

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

SIZE APPEAL OF:

Professional Security Corporation,

Appellant,

Appealed From
Size Determination No. 3-2014-020

SBA No. SIZ-5548

Decided: April 14, 2014

APPEARANCES

Jonathan D. Shaffer, Esq., Mary Pat Bruckenmeyer, Esq., Smith Pachter McWhorter PLC, Vienna, Virginia, for Appellant

Katherine S. Nucci, Esq., Thompson Coburn LLP, Washington, D.C., for American Eagle Protective Services Corporation

DECISION¹

I. Introduction

This appeal arises from a size determination concluding that Professional Security Corporation (Appellant) is affiliated with its subcontractor, Metropolitan Security Service, Inc. d/b/a Walden Security (Walden), under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). Appellant maintains that the size determination is clearly erroneous and should be reversed. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

The U.S. Small Business Administration (SBA) 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. 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.

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

II. Background

A. Procedural History

On June 21, 2012, the U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (CDC) issued Solicitation No. 2012-Q-14617, for security guard services at CDC facilities in and around Atlanta, Georgia. The RFQ stated that CDC planned to award a single task order through the U.S. General Services Administration (GSA) Federal Supply Schedule (FSS) contracts. The Contracting Officer (CO) set aside the procurement entirely for small businesses. Proposals initially were due on July 16, 2012.

On May 30, 2013, the CO notified unsuccessful offerors that American Eagle Protective Services Corporation (AEPS) was the awardee. On June 7, 2013, Appellant filed a bid protest at the U.S. Government Accountability Office (GAO) challenging the award decision. On July 17, 2013, CDC elected to take corrective action in response to Appellant's bid protest. Specifically, CDC stated that it planned to request revised proposals and make a new award determination. Appellant submitted its revised proposal on July 30, 2013. On December 16, 2013, CDC awarded the task order to Appellant.

On December 18, 2013, AEPS filed a size protest against Appellant, alleging that Appellant is affiliated with Walden under the ostensible subcontractor rule. The CO forwarded the protest to SBA's Office of Government Contracting, Area III (Area Office) for consideration.

B. Proposal and Teaming Agreement

On December 31, 2013, Appellant responded to the protest and provided a copy of its proposal, its completed SBA Form 355, and other documents.

Appellant's proposal identified itself as the prime contractor for this procurement, and Walden, the incumbent contractor, as the Appellant's sole subcontractor. Appellant proposed that Appellant will perform 53% of contract services and Walden will perform the remaining 47%. (Proposal, Vol. I, Transition Plan, at 1.) Specifically, "53% of current [Walden] employees will transfer to [Appellant] at [XXXXXXX]," and "47% of current [Walden] employees will continue to be assigned to the remaining facilities." (*Id.*, Vol. I, at 23.) In addition, the incumbent Project Manager, and all incumbent supervisors at [XXXXXXX], "will transition from [Walden] to [Appellant] on the start-date of the contract." (*Id.*, Vol. I, Transition Plan, at 4.) Appellant described this approach as advantageous to CDC in that it "decreases disruption to the current workforce, lessens the administrative burden on [Government officials] and results in the best value to the Government because of a 53% decrease in employee replacement costs." (*Id.*, Vol. I, at 4-5.)

The proposal stated that Appellant's President, Mr. William R. Banks, and Walden's President, Mr. Michael S. Walden, will provide "Executive Leadership" for the project. (*Id.* at 9.) Messrs. Banks and Walden each will devote 50% of their time to the project. According to the proposal, Mr. Banks will "provide[] general guidance and direction for the overall [contract] and interface[] with the subcontractor, CDC Headquarters, the CO, and CDC personnel on a

continual basis to ensure CDC ongoing satisfaction with service performance.” (*Id.* at 10.) The Project Manager will be “the primary interface with the CDC,” and his responsibilities “include coordinating and communicating with the other elements of the Contract Management Team and supervisory personnel, implementing policies and procedures related to [security guard] operations, and assisting [] with investigating misconduct allegations involving the collective workforce.” (*Id.* at 11.) The Program Manager's resume, included with the proposal, indicated that he will “ensure[] all established costs, quality and delivery commitments are made,” and “direct[] the resolution of operational, service, and maintenance problems to ensure minimum costs and prevent lost coverage.”

