

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

SIZE Appeal of:

Kupono Government Services, LLC,

Appellant,

Re: Eagle Harbor, LLC

Appealed from

Size Determinations Nos. 06-2023-010,  
06-2024-047

SBA No. SIZ-6349

Decided: April 11, 2025

APPEARANCES

Robert K. Tompkins, Esq., Hillary J. Freund, Esq., Kelsey M. Hayes, Esq., Richard Ariel, Esq., Holland & Knight LLP, Washington, D.C., for Appellant

James Y. Boland, Esq., Caleb E. McCallum, Esq., Venable LLP, Tysons, Virginia, for Eagle Harbor, LLC

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

This appeal arises from two size determinations in which the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) concluded that Eagle Harbor, LLC (Eagle Harbor) is not in violation of the “ostensible subcontractor” rule, 13 C.F.R. § 121.103(h)(3), for the subject procurement.

On January 30, 2023, the Area Office issued the first of the size determinations, No. 06-2023-010, finding that Eagle Harbor is a small business. Kupono Government Services, LLC (Appellant), which had previously protested Eagle Harbor's size, appealed to SBA's Office of Hearings and Appeals (OHA). While that appeal was pending, the procuring agency undertook corrective action on the procurement, resulting in the submission of revised proposals. OHA

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<sup>1</sup> This decision was originally issued under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

therefore remanded the matter to the Area Office to re-examine the question of Eagle Harbor's compliance with the ostensible subcontractor rule in light of the revised proposals. *Size Appeal of Kuponov Gov't Servs., LLC*, SBA No. SIZ-6299 (2024).

On September 26, 2024, the Area Office issued the second size determination, No. 06-2024-047, again concluding that Eagle Harbor is not in violation of the ostensible subcontractor rule. Appellant again appealed to OHA, and asks that Size Determination No. 06-2024-047 be remanded or reversed. For the reasons discussed *infra*, the appeal is denied.

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 15 calendar days after receipt of Size Determination No. 06-2024-047, 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 September 15, 2020, the U.S. Department of Energy (DOE) issued Request for Proposals (RFP) No. 89303020REA000003 for “management and operations of the National Training Center (NTC)” in Albuquerque, New Mexico. (RFP, Cover Letter at 1.) The Contracting Officer (CO) set aside the procurement entirely for 8(a) program participants, and assigned North American Industry Classification System (NAICS) code 611519, Other Technical and Trade Schools, which at that time had a corresponding size standard of \$16.5 million average annual receipts. Initial offers were due November 18, 2020, and final proposal revisions, submitted during the corrective action, were due August 25, 2023.

According to the RFP, DOE “has a requirement to secure management services to support the operations and maintenance of the NTC in Albuquerque, NM, and acquire training and management services to support [NTC's] training and oversight mission.” (RFP at 2.) “[M]anagement support includes overseeing[,] developing, providing and supporting safety and security classroom and on-line training at the NTC and other locations, managing training programs, providing cyber-security and information technology support for the NTC as well as at DOE Headquarters in Washington, D.C., and maintaining the facilities and grounds.” (RFP, Cover Letter at 1.) Work will be performed in government facilities at the NTC, housed within Kirtland Air Force Base. (RFP at 9.)

The RFP stated that DOE intended to award a single indefinite-delivery / indefinite-quantity (ID/IQ) contract, with a period of performance of 120 months. (RFP, Cover Letter at 1.) Appellant is the incumbent on the predecessor contract. (*Id.*)

The RFP divided the required work into three Contract Line Item Numbers (CLINs):

CLIN 1000 NTC Management, Operations and Training;

CLIN 2000 Strategic Partnerships; and

## CLIN 3000 Custodial Services and Grounds Maintenance.

(RFP at 4-5.) The RFP estimated that CLIN 1000 would include “Other Direct Costs/Travel” in the amount of \$49.5 million. (*Id.*)

The RFP instructed that offerors submit a staffing plan for performing the contract, which “**shall match exactly with the staffing proposed in CLIN 1000.**” (RFP at 92-93 (emphasis in original).) Offerors were instructed to propose a General Manager as key personnel. (*Id.* at 93.) The General Manager “will be the Contractor's authorized supervisor for technical and administrative performance of all work hereunder.” (*Id.* at 10.) For pricing purposes, the RFP stated that offerors must utilize a “Cost/Price Matrix” included with the RFP at Attachment F. (*Id.* at 96.)

According to the RFP's Performance Work Statement (PWS), the purpose of the procurement is to obtain “facilities operations, professional and technical training, information technology, and management support.” (PWS at 1.) The contractor will provide “management services to support and oversee the operations and maintenance of the NTC,” and “training and management services to support NTC's training and oversight mission.” (*Id.* at 2.) To perform the contract, the contractor must “recruit and maintain an instructional design staff and instructors, as well as information technology, business, management, and support operations staffs that are technically proficient in their respective areas of expertise.” (*Id.*)

The PWS divided CLIN 1000, NTC Management, Operations and Training, into five task areas: Training; Training Support; Facilities; Management Support; and Information Technology. (*Id.* at 4-17.) The PWS indicated that all task areas “are vital and essential to the successful management and operation of the NTC.” (*Id.* at 2.)

Under the Training task area, the contractor will “plan and manage the NTC Facilities, Operations and Training Program (i.e. analyze, design, develop, deliver, evaluate, revise and retire training).” (*Id.* at 4.) The contractor also will “support collaborative Departmental training course development and consistency initiatives to aid in promoting greater efficiency and consistency in training across DOE.” (*Id.*) The contractor will deliver training through various means, including in-person, instructor-led, and distance learning, which may include remote live instruction or be asynchronous. (*Id.*)

For the Training Support task area, the contractor will “operate and manage the systems and programs required to support training at the NTC,” including “Training Certification Programs” and the “DOE Enterprise Learning Management System (LMS).” (*Id.* at 7.) Under the Facilities task area, the contractor will “provide effective and efficient management, maintenance and oversight of facilities, maintenance, property, site safety, site security, and logistical support required to support NTC operations.” (*Id.* at 10.) The Management Support task area requires “a full range of management support functions,” including but not limited to:

- Financial Accounting System
- Management Assurance System
- Project Management
- Personal Property
- Fleet Management
- Work Processes
- Records Management

(*Id.* at 11-12.) Under the Information Technology task area, the contractor also will “manage and operate all NTC Information Technology (IT) systems in compliance with applicable requirements in order to ensure effective system implementation, integration, and protection.”

(*Id.* at 14.)

Under CLIN 2000, Strategic Partnerships, the PWS stated that the contractor will “provide specialized training support and other services within NTC's capability profile for other DOE organizations and [other government agencies] as directed.” (*Id.* at 18.) Furthermore, the contractor will plan and manage DOE contractor procurement professional training to ensure the technical proficiency necessary to maintain a qualified workforce. (*Id.*) Lastly, under CLIN 3000, Custodial Services and Grounds Maintenance, the contractor will “furnish all management, supervision, materials, supplies and equipment to [[ensure] that custodial services shall be done in accordance with the schedule provided by the NTC.” (*Id.* at 19.)

The RFP stated that DOE would evaluate proposals based on five evaluation factors: (1) Technical Approach, including “[t]he offeror's technical capability, capacity, and approach to successfully fulfill the objectives of the PWS”; (2) Staffing Plan, including the offeror's “approach to ensuring that an adequate workforce is available with the appropriate skills and qualifications necessary to accomplish the objectives of the PWS,” as well as the qualifications of the proposed General Manager; (3) Business Management Approach, including “[t]he alignment of the proposed organization with the proposed technical approach”; (4) Past Performance; and (5) Price. (RFP at 105-108).

