

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

SIZE APPEAL OF:

Contego Environmental, LLC,

Appellant,

RE: Indigo Blue Construction, LLC

Appealed From

Size Determination No. 3-2020-060

SBA No. SIZ-6073

Decided: September 22, 2020

APPEARANCES

. Theodore P. Watson, Esq., Watson & Associates, LLC, Denver, Colorado, for Appellant

Antonio R. Franco, Esq., Meghan F. Leemon, Esq., PilieroMazza PLLC, Washington, D.C., for Indigo Blue Construction, LLC

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On June 10, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2020-060, concluding that Indigo Blue Construction, LLC (Indigo) is an eligible small business for the instant procurement. On appeal, Contego Environmental, LLC (Appellant), the original protestor, maintains that the size determination is clearly erroneous and contrary to the prior decision of the Office of Hearings and Appeals (OHA) in *Size Appeal of Contego Environmental, LLC*, SBA No. SIZ-6054 (2020) (“*Contego I*”). For the reasons discussed *infra*, the appeal is granted and the size determination is reversed in part and remanded in part.

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

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the 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. The Solicitation

On October 24, 2019, the U.S. Department of Veterans Affairs (VA) issued Request for Proposals (RFP) No. 36C24919R0152, seeking a contractor to perform construction projects at the Lexington VA Medical Center. (RFP at 1, 16.) The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, with a corresponding \$39.5 million annual receipts size standard. (*Id.* at 1.) Proposals were due December 23, 2019. (RFP Amendment 0003 at 1.) Indigo and Appellant submitted timely offers.

According to the RFP, VA planned to award a single Indefinite-Delivery Indefinite-Quantity (ID/IQ) contract to the offeror with the lowest-price technically-acceptable proposal. (RFP at 16, 31.) Specific work would be defined in task orders issued after award of the base contract, but the scope of the contract would include “carpentry, asphalt [and] concrete paving, roofing, excavation, interior renovation, carpet, window and door installation, electrical, plumbing, painting and stucco, demolition, masonry, fire protection construction, telecommunications, and [Heating, Ventilation, and Air Conditioning (HVAC)]” projects. (*Id.* at 1.)

The RFP stated that “[t]he contractor shall be required to be located, either by virtue of his main office or a satellite operation base, within an area permitting a maximum of a two (2) hour response time to the [Lexington VA] Medical Center.” (*Id.* at 17.) Further, “[a] superintendent must be present at work site at all times a Contractor has his/her forces or subcontractor forces working.” (*Id.* at 21.)

The RFP stated that the Project Manager and Site Superintendent would be considered Key Personnel. (*Id.* at 33.) Both individuals were required to have a minimum of five years' experience managing hospital/healthcare construction projects. (*Id.*) In addition, “[t]he Prime Contractor shall provide demonstrated experience in hospital/medical center and/or health care facility construction projects.” (*Id.*)

### B. Proposal

Indigo's proposal stated that Indigo is an SDVOSB specializing in “general contracting, construction management and design/build services from project inception through close-out to private and public clients.” (Proposal at 5.) Indigo is located in Atlanta, Georgia. (*Id.* at 1.) For the instant procurement, Indigo partnered with [Subcontractor] to perform the required work. (*Id.* at 5.) The proposal described [Subcontractor] as “[XXXXXXXXXXXXXXXXXXXXX].” (*Id.*)

Indigo and [Subcontractor] collectively are referred to throughout the proposal as “Team Indigo Blue.” (*Id.*)

The proposal explained that Team Indigo Blue will perform construction management, administrative support, quality control management, and other types of project management, while specialty trade subcontractors will be engaged to provide mechanical, plumbing, electrical, communications, carpentry, drywall/framing, painting, demolition, fire protection, casework, and flooring. (*Id.* at 5-6.)

An organizational chart included in the proposal showed that Indigo's President, Ms. Kimela J. Overstreet, will oversee the contract as the Program Manager. (*Id.* at 6, 7.) According to the organizational chart, Ms. Overstreet will not be located on-site for the instant contract; rather, Ms. Overstreet is identified as part of an “Off-Site Corporate Headquarters Office.” (*Id.* at 6.)

