA timely intervened³ and filed a response to the appeal. SBA maintains that the Area Office correctly determined that Appellant is not a small business for the instant procurement, and that the D/GC did have authority to file the protest.

SBA emphasizes that Appellant did not attempt to challenge the Area Office's conclusion that Appellant is affiliated with Cisco under the ostensible subcontractor rule. Moreover, as discussed in the size determination, Appellant admitted to the Area Office that Cisco is performing all of Tasks 2 and 3, the contract's primary and vital requirements. SBA asserts that the instant appeal engages in "mischaracterization and distraction" in an effort to convince OHA that the protest itself was invalid. (SBA Response at 3.)

SBA asserts that Appellant's entire appeal is based on the false premise "that SBA waives its right to determine if [a concern] is a small business under the Small Business Act by not challenging the terms of the solicitation." (*Id.* at 4.) However, as Appellant itself argues, SBA likely would have no standing to pursue a bid protest against a procuring agency. "Therefore under [Appellant's] interpretation of various statutes, SBA waives its right to render size determinations if it fails to do something it is most likely prohibited from doing." (*Id.*)

SBA asserts that a valid size protest must pertain to a particular acquisition, must be specific, must be timely, and must be initiated by a party meeting the requirements of 13 C.F.R. § 121.1001. SBA argues that the protest here met all of these criteria. The protest alleged that Appellant was other than small for the instant procurement because Cisco was performing the primary and vital contract requirements as Appellant's ostensible subcontractor. SBA argues that the protest was amply specific and included "an abundance of information" establishing that Cisco, and not Appellant, would be performing the contract's primary and vital requirements. (*Id.* at 6.)

SBA maintains that the protest discussed the RFP at considerable length in order to establish what the primary and vital requirements were. SBA argues that any case involving a possible ostensible subcontractor violation must include details regarding the important contract

³ "SBA may intervene as of right at any time in any case until 15 days after the close of record, or the issuance of a decision, whichever comes first." 13 C.F.R. § 134.210(a).

requirements, as well as information on which concern will be performing those requirements. SBA further argues that the D/GC's protest was timely because there are no time limitations on a size protest filed by SBA itself, unlike a size protest brought by a private party.

SBA concludes that Appellant is not a small business for the contract in question. The D/GC filed a timely and valid size protest, and had authority to do so on behalf of the SBA. Appellant did not dispute the Area Office's conclusion that Cisco is Appellant's ostensible subcontractor, so the size determination should be upheld.

H. SBA's Supplemental Comments

On July 16, 2013, OHA *sua sponte* reopened the record and requested supplemental comments to “address the issue of how much of the work involved in the contract is performed by Appellant, and how much by Cisco.” (OHA Order at 1.) OHA further inquired “whether the [RFP's] mandate of the use of Cisco constitutes Government-furnished equipment or a Government-specified resource, and how much of the work outside of this equipment and resource is to be performed by Appellant.” (*Id.*)

On July 31, 2013, SBA submitted its supplemental comments. SBA contends that Cisco, not Appellant, will be performing nearly all the services required under the contract, including the primary and vital contract requirements. In addition, the Area Office found that the vast majority of contract dollars will, ultimately, flow to Cisco.

SBA maintains that the instant solicitation sought maintenance services, 24/7 technical support, and other support services which are not equipment. Further, 13 C.F.R. § 121.103 does not contemplate an exemption to affiliation based on Government-furnished property. Thus, “there is no government-furnished equipment, and even if there was, there is no exception in SBA's affiliation regulations.” (SBA Comments at 3.)

Next, SBA states that the solicitation indeed does require the purchase of Cisco's SMARTnet maintenance service. Again, however, SBA regulations do not afford an exception from affiliation for required Government specified resources. SBA argues that the regulations are meant to prevent situations as the one found here, where a large business is performing, and benefiting from, a contract intended for small businesses. Furthermore, an exception from affiliation when there is a directed source “would allow contracting officers, not the SBA, to make the determination of who is small for a given acquisition.” (*Id.* at 4.)