## B. Protest

On December 30, 2022, Appellant filed a size protest with the CO challenging Eagle Harbor's size and compliance with the “ostensible subcontractor” rule. The CO forwarded the protest to the Area Office for review. In his referral letter, the CO expressed the view that “[t]he purpose of this contract is to provide operational and maintenance support for the DOE's National Training Center in Albuquerque, New Mexico.” (Letter from R. Miller to E. Sanchez (Jan. 4, 2023), at 1.)

In the protest, Appellant alleged that Eagle Harbor lacks the capacity, resources, and experience to perform the primary and vital contract requirements. (Protest at 2.) Appellant maintained that Eagle Harbor “has no management support services experience,” lacks “substantial management expertise,” and that publicly-available information reflects that Eagle Harbor has never previously received an award under NAICS code 611519, nor previously performed a contract for DOE. (*Id.* at 3, 5.)

Appellant observed that Eagle Harbor's primary NAICS code is identified as 518210, Computing Infrastructure Providers, Data Processing, Web Hosting, and Related Services. (*Id.* at 3.) Appellant claimed that apart from four multiple-award IDIQ contracts, Eagle Harbor was awarded only three other contracts in 2020, all of which fell under NAICS code 541330, Engineering Services. (*Id.* at 7.) In Appellant's view, Eagle Harbor must intend to utilize a subcontractor to meet the primary and vital contract requirements. (*Id.*) In particular, the RFP included "very specific" parameters on the types of past performance examples an offeror could submit. (*Id.*) Additionally, with respect to the proposed prime contractor, the RFP stipulated that the "offeror shall provide information on its record of relevant past performance on work similar in scope, size, and complexity to that described in the PWS." (*Id.*) The RFP also expressly required that the offeror "***shall provide past performance information on 3 contracts.***" (*Id.* at 8, emphasis Appellant's.)

Appellant maintained that Eagle Harbor has no relevant past performance, let alone three or more such contracts, and that Eagle Harbor also did not have "***at least two years completed***" on any contract at the time initial proposals were due on November 18, 2020. (*Id.*, emphasis Appellant's.) Appellant asserted that given Eagle Harbor's own inexperience, Eagle Harbor must be relying on a subcontractor's past performance, in order to have achieved an evaluation rating of "Favorable." (*Id.*) Appellant noted that the RFP stipulated that if an offeror did not have a record of relevant past performance, it would be rated "neither favorable nor unfavorably." (*Id.* at 9.) Moreover, Appellant continued, publicly-available information further demonstrates that Eagle Harbor must be utilizing a subcontractor. (*Id.*) In a series of Frequently Asked Questions (FAQs) on Eagle Harbor's website, Appellant pointed to the question "*Why do I need to apply for a job if I want to stay in the same position?*," to which Eagle Harbor responded that "*To continue supporting our customers in your current position, you'll first need to become an employee of either the company or subcontractor that won the contract.*" (*Id.*, emphasis Appellant's.)

Lastly, Appellant contended that Eagle Harbor had prime contracts valued at \$16,675,000 in FY 2019 and \$18,598,302 in FY 2020. (*Id.* at 10.) At the time offers were due in November 2020, Eagle Harbor had been in business approximately 164 weeks. (*Id.*) As a result, Eagle Harbor's average annual receipts were at \$11,189,504. (*Id.*) Eagle Harbor alone therefore is likely close to the applicable size standard of \$16.5 million, even without considering the size of subcontractors. (*Id.*)

Appellant reiterated that because Eagle Harbor apparently had no contracts that met the two years of completed performance requirement under the RFP, Eagle Harbor must have been relying on its subcontractor to meet this requirement. (*Id.*) Moreover, for the subcontractor's work to have been worthy of a "Favorable" past performance rating, the subcontractor must have adduced multiple examples of relevant work. (*Id.*) Additionally, the proposed General Manager must have experience managing a contract with similar size, scope, and complexity of at least \$10 million per year, which again Eagle Harbor does not have, again connoting that Eagle Harbor must be relying on a subcontractor for this requirement. Appellant alleged that, when combined, the average annual receipts of Eagle Harbor and its subcontractor will exceed the \$16.5 million size standard applicable to the procurement.

C. Size Determination No. 06-2023-010

On January 30, 2023, the Area Office issued Size Determination No. 06-2023-010, concluding that Eagle Harbor is an eligible small business for the subject procurement. The Area Office found that Eagle Harbor ultimately is owned and controlled by an Alaska Native Corporation (ANC), and that Eagle Harbor, by itself, is small.<sup>2</sup> (Size Determination at 3-5.) The Area Office further found that Eagle Harbor is not in violation of the ostensible subcontractor rule. (*Id.* at 5-13.) The Area Office based this latter portion of its decision on Eagle Harbor's revised proposal dated April 1, 2022. (*Id.* at 8, 10.)

The Area Office first noted that Appellant's protest alleged that Eagle Harbor is a relatively new entity that will be reliant upon a subcontractor to perform the procurement. (*Id.* at 2.) In response to the protest, Eagle Harbor acknowledged that its primary industry is in NAICS code 518210, Computing Infrastructure Providers, Data Processing, Web Hosting, and Related Services. (*Id.* at 3.) The Area Office explained that in order to properly assess the existence of an ostensible subcontractor relationship, it must review the contents of the RFP and the proposal submitted by Eagle Harbor on the procurement. (*Id.* at 5.)

The Area Office found that, according to the PWS, the purpose of this contract is to “provide for the management and oversight of [the NTC's] facilities operations, professional and technical training, and information technology.” (*Id.*) In the Area Office's view, “the primary and vital functions of the procurement are: providing management services and oversight duties to support and oversee the training operations and maintenance” at the NTC. (*Id.* at 8.)

Team Eagle Harbor” as a collaboration between itself, as the prime contractor, and two subcontractors, Amentum Services, Inc. (Amentum, through its wholly-owned subsidiary PAE National Security Solutions, LLC) and IB3 Global Solutions (IB3). (*Id.*) Eagle Harbor, the proposed prime contractor, is described in the proposal as having a strong background in professional training, facilities operations, information technology, and management support services. (*Id.*) Amentum, a large business, brings over 65 years of experience in providing technical services and national security solutions to the federal government. (*Id.*) IB3, a veteran-owned small business but not an 8(a) participant, has expertise developing training programs in the deterrence, detection, and investigation of smuggling nuclear and radioactive materials outside of regulatory control. (*Id.*) The Area Office noted that the word “team” is used

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<sup>2</sup> In its original appeal, Appellant contested only the Area Office's determination that Eagle Harbor is compliant with the ostensible subcontractor rule. Because Appellant did not challenge any other aspects of the Area Office's decision, they therefore became final. *E.g.*, *Size Appeal of Env't Restoration, LLC*, SBA No. SIZ-5395, at 6 (2012) (when issue is not appealed, the area office's determination “remains the final decision of the SBA.”). Following corrective action, OHA remanded the ostensible subcontractor question to the Area Office for further review, but otherwise affirmed Size Determination No. 06-2023-010. *Size Appeal of Kuponov Gov't Servs., LLC*, SBA No. SIZ-6299, at 3 (2024). Accordingly, only the portion of Size Determination No. 06-2023-010 pertaining to the ostensible subcontractor rule is relevant to the instant proceedings.

throughout the proposal to refer to Eagle Harbor and its subcontractors collectively, “giving the reader the sense that all three companies are one and the same.” (*Id.*)

The Area Office found that the proposed General Manager, Mr. Mark Russell, is not employed by any of the three companies. (*Id.*) However, Eagle Harbor submitted a letter of intent from Mr. Russell reflecting that, should Eagle Harbor be awarded the contract, he would become an Eagle Harbor employee and fill the position of General Manager. (*Id.*) Mr. Russell's resume indicates that he previously “held the position as the General Manager at the DOE NTC for over 6 years. He has over 20 years of professional business experience including 10 years in technical and management positions. He has managed multi-million-dollar budgets with a staff of over 200. Mr. Russell holds a letter of Academic Title as an Adjunct Professor with a Q Level Clearance.” (*Id.*)

The Area Office found that, according to Eagle Harbor's proposal, Mr. Russell, as General Manager, will be Eagle Harbor's representative responsible for all activities conducted at the NTC, as well as the authorized supervisor for technical and administrative performance. (*Id.*) Mr. Russell will be responsible for coordinating contractor activities effectively among government clients, students, and staff. (*Id.*) Furthermore, Mr. Russell would be given “complete decision-making authority on all transition matters” and would be provided with “all necessary corporate support.” (*Id.*) Mr. Russell would also oversee quality assurance, training, management support, facilities, security, and information technology. (*Id.* at 9.)