[XXXX]

(*Id.*) The proposal stated that Ms. Overstreet's role will be to provide: “[s]ignature authority for contracts, task orders and modifications”; “[r]esponsible for overall contract management”; “Senior Executive in Team Indigo Blue”; “[c]entral point of contact for all project matters”; “[r]esponsible for all design and construction related activities”; “[r]esponsible for overall contract compliance”; “[n]egotiating all contract requirements”; “[p]rovide [oversight] and guidance for each project”; “[e]nsure audits are conducted for safety and quality control”; “[p]rovide corporate support for all accounting and administrative actions”; and “[o]versee Project Managers.” (*Id.* at 7.) Indigo's proposal did not include a resume for Ms. Overstreet.

The proposal indicated that on-site supervision and management will be conducted by several named [Subcontractor] employees. (*Id.* at 7, 22-31.) According to the proposal, Team Indigo Blue will establish a [XXXXXXXXXXXXXXXXXX] which “will provide the necessary on-site personnel to ensure successful project delivery.” (*Id.* at 7.) The following employees will be located at the [XXXXXX]: Project Manager/Site Safety Health Officer (SSHO); Site Superintendent; Contractor Quality Control System Manager; and On-Site Quality Control Manager. (*Id.*) The Project Manager/SSHO, [Project Manager], “will remain the ‘point person’ from project start to finish” and “will act as the primary point of contact and is responsible for overall project execution, cost control, progress reporting, and on-site safety.” (*Id.* at 7, 20.) She is also “responsible for the quality of work performed and ensuring that requirements are met.” (*Id.*) [Project Manager] has worked for [Subcontractor] for more than six years. (*Id.* at 12, 25.)

The Site Superintendent, [XXXXXXXXXXXXXXXXXX], will be responsible for “[m]anag[ing] all on site construction activities and subcontractors throughout the project.” (*Id.* at 7.) [XXXXXXXXXXXX] has been employed by [Subcontractor] for more than two years. (*Id.* at 14, 27.) [Project Manager] and [XXXXXXXXXXXX] are the only two individuals identified in the proposal as “Key Personnel.” (*Id.* at 12-15.)

The proposal stated that the Contractor Quality Control System Manager, [XXXXXXXXXXXXXXXXXX], is charged with “develop[ing] project quality plans and procedures”

and “oversee[ing] the on-site Quality Control Program to ensure organizational compliance.” (*Id.* at 20.) [XXXXXXXXXXXXXXXX] has worked for [Subcontractor] for more than two years. (*Id.* at 29.) The On-Site Quality Control Manager, [XXXXXXXXXXXXXXXX], has “full authority, at the site, to manage and implement all requirements of the [quality control] [p]rogram and all contract requirements.” (*Id.* at 20.) [XXXXXXXXXXXXXXXX] has worked for [Subcontractor] for more than five years. (*Id.* at 30.) Both [XXXXXX] and [XXXXXXXXXXXXXXXX] are endowed with “stop work” authority. (*Id.* at 20-21.)

For Experience/Past Performance, Indigo submitted [XXXXXX] for itself, and [XXXXXX] for [Subcontractor]. (*Id.* at 8-10, 39.) The proposal noted that [Subcontractor] has “successfully completed over 700 projects since 2009.” (*Id.* at 5.)

### C. Contego I

After the CO announced that Indigo was the apparent awardee, Appellant filed a protest disputing Indigo's size. On March 2, 2020, the Area Office issued Size Determination No. 3-2020-035, denying the protest and concluding that Indigo is a small business. Appellant challenged Size Determination No. 3-2020-035 at OHA, and on May 19, 2020, OHA issued its decision in *Contego I*, granting the appeal with respect to the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), and remanding the matter to the Area Office for further review. OHA found that Appellant did not otherwise show clear error in Size Determination No. 3-2020-035.

OHA agreed with Appellant that, in Size Determination No. 3-2020-035, the Area Office did not discuss, and apparently did not consider, which firm (Indigo or [Subcontractor]) will perform the “primary and vital” contract requirements. *Contego I*, SBA No. SIZ-6054, at 8. The instant procurement is for construction, and under OHA precedent “[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.” *Id.* (quoting *Size Appeal of Milani Constr., LLC*, SBA No. SIZ-5898, at 6 (2018)). As a result, “on-site management of the contract is of paramount importance in a construction procurement.” *Id.* (citing *Size Appeal of Martin Bros. Constr., Inc.*, SBA No. SIZ-5945 (2018) and *Size Appeal of Iron Sword Enters., LLC*, SBA No. SIZ-5503 (2013)).