SBA further maintains that the solicitation seeks services and not supplies. According to SBA, DISA-DITCO is acquiring “hardware and software repair and maintenance services that will provide comprehensive protection to equipment that is already owned by the Army.” (*Id.* at 5.) SBA asserts that the NAICS code assigned to the procurement is for services, even though Appellant has “at times tried to insinuate that this may be a supply contract, because Cisco maintenance and repair services are a commercial item.” (*Id.*) SBA argues that services can be considered “commercial items” under FAR 2.101. SBA concludes that Cisco SMARTnet is a service not a product, although it may be a ““commercial item.”

I. Appellant's Supplemental Comments

On July 31, 2013, Appellant filed its supplemental comments in response to OHA's order.

Appellant explains that the RFP “mandated that [Appellant] furnish the Government with SMARTnet, a set of bundled maintenance services and products provided by Cisco as a brand-name, commercial-off-the-shelf ('COTS') product.” (Appellant's Comments at 1.) Appellant adds that the solicitation did not authorize Appellant to substitute any other product or service. Thus, per the RFP, Appellant was required to resell bundled services obtained from Cisco exactly as they are sold commercially. Appellant further states that the solicitation contained a list of Government-owned equipment to be maintained. Appellant argues that because the solicitation required the use of Cisco SMARTnet on Government-owned equipment, Cisco itself was a Government-specified resource. (*Id.* at 2.)

Appellant asserts that SMARTnet services should be disregarded when determining whether a violation of the ostensible subcontractor rule exists. Appellant contends that the only way it could be compliant with the RFP was to resell Cisco's bundled services. Appellant argues that 13 C.F.R. § 125.6(e)(7) states that “[w]here the prime contractor has been directed by the Government to use any specific source for parts, supplies, component subassemblies or services, the costs associated with those purchases will be considered as part of the cost of materials, not subcontracting costs.” Therefore, Appellant reasons, because DISA-DITCO required Appellant to supply SMARTnet, a suite of Cisco products and maintenance services, SBA should have excluded SMARTnet when assessing compliance with the ostensible subcontractor rule. Appellant argues that it is contributing to the contract by “managing this effort, providing value-added services, and working with the Government to ensure that the contract is successfully performed.” (*Id.* at 4.)

Next, Appellant explains that the instant contract is fixed price and does not require Appellant to report hours worked. Further, “Cisco does not separately bill [Appellant] for labor.” (*Id.* at 5.) Thus, Appellant is unable to determine the amounts of labor that the firms respectively expend on the contract.

Appellant reiterates its contention that the D/GC's “real challenge is not against [Appellant] and its size, but rather [DISA-DITCO's] use of a set-aside to procure SMARTnet.” (*Id.* at 8.) Appellant contends that, during a teleconference, SBA representatives “essentially asserted” that the D/GC brought this protest in order to contest DISA-DITCO's acquisition strategy. (*Id.* at 6.) Appellant argues that if the protest, and subsequent size determination, are upheld, a different awardee could not be selected because no small business concern will be able to perform the contract without violating the ostensible subcontractor rule. Rather, DISA-DITCO “will be forced to start over with a new solicitation that will re-procure SMARTnet through full and open competition.” (*Id.*) Appellant emphasizes that the D/GC could have initiated the protest months earlier, which would have substantially mitigated the disruption to this procurement. Appellant goes on to suggest ways in which DISA-DITCO could have altered its acquisition strategy had DISA-DITCO been aware of the D/GC's concerns. (*Id.* at 8.) Appellant recommends that OHA “send a message that [the D/GC's] willingness to disrupt a major procurement months

after award will not be tolerated.” (*Id.* at 9.) Alternatively, in the event that OHA denies the appeal, Appellant urges OHA to “stay the effect of its decision with respect to this procurement.” (*Id.*)

J. DISA-DITCO's Comments

On July 31, 2013, DISA-DITCO filed supplemental comments in accordance with OHA's order. DISA-DITCO requests the appeal be granted, and that Appellant be found a small business for the procurement at issue.