To staff the contract, Eagle Harbor will provide its own personnel and intends to hire many incumbent employees that are in good standing and meet or exceed DOE requirements. (*Id.*) The Area Office found that the bulk of the required work falls under CLIN 1000. (*Id.*) Based on the proposal, Eagle Harbor, along with its subcontractors, will perform “training topical areas, DOE Enterprise Learning/Development Training, Training, Planning and Management, Document Risk Assessments for Training Operations, Training Evaluation Program, Training Certification Program, Registration, and Federal Qualification Program Support, among other objective categories.” (*Id.*) The subcontractors, but not Eagle Harbor, will be responsible for “Protective Force Training, Safeguards and Security, Nuclear Safety Training, and eLearning.” (*Id.*) Eagle Harbor and Amentum will be “involved in the remaining facilities, management and support, and information technology support performance objectives.” (*Id.*) The Area Office found that Eagle Harbor and Amentum will also work on CLIN 2000, which deals with Strategic Partnership Projects and in which Eagle Harbor will work on DOE Contractor Acquisition University (CAU), training development for strategic partners, and DOE learning nucleus support desk. (*Id.*) Lastly, Eagle Harbor and Amentum will perform CLIN 3000 which requires the upkeep of custodial services and grounds maintenance. (*Id.*)

The Area Office noted that Eagle Harbor “mention[ed] quality control procedures” throughout its proposal but did not distinguish which entities would perform such measures. (*Id.*) For past performance, Eagle Harbor identified four training services projects for federal agencies. (*Id.*) The Area Office found that “[t]he past experience provided by Eagle Harbor covers training, training support, facilities, management support, and information technology.” (*Id.*) Past performance was also provided for Eagle Harbor's two proposed subcontractors. (*Id.*) The Area Office found that the Price proposal also reflected that Eagle Harbor “would be

performing, with its own employees, at all levels of the contract, including CLIN 1000, CLIN 2000 and CLIN 3000 activities.” (*Id.*)

The Area Office reiterated that “the primary and vital functions of the procurement are: providing management services to support and oversee the training operations and maintenance of the NTC.” (*Id.* at 10-11.) Because the contractor’s work will be “mainly a management function that would ensure the most effective training staff, technology, and support operations at NTC,” the “most important role” for the contract is that of the General Manager. (*Id.* at 11.) Eagle Harbor provided a commitment letter from Mr. Russell, an individual who had previously held the position of General Manager at NTC for over six years. (*Id.*)

The Area Office found that Eagle Harbor’s Price proposal dated April 1, 2022, combined with its Technical proposal, “confirms that employees of [Eagle Harbor] would be providing management services and oversight duties to support and oversee the training operations and maintenance at the DOE’s NTC.” (*Id.*) As such, Eagle Harbor will perform the primary and vital contract requirements. (*Id.*)

The Area Office considered whether Eagle Harbor will be unduly reliant upon its subcontractors, using the four-factor test outlined by OHA in *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716 (2016). Here, neither of the proposed subcontractors is the incumbent contractor, so the first factor is not met. (*Id.* at 11-12.) Furthermore, as an 8(a) participant, Eagle Harbor is eligible to compete for this procurement in its own name. (*Id.* at 12.) The second factor does not apply because Eagle Harbor has its own staff to perform the contract, and will hire additional staff, including Mr. Russell and some of the incumbent staff, but will not be reliant upon its subcontractors for labor. (*Id.*) Likewise, Eagle Harbor’s proposed management, particularly Mr. Russell, have not served with the subcontractors or with the incumbent contractor. (*Id.*) Therefore, the third factor also does not apply. (*Id.*) Lastly, Eagle Harbor has been in operation since 2017, and according to its proposal, the company has performed at least four government contracts. (*Id.*) Eagle Harbor also showed that it has past experience that includes training, training support, facilities, management support, and information technology with several federal agencies. (*Id.* at 13.) Eagle Harbor thus did not rely solely on the experience of its two subcontractors to win the contract.

#### D. Prior OHA Proceedings

On February 14, 2023, Appellant appealed Size Determination No. 06-2023-010 to OHA. The appeal challenged only Eagle Harbor’s compliance with the ostensible subcontractor rule. (Appeal at 1-2.) On February 28, 2023, while the appeal was pending, the parties informed OHA that DOE would undertake corrective action on the procurement in response to a bid protest at the U.S. Government Accountability Office (GAO). On March 1, 2023, in the interest of judicial economy, OHA stayed the appeal pending the outcome of corrective action.

On July 19, 2024, the CO notified OHA that corrective action had been completed, and that Eagle Harbor remained the apparent awardee. On July 25, 2024, OHA remanded the question of Eagle Harbor’s compliance with the ostensible subcontractor rule to the Area Office for a new size determination. *Size Appeal of Kupono Gov’t Servs., LLC*, SBA No. SIZ-6299 (2024). OHA



explained that remand was warranted because DOE permitted offerors to revise their proposals as part of corrective action, but the Area Office had not yet been able to review the most current version of Eagle Harbor's proposal, which did not exist at the time Size Determination No. 06-2023-010 was issued. *Id.* at 3. OHA otherwise affirmed Size Determination No. 06-2023-010. *Id.*

#### E. Eagle Harbor's Proposal

On remand, the Area Office obtained a copy of Eagle Harbor's most current proposal. As part of corrective action, Eagle Harbor submitted a revised Price volume on August 25, 2023. Eagle Harbor did not revise the Technical volume of its proposal during corrective action.

Eagle Harbor's proposal identified itself as the proposed prime contractor and Amentum and IB3 as proposed subcontractors. (Proposal, Vol II. at 1.) The proposal referred to the three companies collectively as “Team Eagle Harbor.” (*Id.*) Eagle Harbor named Mr. Russell as its proposed General Manager. (*Id.*) The proposal explained that “Team Eagle Harbor is experienced in all aspects of training management including but not limited to accreditation and certification support, LMS and related database use and administration, and multimedia operations in furtherance of courses.” (*Id.* at 24.) Additionally, “[w]e have managed training facilities, live fire ranges and delivered training support covering the entire spectrum of the learning areas required by the NTC.” (*Id.*)

According to the proposal, “[f]ive major functional areas report to the [[General Manager]: Security, Information Technology, Management Support, Facilities, and Training.” (*Id.* at 68.) Each of the five functional areas will be headed by a manager subordinate to Mr. Russell. (*Id.* at 67-69.) The proposal stated that Mr. Russell, as General Manager, “has full authority to conduct all contractor management related duties at the NTC including: planning, organizing, staffing, directing, coordinating, reporting, and budgeting.” (*Id.* at 68.)