Here, Indigo's proposal appeared to indicate that [Subcontractor] employees will manage all of the on-site operations. *Id.* at 8. All of the on-site managers identified in the proposal were [Subcontractor], rather than Indigo, employees. *Id.* In addition, although the proposal stated that Indigo's President, Ms. Overstreet, would oversee the contract as Program Manager, she would not be based on-site. *Id.* at 3. Because it was not evident that Indigo itself will perform the on-site management, OHA remanded the ostensible subcontractor issue to the Area Office for further review.

### D. Area Office Proceedings

The Area Office offered Indigo an opportunity to provide additional information to be considered on remand. In response, on June 4, 2020, Indigo submitted a letter from its counsel and a sworn declaration from Ms. Overstreet. In its letter, Indigo contended that it will manage

the instant contract through Ms. Overstreet and [Project Manager]. Specifically, “[a]lthough [Contego I] state[d] that Ms. Overstreet will not be located on-site, this is not correct. [Indigo's] technical proposal did not state that [Ms. Overstreet] would not be located on site.” (Letter from A. Franco to J. Abioye (June 4, 2020), at 2.) Indigo asserted that “Ms. Overstreet has been and will be on site with her team.” (*Id.*) Further, while Indigo's proposal identified [Project Manager] as a [Subcontractor] employee, Indigo subsequently hired her on April 2, 2020. (*Id.* at 3.) Accordingly, “based upon Ms. Overstreet and [Project Manager's] on-site supervisory roles in managing the contract, [Indigo] is performing the primary and vital requirements of the Solicitation.” (*Id.*)

In her declaration, Ms. Overstreet explained that, in addition to the instant contract, Indigo also proposed to utilize [Subcontractor] as its subcontractor for a separate construction contract in California. (Overstreet Decl. ¶¶ 3-4.) According to Ms. Overstreet, “[Indigo's] technical proposals state[d] that [Ms. Overstreet] will be the Program Manager [for both] these construction procurements.” (*Id.* ¶ 6.) However, “[n]owhere in [Indigo's] proposal for either [of the] procurements [did Indigo] state that [Ms. Overstreet] would not be located on site.” (*Id.*) Ms. Overstreet averred that she plans to “conduct on-site management of the work under the contracts, including superintending, managing, and scheduling the work, including coordinating the work of subcontractors, including [Subcontractor].” (*Id.*) Ms. Overstreet added that [Project Manager] “was hired by [Indigo] on April 2, 2020.” (*Id.* ¶ 8.)

#### E. Size Determination No. 3-2020-060

On June 10, 2020, the Area Office issued Size Determination No. 3-2020-060, concluding that Indigo is an eligible small business for this procurement. The Area Office observed that, in *Contego I*, OHA generally affirmed the Area Office's findings from Size Determination No. 3-2020-035, except as pertaining to the ostensible subcontractor rule. (Size Determination No. 3-2020-060, at 2.) The principal question before the Area Office on remand, therefore, is “whether [Indigo] or [its] subcontractor is responsible for the “primary and vital' requirements of this contract.” (*Id.*) The Area Office noted that it must assess Indigo's size as of December 23, 2019, the date of Indigo's proposal for the instant procurement. (*Id.* at 7.)

The Area Office explained that, because this procurement is for construction, the primary and vital contract requirements “are related to the supervision, management, scheduling of work, and on-site management of the contract.” (*Id.* at 5.) Indigo's proposal indicated that the proposed Program Manager, Ms. Overstreet, “is the central point of contact for all project matters and will be responsible for overall contract management.” (*Id.*) The Area Office found Indigo's proposal unclear as to whether or not Ms. Overstreet would be located on-site, but Indigo represented in its submission of June 4, 2020 that Ms. Overstreet “has performed her role on-site and will continue to do so.” (*Id.* at 6.) Therefore, “following the clarification, it is apparent that [Indigo's] Program Manager will be on-site to manage performance under the contract.” (*Id.*) Further, according to Indigo, the proposed Project Manager has become an Indigo employee. (*Id.*)