DISA-DITCO argues that the doctrines of laches and estoppel should be applied in this case, because the D/GC's delay in pursuing the protest prejudiced DISA-DITCO and the Army. DISA-DITCO contends that laches requires “a showing of unreasonable and unexcused delay and prejudice”, which arose here when the D/GC filed a protest, several months after contract award, and even though the PCR had approved the use of a small business set-aside for this procurement. (DISA-DITCO Comments at 8.) DISA-DITCO argues that SBA's lack of diligence should not be rewarded by affirming this appeal.

DISA-DITCO contends that its market research showed that only Cisco or an authorized reseller could perform this procurement. DISA-DITCO states that it forwarded its market research report, along with other supporting documents, to the PCR in order to seek concurrence with the acquisition strategy. The PCR approved the acquisition strategy and did not raise any concerns with the use of a set-aside or the proposed NAICS code. (*Id.* at 5.)

Next, DISA-DITCO states that the procurement at issue was for services, but that those services required the awardee to provide proprietary product support for Cisco equipment that the Army already had in its possession. (*Id.* at 9.) DISA-DITCO cites *Size Appeal of iGov Technologies, Inc.*, SBA No. SIZ-5359 (2012), in arguing that compliance with the ostensible subcontractor rule is not determined merely by considering which firm is receiving the largest portion of the contract dollar value. DISA-DITCO supports Appellant's view that the costs of any service or tool required by the solicitation should be excluded in examining the ostensible subcontractor rule.

DISA-DITCO concludes that affirming the size determination may undermine small business participation in future procurements. DISA-DITCO predicts that, if this determination is upheld, future procurements may be “reserved only for the original equipment manufacturer (OEM) or for large business resellers, for which the ostensible subcontractor rule does not apply.” (*Id.* at 11.)

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 findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

The instant appeal revolves around two principal questions: (1) whether the D/GC exceeded his authority in initiating the protest against Appellant; and (2) if the D/GC's protest was proper, whether Appellant's arrangement with Cisco complies with the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). As discussed *infra*, Appellant and intervener DISA-DITCO have not established that the size determination is clearly erroneous with respect to either issue. Consequently, the appeal is denied and the size determination is affirmed.

1. D/GC's Authority to Protest

Appellant and DISA-DITCO argue at length that, although styled as a size protest, the D/GC's protest actually took issue with the RFP and acquisition strategy, and therefore should be considered a procurement protest (*i.e.*, a bid protest), not a size protest. Appellant and DISA-DITCO emphasize that the instant RFP required the prime contractor to provide access to Cisco SMARTnet. *See* Section II.B, *supra*. As a result, Cisco's dominant role in this procurement stemmed from the solicitation itself, and any firm that had been awarded the contract would be obliged to rely heavily upon Cisco during performance. According to Appellant and DISA-DITCO, by asserting that Appellant is in violation of the ostensible subcontractor rule, the protest essentially contended that this procurement should not have been conducted as a small business set aside in the first instance. “[T]he protest was a challenge not to [Appellant's] particular method of performance, but to the very idea that the procurement could be set aside for small businesses.” (Appeal at 5.) Appellant and DISA-DITCO observe that GAO and other bid protest forums will entertain challenges as to whether or not a procurement should be set aside. *E.g.*, *Marshall & Swift-Boeckh, LLC*, B-407329, Dec. 18, 2012, 2012 CPD ¶ 10 (considering whether a procurement was properly set aside for small businesses). In addition, the D/GC's protest addressed the RFP but not Appellant's proposal, which Appellant and DISA-DITCO view as evidence that the D/GC sought to attack the acquisition strategy.