The Real Property & Facilities Manager “ensur[es] all facilities are properly managed and maintained” and is “[r]esponsible for the performance of all PWS 1.3 activities” as well as “all CLIN 3 activities.” (*Id.* at 69.) The Business Department Manager prepares annual budgets, manages procurement, and is “[r]esponsible for the performance of all PWS 1.4 activities.” (*Id.*) The IT Department Manager “[l]eads the team of network and system engineers,” has “[a]uthority to develop requirements, outlines, budgets and schedules for all information technology projects,” and is “[r]esponsible for the performance of all PWS 1.5 activities.” (*Id.*) The Director of Training “[m]anages the design, effectiveness and integration of the processes of the NTC's training operations, including system design, learning management system, course registration, training needs assessment, and eLearning technology,” and is “[r]esponsible for the performance of all PWS 2.0 activities.” (*Id.*) The Contract Security Officer “[l]eads the implementation of all security processes” and “[h]as full authority and oversi[ght] of the entire security force and control program.” (*Id.* at 68.) The proposal stated that the Contract Security Officer will be an Amentum employee. (*Id.* at 67.) The remaining managers, including Mr. Russell, will be employees of Eagle Harbor. (*Id.*)

Eagle Harbor's revised Price proposal stated that “Eagle Harbor as a certified 8(a) contractor is required to perform a minimum of 50% of the work on this effort. As such, Eagle

Harbor has ensured that when all CLINs are combined, Eagle Harbor shall meet this requirement.” (Proposal, Vol. III at 23.) The proposal included a table summarizing the proposed “division of workshare” between Eagle Harbor and its subcontractors:

<b>CLIN Number</b>	<b>Eagle Harbor</b>	<b>Amentum &amp; IB3</b>	<b>CLIN Total</b>
CLIN 1000	[\$XXXX]	[\$XXXX]	[\$XXXX]
CLIN 2000	[\$XXXX]	[\$XXXX]	[\$XXXX]
CLIN 3000	[\$XXXX]	[\$XXXX]	[\$XXXX]
Total	[\$XXXX]	[\$XXXX]	[\$XXXX]
<b>Total Workshare</b>	<b>51%</b>	<b>49%</b>	<b>100%</b>

(*Id.*)

The proposal included a table confirming that, for CLIN 1000, “the number of [[labor] hours being performed by the prime exceeds the 50% requirement.” (*Id.*)

<b>CLIN Number</b>	<b>Eagle Harbor Hours</b>	<b>[Amentum] &amp; IB3 Hours</b>	<b>Total Hours</b>
CLIN 1000	1,590,400.00	1,515,400.00	3,105,800.00
<b>Total Workshare</b>	<b>51%</b>	<b>49%</b>	<b>100%</b>

(*Id.*) In support, Eagle Harbor provided a detailed breakdown for CLIN 1000, by labor category, specifying whether each labor category will be filled by Eagle Harbor, Amentum, or IB3 personnel. (*Id.* at 1-3.)

#### F. Size Determination No. 06-2024-047

On September 26, 2024, the Area Office issued Size Determination No. 06-2024-047, again concluding that Eagle Harbor is not affiliated with its subcontractors under the ostensible subcontractor rule. The Area Office examined the issue based on Eagle Harbor's revised proposal, including the revised Price volume dated August 25, 2023. (Size Determination No. 06-2024-047, at 1-2.)

The Area Office highlighted that Eagle Harbor's proposal shows that the bulk of the required work falls under CLIN 1000. (*Id.* at 3.) Eagle Harbor, together with its proposed subcontractors Amentum and IB3, “intends to perform on performance objectives dealing with training topical areas, DOE Enterprise Learning/Development Training, Training, Planning and Management, Document Risk Assessments for Training Operations, Training Evaluation Program, Training Certification Program, Registration, and Federal Qualification Program Support.” (*Id.*) The subcontractors, but not Eagle Harbor, would perform “Protective Force Training, Safeguards and Security, Nuclear Safety Training, and eLearning.” (*Id.*) Eagle Harbor and Amentum would be involved in the remaining work under CLINs 2000 and 3000. (*Id.*) Furthermore, Eagle Harbor's Price proposal reflects that Eagle Harbor will be performing, “with its own employees, at all levels of the contract, including CLIN 1000, CLIN 2000 and CLIN 3000 activities.” (*Id.* at 4.)

The Area Office reiterated that the RFP was set-aside for 8(a) program participants, and Eagle Harbor is an 8(a) participant. (*Id.*) The two subcontractors, however, are not 8(a) participants and therefore are not “similarly situated entities” under SBA regulations. (*Id.*)

Lastly, the Area Office observed that, pursuant to 13 C.F.R. § 121.103(h)(3)(iii):

In the case of a contract or order set-aside or reserved for small business for services, specialty trade construction or supplies, SBA will find that a small business prime contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not small businesses, where the prime contractor can demonstrate that it, together with any subcontractors that qualify as small businesses, will meet the limitations on subcontracting provisions set forth in [13 C.F.R.] § 125.6[.]

(*Id.* at 5.) The instant procurement is for services, and based on a review of Eagle Harbor's Price proposal, the Area Office was persuaded that “the amounts being subcontracted out to [Eagle Harbor's] subcontractors fall below the 50% threshold established under 13 C.F.R. § 125.6(a)(1).” (*Id.*) As a result, under 13 C.F.R. § 121.103(h)(3)(iii), Eagle Harbor is compliant with the ostensible subcontractor rule. (*Id.*)

#### G. Appeal

On October 10, 2024, Appellant filed the instant appeal with OHA. Appellant, first, complains that, in Size Determination No. 06-2024-047, the Area Office did not identify or explain what it believes are the primary and vital contract requirements. (Appeal at 2.) Consequently, the record is devoid of any specific information or facts that support the Area Office's decision that Eagle Harbor would self-perform those requirements. (*Id.*) Instead, the Area Office merely asserts, in conclusory fashion, that “[Eagle Harbor] is performing the primary and vital requirements of the contract and is not unduly reliant on its subcontractors.” (*Id.* at 16, quoting Size Determination No. 06-2024-047, at 5.) Absent any analysis of the primary and vital requirements of the contract, the Area Office's determination is fundamentally flawed and should be reversed or remanded. (*Id.*)

Appellant observes that, in the first size determination, No. 06-2023-010, the Area Office found that the primary and vital requirements were management services. (*Id.* at 2.) This conclusion was incorrect, however, because “the primary and vital requirements of the contract are for training services.” (*Id.*) The Area Office failed, in both size determinations, to consider whether Eagle Harbor proposed and would obtain the workforce necessary to self-perform the primary and vital work, *i.e.* the training portion of the contract. (*Id.*)

According to Appellant, Eagle Harbor's proposal demonstrates unequivocally that, for most PWS Training requirements, Eagle Harbor will perform no portion of the work. (*Id.*) The proposal further makes clear that, of the limited work Eagle Harbor intends to perform under certain PWS Training requirements, “none of it relates to actual training,” but instead involves associated administrative and managerial services. (*Id.* at 3.) Moreover, the record shows that

Eagle Harbor's subcontractors will be performing the primary and vital requirements (*i.e.*, the actual training), thereby triggering ostensible subcontractor affiliation. (*Id.*)

Next, Appellant contends that the Area Office committed errors in identifying the “proportion of the total cost of training personnel” allocated to Eagle Harbor vis-à-vis its subcontractors. (*Id.*) Contrary to the Area Office's reasoning, the record shows that the subcontractors will receive the majority of the revenue associated with the primary and vital requirements. (*Id.*) The Area Office also neglected to explore other significant issues, such as the terms of any teaming arrangements and/or subcontracts between the companies. (*Id.*)

Appellant contends that, insofar as the Area Office determined that the primary and vital contract requirements are management services, the Area Office disregarded OHA precedent, which has recognized that “the primary and vital requirements for this exact work are training and the CLIN related to training.” (*Id.* at 14.) More specifically, in *Size Appeal of Kuponov Gov't Servs., LLC*, SBA No. SIZ-5967 (2018), OHA held that the Area Office reasonably determined that technical training was the principal purpose of a predecessor contract for similar work at the NTC. (*Id.* at 17-18.) In Appellant's view, the requirements of the instant procurement “are almost entirely the same as they previously were in the *Kuponov* case.” (*Id.* at 18.) Appellant maintains that the only notable difference between the procurements is that CLINs 1000 and 2000 in the prior procurement have been combined into a single CLIN 1000, “NTC Management, Operations and Training.” (*Id.*)