Having determined that Indigo will perform the primary and vital requirements of the contract, the Area Office considered whether Indigo is unusually reliant upon [Subcontractor]. The Area Office found no unusual reliance here because:

(1) there is no incumbent contractor for this procurement; [(2)] [Indigo] does not intend to hire the large majority of its workforce from [Subcontractor]; (3) [Indigo's] management did not previously work for [Subcontractor] nor was [Subcontractor] the incumbent contractor; and (4) [Indigo] with its previous contracting experience does not lack relevant experience nor must [Indigo] rely on its subcontractor to win the contract.

(*Id.*, citing *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017).) The Area Office previously found, in Size Determination No. 3-2020-035, that Indigo itself is a small business. (*Id.* at 7-8.) Therefore, because Indigo is not affiliated with [Subcontractor] under the ostensible subcontractor rule, Indigo is an eligible small business for the instant procurement.

Size Determination No. 3-2020-060 did not specifically address whether Indigo and [Subcontractor] are similarly-situated entities, or whether the combined receipts of Indigo and [Subcontractor] exceed the \$39.5 million size standard applicable to the instant procurement.

#### F. Appeal

On June 24, 2020, Appellant appealed Size Determination No. 3-2020-060 to OHA. Appellant argues that Indigo's subcontractor, [Subcontractor], will perform the primary and vital contract requirements, specifically the on-site management of the contract, in contravention of the ostensible subcontractor rule. In Appellant's view, “the central problem i[n] this case is that contrary to [the Area Office's] findings, the record does not establish that Indigo will, in fact manage the instant contract.” (Appeal at 6.)

Appellant contends that Indigo's relationship with [Subcontractor] violates the ostensible subcontractor rule in the context of a construction contract “because, among other things, [Indigo] openly used [a Subcontractor] employee as the on-site project superintendent.” (*Id.*) OHA has held that “the on-site project superintendent, responsible for day-to-day decision-making, is a crucial position for management of any construction contract.” (*Id.*, quoting *Size Appeal of Iron Sword Enters., LLC*, SBA No. SIZ-5503, at 6 (2013).) Indigo thus cannot properly delegate day-to-day and on-site management to a subcontractor. (*Id.* at 8.) Here, as OHA explained in *Contego I*, the Team Indigo Blue managerial staff consists almost entirely of [Subcontractor] employees. (*Id.* at 4, 13.) Although the proposed Program Manager, Ms. Overstreet, is an Indigo employee, she will not be located on-site. (*Id.* at 6.) Nor is the Program Manager a key personnel position under the terms of the RFP. (*Id.* at 4.)

Appellant complains that, in Size Determination No. 3-2020-060, the Area Office gave credence to Indigo's “self-serving” statements made “in the heat of litigation” that Indigo will manage the contract. (*Id.* at 8.) In so doing, the Area Office in effect permitted Indigo to alter the content of its proposal. (*Id.*) Under OHA precedent, the Area Office should have attached “great if not controlling weight” to the proposal, and should have rejected any post-proposal representations contrary to “the language of the written proposal as submitted.” (*Id.*, citing *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071 (2009).)

Next, Appellant avers that the Area Office misapplied the “four key factors” suggestive of unusual reliance. (*Id.* at 11, citing *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011).) Contrary to the Area Office's reasoning, nearly all of the proposed managerial staff are actually [Subcontractor]— not Indigo — employees. (*Id.* at 11-12.) Further, the Area Office offered no basis for its conclusion that Indigo did not rely on [Subcontractor's] past performance to win the contract. (*Id.* at 12.)

Appellant concludes by reciting seven “potent facts” which, in Appellant's view, are sufficient to establish violation of the ostensible subcontractor rule:

1. Indigo's proposal indicated that on-site supervision and management will be conducted by several named [Subcontractor] employees.
2. The proposal shows that the Project Manager/SSHO has worked for [Subcontractor] for more than six years.
3. The resume for the On-Site Superintendent is for an employee of [Subcontractor].
4. The Site Superintendent will be responsible for “[m]anag[ing] all on site construction activities and subcontractors throughout the project.” *See* [*Contego I*, SBA No. SIZ-6054, at 3].
5. The Site Superintendent has been employed by [Subcontractor] for more than two years.
6. The Contractor Quality Control System Manager has worked for [Subcontractor] for more than two years. *Id.*
7. Ms. Overstreet, as [Program Manager] will not be located on-site.