In response to the RFQ's requirement that the proposal describe work performed during the past three years “similar in size and complexity” to the instant procurement, Appellant provided a table indicating that only Walden has previously performed work of comparable size. (*Id.* at 35.) Appellant identified three prior contracts for itself, the largest valued at \$2,083,486 since February 2004. (*Id.* at 35-36.) Appellant also provided three examples of Walden's past performance, each exceeding \$100 million in value. (*Id.* at 36-38.) Appellant's proposal stated that Appellant has “entered into a strategic partnership” with Walden “[b]ecause the CDC mission requires a [security guard] provider with the infrastructure and proven ability to deliver complex government [security guard] service.” (*Id.* at 4.)

According to the proposal, Appellant is “a GSA-approved Service-Disabled Veteran Owned Small Business.” (*Id.*) The proposal did not, however, include a self-certification that Appellant qualifies as a small business as of a particular date or under a particular size standard.

Appellant's SBA Form 355 indicated that Appellant had total receipts of \$1,865,421 in fiscal year 2010; \$2,094,108 in fiscal year 2011; and \$2,378,512 in fiscal year 2012.

The record also includes a teaming agreement between Appellant and Walden, executed in April 2012. The teaming agreement stated that Appellant and Walden will remain independent contractors, and will not share profits or losses arising from the efforts of either or both the parties. (Teaming Agreement ¶ 3.2.) The agreement stipulated that “the point of contact for all customer interactions and communications shall be [Appellant's] Program Manager.” (*Id.* ¶ 3.5.)

C. Size Determination

On January 21, 2014, the Area Office issued Size Determination No. 3-2014-020 concluding that Appellant is not an eligible small business for the instant procurement.²

The Area Office found that Appellant is a “security and patrol contracting firm” incorporated in April 1980. (Size Determination at 3.) Ms. Aley Mae Shoemaker owns 51% of

² The copy of the RFQ provided to OHA does not identify any North American Industry Classification System (NAICS) code or size standard. The Area Office determined, however, that the applicable NAICS code for this procurement was 561612, Security Guards and Patrol Services, with an annual receipts size standard of \$18.5 million. (Size Determination at 1.) Neither Appellant nor AEPS disputes this finding.

Appellant, and her son, Mr. Banks, owns the remaining 49% interest. (*Id.*) Mr. Banks is also Appellant's President. (*Id.*) The Area Office found that Ms. Shoemaker and Mr. Banks share an identity of interest due to their family relationship, and there is no clear line of fracture between them. As a result, Ms. Shoemaker and Mr. Banks jointly control Appellant. (*Id.*)

The Area Office next turned to an examination of the ostensible subcontractor rule. The Area Office noted that Walden is the incumbent contractor for security guard services at the CDC's facilities in Atlanta, Georgia, and that Walden is a large business ineligible to compete as the prime contractor for the subject RFQ. (*Id.* at 4, 7.)

The Area Office reviewed Appellant's proposal and the teaming agreement between Appellant and Walden. The Area Office found that, according to Appellant's proposal, Appellant would perform 53% of contract services, whereas Walden would perform 47% as a subcontractor to Appellant. (*Id.* at 4.) In particular, Appellant would be responsible for [XXXXXXX] and for security guard services at [XXXXXXX] CDC location in the Atlanta area. (*Id.* at 4-5.) Walden would supply [XXXXXXX] and [XXXXXXX], and would perform security guard services at [[XXXXXXX] CDC locations. (*Id.*)