Appellant renews its claim that the RFP clearly states that the principal purpose of this procurement is training. (*Id.*) According to the PWS, the contractor will “support NTC's training and oversight mission.” (*Id.* at 19, quoting PWS at 2.) As in *Kuponov*, much of the RFP is devoted to discussing the specialized technical training that the contractor will develop and deliver. (*Id.*) Specifically, under the Training task area, the contractor will provide training development, delivery, and support in five program areas: (1) Protective Force Training; (2) Safeguards and Security (S&S) Training; (3) Nuclear Safety Training; (4) DOE Enterprise Learning and Development Training; and (5) eLearning. (*Id.*) The contractor additionally is responsible for “operat[ing] and manag[ing] the systems and programs required to support training at the NTC.” (*Id.*) Like in *Kuponov*, although the RFP also calls for the contractor to perform other support services, these other activities are ancillary and in support of the primary and vital requirements, *i.e.*, the training requirements. (*Id.*) Appellant observes that the NAICS code assigned to the procurement, 611519, Other Technical and Trade Schools, falls within NAICS subsector 611, Educational Services. (*Id.* at 20.) The assigned NAICS code thus reinforces that the primary purpose of this requirement is training. (*Id.*)

Appellant contends that, contrary to the Area Office's reasoning, the RFP does not support the notion that DOE primarily seeks to acquire management and oversight services. (*Id.*) OHA has consistently held that for services (as distinguished from construction contracts), the prime contractor does not perform the primary and vital requirements of a contract merely by supervising subcontractors in their performance of work. (*Id.* at 21.) Here, “Management Support” represents a small portion of the requirements in the PWS, and such tasks are incidental to the training services that DOE primarily seeks to acquire. (*Id.*) In fact, the “Management Support” task area under CLIN 1000 constitutes a mere 10% of the labor hours under that CLIN.

(*Id.*) Furthermore, similar services were required for the procurement at issue in *Kupono*, and OHA nevertheless found that the primary and vital requirements were for training. (*Id.*)

Appellant argues that, based on the Cost Matrix template provided as an attachment to the RFP, training represents the largest portion, over 50%, of contract labor hours under CLIN 1000. (*Id.*) The RFP also required offerors to provide a Staffing Plan for CLIN 1000. (*Id.*) As such, staffing under CLIN 1000 consisted largely of training positions, and was a significant factor in the evaluation of proposals, further demonstrating that training is the primary and vital portion of the work. (*Id.* at 21-22.)

Appellant alleges that the Area Office failed to conduct a substantive review of Eagle Harbor's proposal, including whether Eagle Harbor will self-perform the majority of the work. (*Id.* at 22.) Eagle Harbor's proposal, which is included in the Area Office file, confirms that Eagle Harbor's subcontractors, not Eagle Harbor, will perform the majority of the primary and vital contract requirements. (*Id.*)

**TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE**

(*Id.* at 23-24, quoting Proposal, Vol. II at 4-5.) According to the chart, Amentum (formerly PAE) is proposed to perform all of the Training (PWS 1.1) and Training Support (PWS 1.2) task areas of the PWS. (*Id.* at 24.) IB3 is proposed to perform eight out of nine of the PWS requirements for Training and five out of seven requirements for Training Support, or 13 out of 16 total requirements. (*Id.*) Eagle Harbor, though, is proposed to perform the fewest PWS requirements, with only portions of five out of nine for Training and three out of seven for Training Support. (*Id.*)

Furthermore, Eagle Harbor's Price proposal further delineates the labor categories for Training by team member. (*Id.* at 25.) The Price proposal reflects that Amentum and IB3 will fill “virtually all” of the Training labor categories, while Eagle Harbor has essentially none of them, even in those requirements where Eagle Harbor claims to have the capability to perform. (*Id.*) Appellant estimates that, for CLIN 1000, Amentum will perform 91,380 labor hours out of 170,340 hours for Training, or roughly 53.6% of the total labor hours for Training. (*Id.* at 25-26.) Additionally, IB3 will perform 60,160 labor hours out of the 170,340 labor hours for Training, meaning that approximately 35.3% of the total labor hours for Training will be performed by IB3. (*Id.* at 26-27.) Taken together, then, Amentum and IB3 are proposed to perform the overwhelming majority (151,540 hours, or 88.9%) of labor hours for Training. (*Id.* at 27.) Furthermore, according to Appellant, of the remaining 18,800 labor hours that Eagle Harbor will self-perform, the proposed labor categories relate predominantly to management and administration, not the actual training. (*Id.*) “This division of labor further shows that [[subcontractors] are doing the actual training (approximately, a combined 88.9% of the total labor hours for Training), the primary and vital requirements of the contract, while Eagle Harbor is doing essentially none.” (*Id.*)

Appellant contends that more detailed scrutiny of Eagle Harbor's proposal confirms that Eagle Harbor's subcontractors will perform the bulk of the actual training. (*Id.*) With respect to

PWS 1.1.1, Training Topical Areas and its five subareas, the proposed division of labor further reinforces that Eagle Harbor's subcontractors are performing the vast majority of the training. (*Id.* at 28.) Appellant argues that, according to Eagle Harbor's proposal, Eagle Harbor will perform no work at all under three of the Topical Areas (1.1.1.3, 1.1.1.4, and 1.1.1.5), “minimally” (12.4%) under Topical Area 1.1.1.2, and less than a majority (32%) under the remaining Topical Area (1.1.1.1). (*Id.* at 28-29.) Thus, under PWS 1.1.1, Eagle Harbor will only self-perform 13,160 labor hours out of 95,960, or 13.7%. (*Id.* at 29-30.) Meanwhile, Amentum, a large business, will perform 41,440 labor hours out of 95,960, or 43.2%, and IB3 will perform the remaining 41,360 labor hours, or 43.1%. (*Id.* at 30.) OHA should conclude that Eagle Harbor's subcontractors will perform the vast majority of the primary and vital requirements of the contract. (*Id.*)

Appellant contends that, although Size Determination No. 06-2024-047 failed to properly analyze the details of Eagle Harbor's proposal, the Area Office's comments suggest that it agrees that Eagle Harbor's role in the substantive training will be quite limited. (*Id.* at 31.) Furthermore, the size determination seemingly confirms that Eagle Harbor's subcontractors would be responsible for a large majority of the training. (*Id.* at 32.) Appellant reiterates that Eagle Harbor will not perform any work under three of the five Topical Areas (1.1.1.3, 1.1.1.4, and 1.1.1.5), minimal work (12.4%) under another Topical Area (1.1.1.2), and less than a majority (32%) of work under the remaining Topical Area (1.1.1.1). (*Id.*) In Appellant's view, “the Area Office erred in failing to consider at all the requisite question: who would perform the majority of the primary and vital services?” (*Id.* at 33.)

Appellant lastly argues that the Area Office erroneously determined Eagle Harbor will comply with limitations on subcontracting restrictions set forth at 13 C.F.R. § 125.6(a)(1). (*Id.* at 33-34.) Appellant maintains that the instant contract is a mixed procurement of supplies and services, with the supplies characterized as Other Direct Costs (ODCs). (*Id.* at 34.) Because the primary and vital requirements of the contract are services (*i.e.*, training), though, and because the RFP was assigned a services NAICS code, the Area Office should have excluded the supplies (ODCs) from its calculations. (*Id.*) While the size determination is sparse of detail, it “strongly appears” that the Area Office considered the entire contract value, including ODCs, and not just the services portions of the contract. (*Id.*) Further, Appellant posits, the Area Office was factually incorrect in concluding that Eagle Harbor will subcontract less than 50% of contract dollar value. (*Id.*) Eagle Harbor's proposal indicates that “Eagle Harbor's subcontractors are receiving more service revenue than Eagle Harbor” for CLIN 1000, and the disparity increases each year. (*Id.* at 34-35.) Additionally, the vast majority of Eagle Harbor's revenue under CLIN 1000 does not come from the Training labor categories, but rather from Facilities, Management Support, and Information Technologies. (*Id.* at 35.)