Appellant and DISA-DITCO raised these same arguments in response to the D/GC's protest, and the Area Office considered, and rejected, them in the size determination. *See* Sections II.D and II.E, *supra*. Having reviewed the record, I agree with the Area Office that the D/GC was pursuing a size protest, not a bid protest. The D/GC characterized the protest as a size protest, and did not attempt to find fault with the acquisition strategy or the RFP. The D/GC did not assert that it would be impossible for any small business to perform the contract, nor did he challenge “the very idea that the procurement could be set aside for small businesses”, as Appellant suggests. Rather, the protest maintained that Appellant is not a small business for the instant procurement. The protest specifically alleged that Cisco, Appellant's large business subcontractor, is performing the primary and vital contract requirements, and that Appellant is heavily reliant upon Cisco to perform the contract. Section II.C, *supra*. These issues are directly pertinent to assessing a concern's size under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), and thus are allegations pertaining to size. Further, as a remedy, the D/GC asked

that Appellant be found affiliated with Cisco for the instant procurement, but did not seek to have the RFP revised or a new acquisition strategy implemented. Thus, based upon the record, the Area Office correctly concluded that the protest is properly viewed as addressing size issues, not matters of procurement law or acquisition strategy.

Appellant and DISA-DITCO point to the fact that the protest made repeated references to the RFP, which in their view indicates that the D/GC's real concern was with the underlying acquisition strategy. OHA has recognized, however, that it is appropriate to examine the terms of the solicitation in an ostensible subcontractor case in order to determine a contract's primary and vital requirements. *E.g.*, *Size Appeal of iGov Technologies, Inc.*, SBA No. SIZ-5359, at n.10 (2012) (“the primary and vital requirements are ascertained principally from the solicitation itself”). Accordingly, the fact that the protest included detailed discussion of the RFP does not establish that the protest is in the nature of a bid protest. Similarly, while it is true that the D/GC's protest contained no analysis of Appellant's proposal, a protester seldom has access to a challenged firm's proposal at the time of a size protest. Indeed, in some instances, a protester has so little information that it cannot even identify the alleged ostensible subcontractor. *Size Appeal of C2G Ltd. Co.*, SBA No. SIZ-5294 (2011). I find, therefore, that the protest here — which addressed the solicitation but not the challenged firm's proposal — was neither improper nor unusual relative to any other size protest involving the ostensible subcontractor rule.

Appellant and DISA-DITCO also argue that the D/GC's protest should be treated as a bid protest rather than a size protest because Cisco's prominent role in this procurement was inherent in the RFP, and challenges to the terms of a solicitation should be voiced in a bid protest, rather than a size protest. There are at least two problems with these arguments. First, according to Appellant's own contentions in these proceedings, SBA likely has no standing to pursue a bid protest against a procuring agency, because SBA has no economic stake in the outcome of a procurement conducted by another agency. (Appeal at 3 (acknowledging that “[o]nly actual or prospective bidders whose direct economic interest would be affected by the award of a contract or the failure to award a contract have standing to bring procurement protests.”)). Thus, construing the D/GC's protest as an attempted bid protest would create an untenable situation whereby SBA is unable to pursue either a size protest or a bid protest, thereby jeopardizing SBA's ability to police size issues arising in conjunction with Government procurements. Second, under OHA case precedent, the fact that a concern is compliant with solicitation requirements does not insulate that concern from subsequent size protests or from violation of the ostensible subcontractor rule. In, for example, *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071 (2009), OHA affirmed a violation of the ostensible subcontractor rule after two size protests were lodged against the apparent awardee. In response to the challenged firm's contention that the solicitation permitted the prime contractor to rely upon the experience of its subcontractors, OHA remarked that “[a]lthough such total or unusual reliance may be permitted by the RFP, it is not permitted under the [ostensible subcontractor rule].” *Smart Data*, SBA No. SIZ-5071, at 21-22. OHA went on to state that “a prime contractor must bring something to the table beyond its small business size status and under 13 C.F.R. § 121.103(h)(4) that something must be, at a minimum, the ability to perform primary and vital contract requirements.” *Id.* Similarly, in the instant case, compliance with the RFP does not bar a subsequent size protest against Appellant, nor excuse non-compliance with the ostensible subcontractor rule.