The Area Office found that, aside from Appellant's President, who would not play a major role on the project, “[Appellant] is proposing as its entire project management team individuals who are currently employed by [Walden].” (*Id.* at 5.) Specifically, Appellant's proposed Project Manager, Deputy Project Manager and Training Manager, Field Training Sergeant/Shift Supervisor, Senior Shift Supervisor, Lead Supervisor, and Site Managers all are current employees of Walden. (*Id.*) Although Appellant apparently expected to hire some of these individuals after award, formal offers of employment had not yet been made or accepted. (*Id.*) The Area Office was particularly troubled by the fact that Appellant proposed to retain Walden's incumbent Project Manager to serve as Appellant's own Project Manager, because this individual “will be providing oversight over the project, including staffing and training, ensuring all costs, quality and delivery commitments are met, and generally administering the project.” (*Id.*) The Area Office observed that, following the issuance of Executive Order 13,495, OHA has opined that the hiring of incumbent non-managerial personnel is no longer considered strong evidence of unusual reliance. The instant case is distinguishable, however, because “[Appellant] here intends to hire not merely some of its management staff from Walden but all of them, and all of those identified [as] key employees are current Walden employees.” (*Id.* at 5-6.)

The Area Office also determined that Appellant lacks relevant experience performing contracts of similar magnitude. According to the Area Office, the value of the CDC contract — approximately \$67 million over five years — is “more than 22 times more than the largest contract [Appellant] cited in its past performance.” (*Id.* at 6.)

The Area Office stated that “[u]nder the Ostensible Subcontractor rule, SBA determines the size status of a concern as of the date the concern submits a written self-certification that it is small to the procuring activity as of the date of final proposal revision which includes price.” (*Id.*, citing 13 C.F.R. § 121.404(d).) Therefore, the Area Office found, Appellant's size should be assessed as of July 30, 2013, the date of Appellant's most recent proposal revision. Although Appellant alone qualifies as a small business, Appellant significantly exceeds the \$18.5 million

size standard once its receipts are aggregated with those of Walden. (*Id.* at 7.) Accordingly, Appellant is other than small for this procurement.

D. Appeal

On January 27, 2014, Appellant appealed the size determination to OHA. Appellant contends that the Area Office improperly concluded that Appellant is affiliated with Walden.

Appellant complains that the Area Office applied the ostensible subcontractor rule in an “overly restrictive” fashion. (Appeal at 2.) Appellant argues that the Area Office overlooked “control or the power to control,” did not consider the “totality of the circumstances,” and treated teaming with an incumbent that was unable to bid as a controlling factor. (*Id.* at 5.) Appellant emphasizes that Appellant was established in 1980 and has sufficient experience, past performance, and capabilities to successfully perform the contract without excessive reliance upon Walden. (*Id.*)

Appellant argues that the teaming agreement demonstrates that Appellant is not unusually reliant on Walden. Appellant states that the teaming agreement establishes that Appellant prepared and submitted the proposal; maintains exclusive control over the negotiation of any prime contract; will serve as the prime contractor; acts as the point of contact with CDC; and provides a Project Manager to serve as a principal point of contact. Appellant notes that the teaming agreement clearly stipulates that the parties will “remain independent contractors and would not share employees, resources, profits or losses.” (*Id.* at 7.) Appellant highlights that Appellant and Walden have not previously worked together, are headquartered in separate locations, and do not share office staff, human resources, or benefits. In addition, Appellant is not economically dependent upon Walden. (*Id.* at 8.)

Appellant states that the size determination fails to recognize that Appellant's President will be primarily responsible for managing the contract. Appellant concedes that the proposal indicates Appellant will hire former Walden personnel, including the Project Manager, as managerial employees, but Appellant argues that hiring former employees is not improper or indicative of unusual reliance. (*Id.* at 9-11 (citing *Size Appeal of Maywood Closure Co., LLC & TPMC-Energy Solutions Env'l Servs. 2009, LLC*, SBA No. SIZ-5499 (2013) and *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305 (2011).) Indeed, Executive Order 13,495 “requires service providers that win follow-on contracts to offer jobs to non-managerial employees at the previous company.” (*Id.* at 12, emphasis in original.) Moreover, while Appellant and Walden will be performing the same types of services, the Area Office itself acknowledged that Appellant will perform a majority of this work, consistent with limitations on subcontracting restrictions. (*Id.* at 14-15.)