Appellant alleges that Size Determination No. 06-2024-047 contains no meaningful analysis of whether Eagle Harbor will self-perform the majority of the primary and vital work; instead, the size determination merely asserts, in conclusory fashion, that “the amounts being subcontracted out to [Eagle Harbor's] subcontractors fall below the 50% threshold.” (*Id.* at 36, quoting Size Determination No. 06-2024-047, at 5.) This is both a clear error of fact, as Eagle Harbor's subcontractors likely will receive more than 50% of the revenue for training services, and a clear error of law, as the Area Office improperly included ODCs in its calculations. (*Id.*)

Additionally, the Area Office failed to consider other important elements, including any teaming arrangements and/or subcontracts between Eagle Harbor and its subcontractors. (*Id.*) The RFP required offerors to provide teaming agreements or subcontracts between the proposed prime contractor and each entity proposed to perform work. (*Id.* at 37.) Nothing in the size determinations indicates that the Area Office obtained or reviewed any such agreements in reaching its decision. (*Id.*)

#### H. Eagle Harbor's Response

On October 30, 2024, Eagle Harbor responded to the appeal. Eagle Harbor argues that Appellant has not demonstrated clear error in the size determinations. (Response at 2.) The appeal should therefore be denied.

Eagle Harbor contends that, in its protest filed December 30, 2022, Appellant “took the position that the primary and vital requirements were management support services.” (*Id.*) The Area Office agreed with Appellant on this point, yet denied the protest because Eagle Harbor, the proposed prime contractor, will self-perform such work. (*Id.*) On appeal, Appellant has “completely changed its position,” now arguing that the primary and vital requirements are training services. (*Id.*) In Eagle Harbor's view, although training does constitute “the largest portion of [labor] hours among numerous requirements,” Eagle Harbor will “**manage and supervise** the training along with the management and operation of the entire NTC, thus fulfilling the most important and vital role of the contract.” (*Id.* (emphasis Eagle Harbor's).) DOE does not merely seek trainers, but rather “a single contractor to run the entire NTC, from managing physical operations and information technology needs, to grounds maintenance and the training that takes place at the center.” (*Id.*) Since Eagle Harbor will perform the most important and core aspects of the overall contract, it is not affiliated with its two subcontractors. (*Id.*)

To Eagle Harbor, the Area Office's conclusion is also supported by the fact that Eagle Harbor will receive the majority of revenue under the contract in compliance with limitation on subcontracting restrictions, which, under 13 C.F.R. § 121.103(h)(3)(iii), “**automatically** means Eagle Harbor is performing the primary and vital requirements.” (*Id.* at 2-3 (emphasis Eagle Harbor's).) Size Determination No. 06-2024-047 rests largely on this “safe harbor” regulation, which offers a streamlined basis for testing compliance with the ostensible subcontractor rule. (*Id.* at 3.) The instant appeal fails to address the regulation and thus does not properly contest the Area Office's reliance upon it to find that Eagle Harbor will self-perform the primary and vital requirements. (*Id.*) As this issue is dispositive, Eagle Harbor urges that OHA “need only confirm that Eagle Harbor will receive 50% or more of the revenue under the contract to affirm the Area Office's size determination.” (*Id.*)

Eagle Harbor maintains that Appellant unfairly attacks Size Determination No. 06-2024-047 on the grounds that the Area Office did not first recite which requirements constitute the principal purpose of the acquisition. (*Id.* at 10.) Appellant, though, ignores the earlier size determination, No. 06-2023-010, as well as the scope of OHA's remand. (*Id.*) In particular, OHA remanded Size Determination No. 06-2023-010 to the Area Office because DOE undertook corrective action on the procurement and permitted offerors to update their proposals. (*Id.* at 11.)

The remand thus was limited “solely to the question of Eagle Harbor's compliance with the ostensible subcontractor rule,” and OHA specified that Size Determination No. 06-2023-010 was otherwise affirmed. (*Id.*, citing *Kupono*, SBA No. SIZ-6299, at 3.)

Accordingly, Size Determination No. 06-2024-047 did not arise from a new solicitation, nor did Appellant file a new size protest. (*Id.*) Rather, Size Determination No. 06-2024-047 was based on the original size protest and resulted solely from OHA's remand order, which in turn stemmed solely from updates to the proposals — not because DOE had amended the RFP or had started a new procurement. (*Id.*) OHA's remand did not relate to, and did not disturb, the Area Office's analysis of the principal purpose of the procurement in Size Determination No. 06-2023-010. (*Id.*) Size Determination No. 06-2024-047 is therefore properly viewed as “a supplemental decision adding to and otherwise affirming the Area Office's original analysis,” including its determination that the principal purpose of this contract is management. (*Id.*) The two size determinations, together, resolve Appellant's December 30, 2022, size protest — the only size protest filed. (*Id.*) Appellant itself appears to recognize this point, as much of the instant appeal assumes that the Area Office relied on the earlier Size Determination No. 06-2023-010. (*Id.*)

Eagle Harbor contends that Appellant has not satisfied its high burden of showing that the Area Office erred in determining the principal purpose of the contract. (*Id.*) The Area Office concurred with Appellant's own argument in its size protest that the principal purpose of the contract is management and operation of the NTC. (*Id.* at 12.) On appeal, having now discovered that “Eagle Harbor will perform the core management functions of the contract,” Appellant disavows its earlier position, instead arguing that “the primary and vital requirements are really the training services that take place at the NTC, which Eagle Harbor will manage and supervise.” (*Id.*) OHA should reject Appellant's “contradictory and opportunistic argument.” (*Id.*)

Eagle Harbor contends that CLIN 1000 accounts for [a large majority] of the contract's total dollar value. (*Id.* at 13.) Each of the task areas under CLIN 1000 is focused on management and operation of the NTC, to include “management of the underlying training that the contractor must furnish at the NTC.” (*Id.*) Therefore, management and operations, including planning and management of the training program, represent the principal purpose of the contract, as the Area Office correctly recognized. (*Id.*) While training services are an important part of the overall effort, this is not a training contract — DOE's paramount goal is to obtain “a contractor to manage and operate the NTC.” (*Id.*) Were this a training contract, as Appellant argues, DOE could simply have solicited contractors to perform the training. (*Id.* at 13-14.)

Eagle Harbor maintains that the Area Office correctly determined based on its review of the tasks set forth in the PWS that “the primary and vital functions of the procurement are[] providing management services and oversight duties to support and oversee the training operations and maintenance at the DOE's NTC.” (*Id.* at 14, quoting Size Determination No. 06-2023-010 at 8.) The appeal fails to identify sufficient error to warrant reversal or remand. (*Id.*) Appellant argues on appeal that, in *Size Appeal of Kupono Gov't Servs., LLC*, SBA No. SIZ-5967 (2018), OHA determined that “the primary and vital portion of the work under this exact requirement is training.” (*Id.*) Appellant, though, is incorrect that the instant procurement is fundamentally identical to the one at issue in *Kupono*. (*Id.*)



In *Kupono*, the solicitation stated that the procurement's "overall objective [is] to acquire a contractor to support the mission of the [NTC]," which OHA found to be training. (*Id.*) Conversely, the RFP here identified the services to be provided as "[o]perations and maintenance of the NTC in Albuquerque, NM" and specified that DOE "has a requirement to secure management services to support the operations and maintenance of the NTC . . . and acquire training and management services to support NTC's training and oversight mission." (*Id.*, quoting PWS at 2.) The underlying purpose and scope of the procurements are therefore not the same. (*Id.* at 15.) Whereas *Kupono* reveals that the earlier procurement was focused on training, the RFP here made clear that management and operations of the entire NTC is the principal purpose. (*Id.*) Furthermore, the CLIN structures of the two procurements are materially different. (*Id.*) In the *Kupono* procurement, the solicitation divided the contract requirements into four CLINs, while in this case there are only three CLINs, with the large majority of the contract dollar value being associated with CLIN 1000, "NTC Management, Operations, and Training." (*Id.*) The different CLIN structures further undermines Appellant's claim that the subject procurement is the "exact requirement" at issue in *Kupono*. (*Id.*)