Appellant and DISA-DITCO do not dispute that, to the extent the D/GC's protest was a valid size protest, the D/GC had authority to bring the protest under 13 C.F.R. § 121.1001(a)(1)(iii). Nor can I conclude that the D/GC's protest was untimely, or that the D/GC waived his right to protest by not initiating it earlier. Because the D/GC's protest was a size protest rather than a bid protest, the protest was not subject to the timeliness restrictions pertaining to bid protests; rather, the rules governing size protests were controlling. *E.g.*, *Size Appeal of The Trevino Group, Inc.*, SBA No. SIZ-5472, at 2 (2013) (recognizing that “GAO regulations are not applicable to size protests and size appeals.”). As SBA correctly observes in its response to the appeal, size protest regulations impose no deadline on a size protest brought by the contracting officer or by SBA itself, as distinguished from a size protest filed by a private party. 13 C.F.R. § 121.1004(b); *see also Size Appeal of Aerospace Engineering Spectrum*, SBA No. SIZ-5469, at 2 (2013) (noting that a contracting officer's size protest, filed “more than a year after contract award”, was nevertheless timely). Indeed, the regulations specifically contemplate that SBA may bring a size protest either “before or after” contract award, and that ostensible subcontractor issues may arise “during contract performance.” 13 C.F.R. §§ 121.1004(b) and 121.404(g)(4). Further, the fact that the PCR previously endorsed the acquisition strategy does not prevent SBA from bringing a size protest, as SBA is not bound by a PCR's interpretation of the size regulations. *Id.* § 121.403. Accordingly, I find no justification to conclude that the D/GC's protest here was untimely, or that the protest is barred by waiver, laches, estoppel, or excessive delay.

Appellant and DISA-DITCO also argue that the D/GC made a poor policy choice in bringing the instant protest. Appellant and DISA-DITCO observe that, if the protest is upheld, 13 C.F.R. § 121.1009(g)(2)(iii) instructs that DISA-DITCO should “either terminate the contract or not exercise the next option.” Therefore, DISA-DITCO would likely respond to a successful protest by making a sole source award to Cisco, or by conducting a new competition that is not set-aside for small businesses. Under either scenario, small business participation would be curtailed or eliminated, a result plainly at odds with SBA's mission. DISA-DITCO complains that a change of contractors may be disruptive for the Army, and that taxpayers will bear extra costs if a new source selection is necessary. (DISA-DITCO Comments at 8.) In addition, Appellant and DISA-DITCO assert, sustaining the protest creates a harmful precedent which will discourage procuring agencies from structuring future reseller procurements as small business set-asides. DISA-DITCO predicts that, if the appeal is denied, “authorized small business resellers would be effectively removed from this market.” (*Id.* at 11.)

SBA disagrees with these concerns, and the size determination suggests that Appellant is not functioning as a “value added reseller” as defined in 13 C.F.R. § 121.201 n.18, because Appellant is merely providing “direct access” to Cisco services without meaningful contributions of its own. (Size Determination at 9.) In addition, SBA asserts that “[a] small business could acquire the skills and knowledge necessary to perform the majority of work on a contract to provide maintenance services for previously purchased goods that were manufactured by an other than small firm and thus eliminate the need for an other than small business subcontractor [that] performs the majority of the primary and vital requirements.” (*Id.*) In SBA's view, the protest furthers important policy objectives by ensuring that contracts intended for small businesses are performed by, and beneficial to, small businesses.

Ultimately, these policy debates are beyond the scope of OHA's review. Even if OHA were to agree that the D/GC should, as a policy matter, have refrained from bringing the protest, that issue is wholly independent from whether the D/GC had legal authority to do so. Here, the Area Office determined, and the record supports, that the D/GC filed a valid size protest, not a procurement or bid protest. The size protest was timely, specific, and brought by an appropriate representative of the SBA. For these reasons, the protest was legally proper.