Appellant argues that the Area Office usurped the CO's role in assessing Appellant's responsibility. In particular, the Area Office improperly and unreasonably determined that Appellant lacks sufficient experience to perform this procurement.

Finally, Appellant asserts that if the Area Office had considered the totality of the circumstances (the teaming agreement; separate office space, staff, human resources, benefits,

and headquarters; no economic dependency; and Appellant's capabilities and proven experience) the Area Office would not have found Appellant affiliated with Walden.

E. AEPS Response

On February 12, 2014, AEPS responded to the appeal. AEPS argues that the Area Office correctly found Appellant affiliated with Walden under the ostensible subcontractor rule. Consequently, OHA should affirm the size determination and deny the appeal.

AEPS emphasizes that Walden is the incumbent contractor and is ineligible to submit its own proposal for the instant procurement; that Appellant's entire management team consists of current Walden employees; that Appellant's proposed Project Manager has been Walden's Project Manager since 2006; and that Appellant's three past performance references were considerably smaller in size and complexity than the subject procurement. (Response at 2-8.) AEPS notes that, notwithstanding Appellant's claim that its President, Mr. Banks, will be the primary contact with CDC, Appellant's proposal stated that the Project Manager, who is also Walden's Project Manager under the incumbent contract, would perform these duties. (*Id.* at 5.) AEPS alleges that Appellant apparently will rely upon Walden for human resources, quality assurance, training, logistics, payroll/billing, legal and other administrative support services. (*Id.*) AEPS also finds it telling that Appellant would use employment forms, such as new hire applications and orientation packets, that are virtually identical to Walden's. AEPS posits that Appellant "simply copied Walden's forms and changed the logo and name on each one." (*Id.* at 7.)

AEPS asserts that the size determination is based on accurate information and contains no reversible error. AEPS argues that the size determination is supported by *Size Appeal of Four Winds Servs., Inc.*, SBA No. SIZ-5260 (2011), *recons. denied*, SBA No. SIZ-5293 (2011) (PFR). AEPS argues that, as in *Four Winds*, Appellant, the prime contractor, did not propose any of its current employees as key employees, and possesses only limited experience whereas Walden, the subcontractor, is far more experienced. AEPS argues the relationship between Appellant and Walden is also similar to the relationships between the prime contractors and subcontractors in *Size Appeal of Wichita Tribal Enterprises, LLC*, SBA No. SIZ-5390 (2012) and *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011). In these cases, explains AEPS, OHA found violation of the ostensible subcontractor rule because the prime contractor was heavily reliant upon the incumbent contractor, which was supplying a large majority of the workforce and managerial personnel for the contract. (*Id.* at 9-11.)

AEPS distinguishes *Size Appeal of TCE, Incorporated*, SBA No. SIZ-5003 (2008), referenced by Appellant. AEPS explains, unlike here, in *TCE* the subcontractor was not the incumbent contractor; the prime contractor had previously performed the same tasks for the same agency, as well as other contracts of the same magnitude; the prime contractor and subcontractor each provided key employees; the prime's employees were not former employees of the subcontractor; and management control resided with the prime contractor. AEPS also distinguishes other cases cited by Appellant, including *Size Appeal of Maywood Closure Co., LLC & TPMC-EnergySolutions Environmental Services 2009, LLC*, SBA No. SIZ-5499

(2013); *Size Appeal of J. W. Mills Management, LLC*, SBA No. SIZ-5416 (2012); and *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305 (2011). (*Id.* at 11-13.)

Based on the facts and the law, AEPS urges OHA to affirm the size determination.