Eagle Harbor argues that, although more pages of the PWS may be devoted to discussing the training aspects of the requirement, this does not establish that training is the primary and vital requirement. (*Id.* at 15-16.) Eagle Harbor reiterates that the determination should be made by reviewing the entire solicitation to determine the principal purpose of the procurement, which shows that the principal purpose here is to engage a contractor to comprehensively manage the NTC—key tasks that Eagle Harbor will self-perform. (*Id.* at 16.) Likewise, the mere fact that this procurement supports the NTC does not establish that the primary and vital requirements are training. (*Id.*) Otherwise, any contract for services at the NTC would automatically be deemed a training contract. (*Id.*) Here, DOE is acquiring the overall management and operation of the NTC. (*Id.*) It would be irrational to characterize the primary and vital requirements of the RFP as training when training is merely one part of, and organizationally beneath, the required management and supervision services. (*Id.*)

Eagle Harbor further argues that the CO's description of the purpose of this procurement contrasts with corresponding comments about the primary and vital requirements of the procurement in *Kupono*. (*Id.*) In *Kupono*, the CO, asked by the Area Office whether he agreed with the Area Office's opinion that "the technical training portion of CLIN 1000 [was] the primary and vital requirement of this contract," confirmed that he agreed. (*Id.*) Conversely, here, the CO stated in his cover letter transmitting Appellant's size protest to the Area Office that "[t]he purpose of this contract is to **provide operational and maintenance support** for the DOE's National Training Center in Albuquerque, New Mexico." (*Id.*, quoting Letter from R. Miller to E. Sanchez (Jan. 4, 2023), at 1 (emphasis added by Eagle Harbor).) Given the differences between the procurements, Appellant's claim that the Area Office "violated the precedent set in the *Kupono* case" must fail, as OHA's decision was based upon a different procurement with a different solicitation and different requirements. (*Id.* at 17.) Applying OHA's decision in *Kupono* would disregard the subject RFP and Eagle Harbor's proposal entirely. (*Id.*)

Eagle Harbor observes that Appellant did not mention the *Kupono* decision in its size protest, nor did Appellant introduce the *Kupono* contract into the record. (*Id.* at 18.) Indeed, Appellant initially urged the Area Office to find that the principal purpose of this contract is

“management support services,” not training as in *Kupono*. (*Id.*) If Appellant genuinely believed that the principal purpose of the instant contract was training or that the *Kupono* decision was controlling, Appellant could and should have said so in its initial size protest. (*Id.*) Furthermore, Appellant now makes the unsupported assertion that “[t]he only difference in the current procurement is the prior CLINs 1000 and 2000, [which] have been combined into the current CLIN 1000 ‘NTC Management, Operations and Training’”, but this factual allegation turns upon the *Kupono* contract itself, which is not in the record. (*Id.*) OHA should find that Appellant has long since waived its right to argue, and has failed to meet its evidentiary burden to prove, that the Area Office should have reached the same factual conclusions as in the *Kupono* decision. (*Id.* at 19.)

Eagle Harbor emphasizes that, as demonstrated in its proposal, Eagle Harbor will perform the majority of the direct labor hours under CLIN 1000:

**CLIN 1000 Task Area Hours Breakdown**

<b>CLIN 1000 TASK AREAS</b>		<b>Company</b>	<b>Total Labor Hours Per Year</b>	<b>Percentage</b>
<b>General and Training</b>	Eagle Harbor		20,680	12.1%
	Amentum		104,540	61.4%
	IB3		45,120	26.5%
	Total		170,340	100%
<b>Facilities</b>	Eagle Harbor		37,600	100%
	Amentum		0	0%
	IB3		0	0%
	Total		37,600	100%
<b>Management Support</b>	Eagle Harbor		35,720	100%
	Amentum		0	0%
	IB3		0	0%
	Total		35,720	100%
<b>Information Technology</b>	Eagle Harbor		65,040	97.2%
	Amentum		0	0%
	IB3		1,880	2.8%
	Total		66,920	100%

(*Id.* at 23-24, citing Proposal, Vol. III at 2-3.) The proposal thus reflects “that for two of the CLIN 1000 task areas—Facilities and Management Support—Eagle Harbor is performing 100% of the work and that for another task area—Information Technology—Eagle Harbor is performing 97.2% of the work.” (*Id.* at 24.) In short, Eagle Harbor “proposed to perform virtually all of three-fourths of the task areas in the contract’s predominant CLIN.” (*Id.*)

Furthermore, although Eagle Harbor proposed to self-perform only 12.1% of the labor hours for the Training and Training Support task areas under CLIN 1000, the particular roles in question “encompassed the most important positions including several critical management labor

categories, such as the General Manager (the sole key person), Director of Training, Protective Force Training Department Manager, Programs and Projects Manager, and Programs and Projects Coordinator, among others, whereas Amentum and IB3 would be primarily filling lower-level manager and training instructor positions.” (*Id.*)

Eagle Harbor concludes that it will do far more than “merely supervise Amentum and IB3 in their performance of the contract,” and instead “will perform meaningful work across all CLINs and task areas.” (*Id.* at 26.) OHA should uphold the Area Office's determination that Eagle Harbor will self-perform the majority of “the primary and vital requirements of the overall management and operation of the NTC.” (*Id.*)

### I. Supplemental Appeal

On October 31, 2024, after its counsel reviewed the Area Office file under the terms of an OHA protective order, Appellant supplemented its appeal. Appellant highlights that, as part of corrective action, Eagle Harbor did not revise its Technical proposal, nor did it change the labor hour split between Eagle Harbor and its subcontractors in its revised Price proposal. (Supp. Appeal at 2.) The only aspect of Eagle Harbor's Price proposal that changed were its rates. (*Id.*) The Area Office file also includes a September 26, 2024 e-mail in which Eagle Harbor claimed it will receive 51% of the total workshare. (*Id.*) In actuality, however, the record (*i.e.*, Eagle Harbor's proposal and its statements to the Area Office) demonstrates that Eagle Harbor will receive less than 50% of the revenue for not only CLIN 1000 but also for the entire contract, thus confirming that Eagle Harbor will not self-perform the primary and vital contract requirements and that an ostensible subcontractor affiliation exists. (*Id.*)

Appellant maintains that the Area Office erroneously determined that the amounts subcontracted under Eagle Harbor's revised Price proposal fall within the 50% threshold established under 13 C.F.R. § 125.6. (*Id.* at 3.) The Area Office offered no factual support for this conclusion, and Eagle Harbor's proposal is inconsistent with this point. (*Id.*) As this is a services contract, the proper analysis under SBA's regulations requires examination of whether the prime contractor will receive revenues in excess of 50% of the services portion of the contract. (*Id.* at 3-4.) The Area Office failed to properly apply § 125.6 in reaching its decision. (*Id.* at 4.)