2. Ostensible Subcontractor

The remaining question presented is whether Appellant's arrangement with Cisco contravenes the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). The Area Office found that, in correspondence with the Area Office, Appellant acknowledged that “no other firm” besides Cisco would be performing Tasks 2 and 3, which the Area Office considered to be the contract's primary and vital requirements. Section II.E, *supra*. In the Area Office's view, the other four task areas are ancillary to the contract's primary and vital requirements, and Appellant did not claim to be performing a majority of any of those task areas in any event. *Id.* Thus, the Area Office concluded, Cisco is performing the contract's primary and vital requirements, and Appellant is heavily reliant upon Cisco for contract performance.

In its appeal, Appellant did not attempt to challenge the merits of the ostensible subcontractor findings. *See* Section II.F, *supra*. Rather, as discussed above, Appellant devoted its entire appeal petition to disputing the D/GC's legal authority to protest. Based on the appeal petition, then, I can only conclude that Appellant abandoned the contentions, raised in its motion to dismiss, that Appellant is not affiliated with Cisco under the ostensible subcontractor rule. Pursuant to 13 C.F.R. § 134.316(c), OHA will not adjudicate issues which have been abandoned. *Size Appeal of EASTCO Building Services, Inc.*, SBA No. SIZ-5437, at 6 (2013); *Size Appeal of Cherokee Nation Healthcare Servs., Inc.*, SBA No. SIZ-5343, at 4 (2012).

In its supplemental comments filed in these proceedings, Appellant argued for the first time that costs associated with SMARTnet should be excluded altogether from the ostensible subcontractor analysis, because Cisco amounts to a government specified resource under 13 C.F.R. § 125.6(e)(7). *See* Section II.I, *supra*. I find Appellant's argument unavailing for several reasons. First, under OHA's rules of practice, OHA will not consider new issues introduced for the first time on appeal. 13 C.F.R. § 134.316(c); *Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012). Here, Appellant offers no explanation why its argument concerning exclusion of costs was not, or could not have been, presented to the Area Office for consideration at the time of the size review. An area office may not be faulted for failing to address issues that were never before it in the first instance. Second, the regulation Appellant references — 13 C.F.R. § 125.6(e)(7) — is used for determining whether the prime contractor has adhered to “limitations on subcontracting” restrictions, and has the effect of treating government specified resources as part of the “cost of materials.” Under limitations on subcontracting provisions, the “cost of materials” is subtracted when determining compliance for supply contracts, although not for services contracts. *See* 15 U.S.C. § 657s(a)(1) and (a)(2); 13 C.F.R. § 125.6(a)(1), (a)(2), and (e)(4); 48 C.F.R. § 52.219-14(c)(1) and (c)(2). In the instant case, DISA-DITCO assigned a services NAICS code to the procurement. Section II.A, *supra*. Accordingly, even if Cisco SMARTnet costs were deemed part of the “cost of materials,” it is not evident that those costs

could properly be excluded here, because the instant contract was for services rather than supplies. Third, under OHA precedent, a concern may contravene the ostensible subcontractor rule even if it complies with limitations on subcontracting. *E.g.*, *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011) (finding violation of the ostensible subcontractor rule when the prime contractor proposed to self-perform 51% of services and subcontract 40% to the alleged ostensible subcontractor). Thus, even assuming that Cisco SMARTnet costs should be excluded for purposes of limitations on subcontracting, this would not necessarily alter the analysis of the ostensible subcontractor rule.

IV. Conclusion

For the above reasons, I affirm the Area Office's size determination and deny the instant appeal.⁴ This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge

⁴ I have also considered Appellant's request to stay the effects of this decision with respect to the instant procurement, but find no authority to do so. Pursuant to 13 C.F.R. § 134.316(d), OHA's decision "becomes effective upon issuance." Further, a decision without legal effect would be academic or advisory, and 13 C.F.R. § 134.303 stipulates that OHA "does not issue advisory opinions."