F. Additional Pleadings

On February 26, 2014, approximately two weeks after the close of record, Appellant moved to reply to AEPS's response, and attached its proposed reply. Appellant contends that there is good cause to admit the reply because AEPS's response contains legal arguments that “ignore or misconstrue highly relevant OHA decisions,” and because AEPS mischaracterizes the record. (Motion at 1.) AEPS opposes Appellant's motion. According to AEPS, Appellant's reply is “nothing more than a regurgitation by counsel of the same arguments made in Appellant's Petition of Appeal.” (Opposition at 1.)

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, Appellant's reply was filed well after the close of record, and elaborates upon legal points raised in the appeal petition. In addition, although Appellant claims that AEPS mischaracterizes the record, Appellant's reply does not identify significant factual errors or inaccuracies in AEPS's response. Accordingly, Appellant's motion to reply is DENIED, and the reply is EXCLUDED from the record. *E.g.*, *Size Appeal of Mali, Inc.*, SBA No. SIZ-5506, at 3-4 (2013).

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).

The “ostensible subcontractor” rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or when the prime contractor is unusually reliant upon the subcontractor, the two firms are affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). The rule is intended to “prevent other than small firms from forming relationships with small firms to evade SBA's size requirements.” *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). To ascertain whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, an area office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). Ostensible subcontractor inquiries are “intensely

fact-specific given that they are based upon the specific solicitation and specific proposal at issue.” *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 12 (2010).

B. Analysis

Having reviewed the record, OHA case precedent, and the arguments of the parties, I agree with AEPS that the instant case is not distinguishable from *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011) and its progeny, where OHA has found violation of the ostensible subcontractor rule due to the prime contractor's unusual reliance upon a subcontractor. As a result, this appeal must be denied.

As AEPS observes, *Size Appeal of Wichita Tribal Enterprises, LLC*, SBA No. SIZ-5390 (2012), a case that adhered closely to the reasoning of *DoverStaffing*, is particularly instructive here. In that case, the prime contractor was to perform 51% of services and the subcontractor 49%. *Wichita Tribal Enterprises*, SBA No. SIZ-5390, at 3. OHA affirmed a determination that the prime contractor was unusually reliant upon its subcontractor, based on four key factors. *Id.* at 9. First, the proposed subcontractor was the incumbent contractor, and was not itself eligible to compete for the procurement. *Id.* Second, the prime contractor planned to hire the large majority of its workforce from the subcontractor. *Id.* Third, the prime contractor's proposed program manager previously served as program manager for the subcontractor on the incumbent contract. *Id.* And fourth, the prime contractor was a relatively new firm with modest revenues and scant experience. *Id.* OHA concluded that “when a prime contractor proposes the incumbent contractor as its subcontractor, relies heavily upon its subcontractor for both managerial and non-managerial personnel, and has little or no corporate experience, the prime contractor is [] at risk of violating the ostensible subcontractor rule.” *Id.* at 11 (citing *DoverStaffing* and *Size Appeal of SM Resources Corp., Inc.*, SBA No. SIZ-5338 (2012)).

Essentially the same operative facts are present in the instant case. Walden is the incumbent on the predecessor contract for similar services, and is ineligible to submit its own proposal for the subject procurement. Appellant proposed to staff Appellant's portion of the project by “transfer[ring]” non-managerial personnel from Walden to Appellant at [XXXXXX]. Section II.B, *supra*. In effect, then, Appellant proposed to adopt Walden's incumbent workforce *en masse*. Appellant further proposed to hire the incumbent Project Manager, as well as other managerial and supervisory personnel, from Walden. Indeed, the Area Office concluded that “[Appellant] is proposing as its entire project management team individuals who are currently employed by [Walden].” Section II.C., *supra*. Lastly, Appellant is a relatively small firm with no apparent experience in contracts of similar magnitude, whereas Walden is highly-experienced entity with at least three recent contracts valued in excess of \$100 million. In short, then, this case fits squarely within the *DoverStaffing* fact pattern where “a prime contractor proposes the incumbent contractor as its subcontractor, relies heavily upon its subcontractor for both managerial and non-managerial personnel, and has little or no corporate experience.”³