(*Id.* at 13-14.) Given these facts, “OHA must reverse the [Area Office's] decision and rule that Indigo is other than small for this procurement.” (*Id.* at 14.)

#### G. Indigo's Response

On July 10, 2020, Indigo responded to the appeal. Indigo argues that the Area Office properly found that Indigo will perform the primary and vital contract requirements, and correctly concluded that Indigo is not unusually reliant upon [Subcontractor] to perform the contract. The appeal therefore should be denied.

Indigo highlights that the instant contract is for construction, and the primary role of a prime contractor in a construction procurement is to superintend, manage, and schedule the work, including coordinating the work of the various subcontractors. (Response at 3, citing *Size Appeal of C.E. Garbutt Constr. Co.*, SBA No. SIZ-5083 (2009).) Here, based on Indigo's proposal and the information provided on remand, the Area Office could properly find that Indigo, through Ms.

Overstreet, “will be managing performance of the contract and, thus, will be performing the primary and vital requirements.” (*Id.*) There is no dispute that the proposal identified Ms. Overstreet as Indigo's Program Manager, and the proposal similarly made clear that Ms. Overstreet will oversee the contract as a whole. (*Id.*) Although Appellant questions whether Ms. Overstreet will be located on-site, “[Indigo's] proposal simply shows that Ms. Overstreet will be based out of [Indigo's] corporate office, but there is nothing in the proposal confirming that Ms. Overstreet will not be present at the job site.” (*Id.*) On remand, Ms. Overstreet provided a declaration explaining that she will manage the contract on-site, including “superintending, managing, and scheduling the work.” (*Id.*)

Indigo acknowledges that Ms. Overstreet's declaration was “created after the date to determine size.” (*Id.* at 3 n.3.) Nevertheless, Indigo maintains, the Area Office could appropriately consider the declaration because it “does not conflict with [Indigo's] proposal.” (*Id.*, citing *Size Appeal of Nationwide Pharm., LLC*, SBA No. SIZ-6027 (2019).)

Indigo also argues that the Area Office correctly concluded that Indigo is not unusually reliant upon [Subcontractor]. OHA case law has identified four key factors that may be suggestive of unusual reliance, and those factors are not present here. (*Id.* at 4.) First, there is no incumbent contractor. Second, aside from [Project Manager], Indigo has not hired other managerial employees from [Subcontractor], and [Project Manager] is supervised by, and subordinate to, Ms. Overstreet. (*Id.*) Indigo will not hire a majority of its workforce from [Subcontractor]. (*Id.*) Further, the Area Office found that Indigo does not lack relevant experience, and [XXXXXXXXXX] of the past performance references in the proposal was for Indigo. (*Id.* at 4-5.)

### 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

In *Contego I*, OHA remanded the instant case for the Area Office to more fully consider whether the prime contractor, Indigo, or the subcontractor, [Subcontractor], will perform the “primary and vital” requirements of this contract. Section II.C, *supra*. OHA noted that the instant procurement is for construction, and that OHA has long held that “[t]he primary role of a prime contractor in a construction project is to superintend, manage, and schedule the work, including coordinating the work of the various subcontractors.” *Size Appeal of Milani Constr., LLC*, SBA No. SIZ-5898, at 6 (2018) (quoting *Size Appeal of Iron Sword Enters., LLC*, SBA No. SIZ-5503, at 6 (2013) and *Size Appeal of C.E. Garbutt Constr. Co.*, SBA No. SIZ-5083, at 6 (2009).) As a



result, OHA explained, on-site management of the contract is of paramount importance in a construction procurement. *Size Appeal of Martin Bros. Constr., Inc.*, SBA No. SIZ-5945, at 11 (2018); *Iron Sword*, SBA No. SIZ-5503, at 6-7; *C.E. Garbutt*, SBA No. SIZ-5083, at 7.