³ *Wichita Tribal Enterprises*, SBA No. SIZ-5390, at 11. Arguably, the instant case presents even stronger facts than *DoverStaffing* and *Wichita Tribal Enterprises*, because Appellant may also be reliant on Walden for support services essential to performing the contract. Specifically, AEPS alleges that “[n]ot only is [Appellant] hiring all of the managerial

Appellant attempts to distance itself from the *DoverStaffing* line of cases, but none of Appellant's arguments is persuasive. Appellant emphasizes that, as the prime contractor, Appellant will perform 53% of contract services, and Walden will perform only 47%, consistent with limitations on subcontracting requirements. (Appeal at 14-15.) OHA has explained, however, that “a concern may contravene the ostensible subcontractor rule even if it complies with limitations on subcontracting.” *Size Appeal of Red River Computer Co., Inc.*, SBA No. SIZ-5512, at 16 (2013). In *DoverStaffing* itself, for example, OHA found violation of the ostensible subcontractor rule when the prime contractor would self-perform 51% of services and would subcontract only 40% to the alleged ostensible subcontractor. OHA explained that the prime contractor was “reliant upon [its subcontractor] not only for the 40% of the contract work assigned to it by the proposal, but for nearly all of [the prime contractor's] own staff for this contract and for all of the key employees performing the contract management.” *DoverStaffing*, SBA No. SIZ-5300, at 8. Accordingly, the fact that Appellant will perform 53% of contract services does not preclude a finding that Appellant is unusually reliant upon Walden.

Appellant also maintains that it should not be penalized for hiring incumbent staff because Executive Order 13,495 encourages contractors to offer a right of first refusal of employment to qualified incumbent non-managerial employees.⁴ Similarly, OHA has recognized that the hiring of incumbent personnel should no longer be considered strong evidence of reliance, in light of the Executive Order and widespread industry practice. In its decisions addressing the Executive Order, however, OHA has found that the Executive Order “does not apply to managerial personnel, and does not mandate that a successor contractor will rely upon the incumbent for its entire workforce.” *Wichita Tribal Enterprises*, SBA No. SIZ-5390, at 9. Thus, the problem for Appellant here is not merely that Appellant proposed to offer a right of first refusal to Walden's employees, but rather that Appellant, having selected Walden as its sole subcontractor, proposed to rely upon Walden for virtually all staffing, including both managerial and non-managerial employees, and without contributing Appellant's own employees or other value to the project beyond Appellant's small business status. It is notable in this regard that the prior OHA decisions referenced by Appellant — such as *Maywood Closure*, *J. W. Mills*, and *National Sourcing* — all involved situations where the prime contractor proposed its own personnel to perform a contract, or involved situations where the prime contract proposed to hire from an incumbent firm that was not also the proposed subcontractor.

and supervisory personnel and non-key workforce from Walden, but it is also relying on Walden to provide all support functions (training, quality assurance, logistics, human resources, payroll/billing and legal) and using Walden's operational plans and even forms for purposes of contract performance.” (AEPS Response at 14.) The Area Office, though, did not base its determination on these grounds, so it is unnecessary to further explore the issue here.

⁴ See 74 Fed. Reg. 6103 (Feb. 4, 2009). The instant RFQ did not incorporate Federal Acquisition Regulation (FAR) clause 52.222-17 “Nondisplacement of Qualified Workers (JAN 2013),” which implements the Executive Order. However, the RFQ did instruct that, during the transition process, the “[c]ontractor shall offer first right of refusal to the existing workforce.” (RFQ, Performance Work Statement § 2.1.2.)

Appellant further asserts that hiring Walden's managerial workforce does not demonstrate unusual reliance, because “[t]he personnel hired from Walden to become [Appellant's] employees will always be subordinate to Mr. Banks' direct control.” (Appeal at 14.) The Area Office found, however, and the record confirms, that Mr. Banks is not assigned a major role in this procurement. Sections II.B and II.C, *supra*. Rather, Appellant's proposal indicates that the Project Manager is responsible for day-to-day management of the contract, while Mr. Banks will provide “general guidance and direction” and interface with the CDC. *Id.* In addition, Mr. Banks is devoted only half-time to the project, and is not physically located in the state of Georgia, where the contract will be performed. Again, then, the instant case is highly analogous to *DoverStaffing*, where OHA rejected the argument that the challenged firm's President would control the project because “the proposal does not assign a major role to the [challenged firm's] President beyond interface with the [[procuring agency], and it is the Project Manager who will be providing oversight over the project.” *DoverStaffing*, SBA No. SIZ-5300, at 8. Accordingly, the Area Office did not err in concluding that Appellant would be heavily reliant upon Walden for contract management.

Appellant also contends that, unlike the prime contractors in the *DoverStaffing* line of cases, Appellant here is not a newly-created or unproven firm. Instead, Appellant “has been in business for well over thirty years and is successfully performing similar types of contracts.” (Appeal at 2.) Appellant argues that the Area Office improperly questioned whether Appellant was capable of performing this contract, as this issue is in the nature of a responsibility determination. (*Id.* at 16-19.) In addition, Appellant argues, the Area Office could not reasonably conclude that Appellant lacks experience with comparable projects, given that “the RFQ did not require offerors to provide past performance references of the same value as the contract here.” (*Id.* at 15.) I find no merit to these arguments. Contrary to Appellant's contentions, OHA has repeatedly held that “it is appropriate to consider a prime contractor's experience as part of an 'ostensible subcontractor' analysis, because such matters are relevant to whether the prime contractor can perform independently from the subcontractor.” *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 7 (2011). The Area Office thus did not err in reviewing Appellant's corporate experience. Further, the record supports the Area Office's conclusion that Appellant lacks experience with contracts of similar magnitude. The instant RFQ instructed offerors to describe work performed during recent years “similar in size and complexity” to this procurement, and Appellant's proposal included a table indicating that only Walden had previously performed work of comparable size. Section II.B, *supra*. Further, Appellant's sworn SBA Form 355 identified revenues of less than \$2.4 million annually for fiscal years 2010-2012, again confirming that Appellant had not previously performed contracts approaching the magnitude of the instant procurement. This case is therefore unlike *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279 (2011), where OHA found that an area office made unwarranted assumptions about the breadth and depth of the challenged firm's corporate experience.

Appellant also alleges that the Area Office failed to consider all aspects of the relationship between Appellant and Walden, as is required by 13 C.F.R. § 121.103(h)(4). (Appeal at 19-20.) Appellant highlights that the Area Office did not discuss the teaming agreement in detail, and did not make any other findings suggestive of a joint venture, such as profit sharing, commingling of personnel, or collaboration on multiple projects. (*Id.* at 2.) Nor

did the Area Office find evidence that Appellant and Walden are affiliated through economic dependence. In addition, Appellant maintains, “[t]he [Area Office] treated teaming with an incumbent as a predominant or controlling factor far beyond OHA standards.” (*Id.* at 5.) These arguments again are meritless. While it is true that the Area Office noted Walden's incumbency, the size determination does not indicate that the Area Office based its decision solely, or primarily, on this issue. The underlying regulation, 13 C.F.R. § 121.103(h)(4), instructs an area office to consider “whether the subcontractor is the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation,” and OHA likewise has held that “engaging the incumbent as a subcontractor leads to heightened scrutiny of the arrangement.” *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436, at 15 (2013). It therefore was appropriate for the Area Office to consider Walden's status as the incumbent contractor. Contrary to Appellant's suggestions, the Area Office was not required to find Appellant affiliated with Walden through economic dependence or other independent grounds. Furthermore, although the Area Office could have discussed the teaming agreement in greater detail, the agreement is in the record, and there is no reason to believe that the Area Office failed to consider it, or that a more detailed analysis of the agreement might have affected the outcome of the case. *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359, at 14 (2012).

IV. Conclusion

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

KENNETH M. HYDE
Administrative Judge