On remand, the Area Office found that Indigo, the prime contractor, will perform the on-site management, and thus will be responsible for the primary and vital contract requirements. Section II.E, *supra*. I must agree with Appellant, however, that the record does not support this conclusion. Pursuant to 13 C.F.R. § 121.404(d), Indigo's compliance with the ostensible subcontractor rule is assessed as of the date of its proposal for the subject procurement. Indigo submitted its proposal for the instant procurement on December 23, 2019, and the Area Office therefore determined Indigo's size as of this date. Sections II.A and II.E, *supra*. Indigo's proposal of December 23, 2019, however, did not indicate that Indigo will manage the instant contract. Indeed, all of the on-site managers — including the Project Manager and the Site Superintendent — were identified in the proposal as [Subcontractor], rather than Indigo, employees. Sections II.B and II.C, *supra*. Further, while the proposal did state that Indigo's President, Ms. Overstreet, would oversee the contract as Program Manager, the proposal also made clear that she would not be based on-site. *Id.* Accordingly, Indigo's proposal of December 23, 2019 does not support the notion that Indigo will manage this contract.

On remand, Indigo persuaded the Area Office that Indigo will manage the contract, based on information provided in its submission of June 4, 2020. Section II.D, *supra*. Indigo contended in particular that Ms. Overstreet will perform her work on-site, and that [Project Manager] became an Indigo employee on April 2, 2020. *Id.* As Appellant correctly observes in its appeal, though, the problem for Indigo is that these changes cannot be reconciled with Indigo's actual proposal. The proposal showed Ms. Overstreet as part of the “Off-Site Corporate Headquarters Office,” as distinguished from the “On-Site Project Delivery Team,” and likewise omitted Ms. Overstreet from the list of specific managers who would be based at the on-site [XXXXX]. Section II.B, *supra*. Meanwhile, [Project Manager], the proposed Project Manager, was identified in the proposal as a [Subcontractor] employee, and the proposal contained no indication that this position instead would be filled by an Indigo employee. *Id.*

It is well-settled law that “documents created in response to a protest may not be used to contradict an offeror's proposal.” *Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815, at 10 (2017); *Size Appeal of Tech. Assocs., Inc.*, SBA No. SIZ-5814, at 12 (2017). Similarly, changes of approach occurring after the date to determine size do not affect a firm's compliance with the ostensible subcontractor rule because size is assessed as of that specific date. *Size Appeal of Warrior Serv. Co., LLC*, SBA No. SIZ-6046, at 7 (2020); *Size Appeal of Greener Constr. Servs., Inc.*, SBA No. SIZ-5782, at 5 (2016); *Size Appeal of WG Pitts Co.*, SBA No. SIZ-5575, at 8 (2014); *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 16 (2011); *Size Appeal of Earthcare Solutions, Inc.*, SBA No. SIZ-5183, at 6 (2011) (“The Area Office must base its ostensible contractor determination solely on the relationship between the parties at that time, which is best evidenced by [the offeror's] proposal (and anything submitted therewith, including teaming agreements). Any assertions not in accord with the proposal and teaming agreements are, therefore, irrelevant.”). Here, although it would seem that Indigo attempted, on remand, to bring itself into compliance with the ostensible subcontractor rule, such changes in approach occurred after December 23, 2019, the date to determine size, and are inconsistent with

Indigo's proposal. The Area Office therefore clearly erred in basing its decision on Indigo's remand submission of June 4, 2020, rather than Indigo's actual proposal of December 23, 2019.

IV. Conclusion

Based on Indigo's proposal of December 23, 2019, [Subcontractor], not Indigo, will perform the primary and vital contract requirements. Accordingly, the appeal is GRANTED and Size Determination No. 3-2020-060 is REVERSED to that extent.

Size Determination No. 3-2020-060 did not, however, specifically address whether Indigo and [Subcontractor] are similarly-situated entities, or whether the combined receipts of Indigo and [Subcontractor] exceed the \$39.5 million size standard applicable to the instant procurement. Section II.E, *supra*. Nor does the record contain [Subcontractor's] tax returns or other information sufficient for OHA to resolve these questions. I therefore REMAND this case to the Area Office, solely for the purpose of assessing whether Indigo and [Subcontractor] are similarly-situated entities, and if not, whether the combined receipts of Indigo and [Subcontractor] exceed the \$39.5 million size standard.

KENNETH M. HYDE  
Administrative Judge