Appellant renews its contention that the primary and vital requirements of the work are the Training requirements. (*Id.*) OHA precedent in *Kupono* and the RFP itself demonstrate that the primary and vital part of the procurement is training. (*Id.*) CLIN 1000 contains the training requirements. (*Id.*) The RFP's pricing model for CLIN 1000 specified the number of Direct Productive Labor Hours as 3,105,800 over the contract's ten-year duration. (*Id.*) CLIN 1000 additionally required offerors to utilize a “plug in” number for ODCs of \$49,500,000. (*Id.*) Eagle Harbor concedes that it will not self-perform the majority of CLIN 1000 labor nor receive a majority of the revenue under CLIN 1000. (*Id.*) Meanwhile, CLIN 2000 calls for undefined “Strategic Partnership Projects” and the RFP merely required all offerors to utilize a “plug in” number of \$22,700,000. (*Id.*) There were no Direct Productive Labor Hours associated with CLIN 2000; and thus no actual services are associated with CLIN 2000 in either the RFP or offerors' proposals. (*Id.* at 5.) Additionally, the RFP indicated that work that is “permanently

appropriated” under CLIN 2000 will be transferred to CLIN 1000, meaning that work awarded under CLIN 2000 may ultimately revert back to CLIN 1000, and presumably be performed primarily by Eagle Harbor's subcontractors. (*Id.*)

Appellant argues that although Eagle Harbor claims it will receive all CLIN 2000 revenue, this cannot be true. (*Id.*) According to Appellant, any “meaningful work” under CLIN 2000 will be transferred to CLIN 1000, and the large majority of CLIN 1000 work will be performed by Eagle Harbor's subcontractors, not Eagle Harbor. (*Id.*) Additionally, in its Technical proposal, Eagle Harbor made clear that the subcontractors will be involved in performing CLIN 2000:

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(*Id.*, quoting Proposal, Vol. II, at 5.) In discussing CLIN 2000, Eagle Harbor stated that “Team Eagle Harbor” will perform the CLIN 2000 requirements, rather than Eagle Harbor alone. (*Id.*) The Area Office therefore erred in attributing the CLIN 2000 revenue figures to Eagle Harbor. (*Id.* at 6.) The Area Office's consideration of CLIN 2000 revenue as belonging exclusively to Eagle Harbor represents error in another way as well. (*Id.*) Appellant reiterates that CLIN 2000 does not involve any actual Direct Productive Labor Hours, and the “plug-in” number does not necessarily reflect the provision of any actual services under the contract or how revenue associated with that work would be allocated among the members of Team Eagle Harbor. (*Id.*) Appellant urges that because CLIN 2000 does not call for any actual services, it should have been excluded from the calculations for purposes of determining compliance with § 125.6. (*Id.*)

With regard to CLIN 3000, Appellant contends that it calls for ancillary Custodial and Grounds Maintenance Services, which are not primary and vital requirements, and constitute only a small portion of the contract. (*Id.*) As a result, CLIN 1000 alone encompasses the primary and vital portion of the work (*i.e.*, the actual training services). (*Id.*) Additionally, only CLINs 1000 and 3000 call for services, and those two CLINs should have formed the basis for determining compliance with limitation on subcontracting requirements. (*Id.*) As discussed in Appellant's original appeal, Amentum and IB3 will be responsible for approximately 88.9% of the Training labor hours, and Eagle Harbor's limited Training hours largely involve management and administration. (*Id.* at 7.) Eagle Harbor's revised Price proposal confirms that during each year of the contract for CLIN 1000, Eagle Harbor's subcontractors will receive substantially more revenue than Eagle Harbor, and the difference grows over time. (*Id.*) According to Appellant, the revised proposal also confirms Appellant's argument that the vast majority of Eagle Harbor's revenue under CLIN 1000 does not come from Training labor categories, but rather from labor categories under Facilities, Management Support, and Information Technologies. (*Id.* at 8.)

Appellant alleges that Eagle Harbor admitted that it would not perform the majority of the services or receive the majority of revenue for the services portions of the contract. (*Id.*) Specifically, in response to an inquiry from the Area Office, Eagle Harbor noted that it will receive [less than 50]% of CLIN 1000 dollar value, while Amentum will receive [XX]% and IB3 [XX]%. (*Id.*, citing E-mail from R. Jones to E. Sanchez (Sept. 26, 2024).) The Area Office thus

factually erred when it failed to examine Eagle Harbor's revenue split, which shows Eagle Harbor's subcontractors taking substantially more than 50% of the services revenue under CLIN 1000. (*Id.*) Appellant claims that, while Eagle Harbor proposed to self-perform the entirety of CLIN 3000, the revenue associated with CLIN 3000 is merely \$[XXXX]. (*Id.*) Even crediting Eagle Harbor the CLIN 3000 revenue, it still would receive only \$[XXXX], far less than the \$[XXXX] that will flow to Eagle Harbor's non-similarly situated subcontractors for the actual services to be provided under this services contract. (*Id.*)

#### J. Supplemental Response

On February 12, 2025, Eagle Harbor supplemented its Response.<sup>3</sup> Eagle Harbor contends that, contrary to Appellant's allegations, there is no basis in the record to conclude that the Area Office committed clear error of fact or law. (Supp. Response at 1.) The Supplemental Appeal relies on multiple mischaracterizations of the law and record. (*Id.*) Eagle Harbor maintains that the Area Office correctly determined that Eagle Harbor “will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated.” (*Id.* at 1-2, citing 13 C.F.R. § 125.6(a)(1).) This issue alone is dispositive of the appeal. (*Id.* at 2.)

Eagle Harbor contends that resolution of this case turns upon a single issue: whether Size Determination No. 06-2024-047 properly concluded that Eagle Harbor demonstrated compliance with the limitations on subcontracting restrictions in 13 C.F.R. § 125.6. (*Id.* at 5.) Appellant disregards the plain language of § 125.6 and misconstrues the facts. (*Id.*) In particular, Appellant originally argued, self-servingly, that limitations on subcontracting should apply only to CLIN 1000. (*Id.* at 6.) Upon discovering that the record clearly establishes that Eagle Harbor will retain the majority of revenue, Appellant now pivots to a new argument, alleging that “Eagle Harbor will still receive below 50% of the revenue for not only CLIN 1000 but also for the entire Contract.” (*Id.*, quoting Supp. Appeal at 2.) In an effort to support this argument, though, Appellant “creates facts and law out of thin air.” (*Id.*)

Appellant first seeks to re-write § 125.6 so that it applies to less than the entire contract, apparently to bolster its claim that OHA should disregard CLIN 2000. (*Id.*) SBA's default rule, though, does not restrict limitations on subcontracting only to the “services” portion of the contract. (*Id.*) Furthermore, the subsection of the regulation that Appellant relies upon, § 125.6(b), authorizes an exception to the default rule only for “mixed contracts.” (*Id.*)

The subject procurement is not a “mixed contract” because it does not provide for construction or supplies. (*Id.* at 7.) The assigned NAICS code is for services, and each of the contract's three CLINs is for services. (*Id.*) CLIN 1000: “The Contractor shall **plan and manage** the NTC Facilities, Operations and Training Program”; CLIN 2000: “The Contractor shall **provide specialized training support and other services** within NTC's capability profile for other DOE organizations and OGA as directed”; and CLIN 3000: “The Contractor will provide these **well-defined services** on a routine basis.” (*Id.*, quoting PWS at 4, 18-19 (emphasis added by Eagle Harbor).) Additionally, the only pricing that offerors were required to provide was labor

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<sup>3</sup> Eagle Harbor initially moved to dismiss the Supplemental Appeal as untimely and procedurally defective. OHA denied the motion by separate Order dated January 29, 2025.

rates (*i.e.*, for services), not unit prices for supplies or products. (*Id.*) Nor does Appellant identify any aspect of the contract that will be for construction or supplies. (*Id.*)

Since the instant contract plainly is not a mixed contract, and CLIN 2000 is not for supplies, there is no validity to Appellant's contention that OHA should exclude CLIN 2000 from the limitations on subcontracting calculations. (*Id.* at 8.) Neither SBA regulations nor Federal Acquisition Regulation (FAR) clause 52.219-14 provide for an assessment of the limitation on subcontracting on less than the entire amount to be paid by DOE. (*Id.*)

Eagle Harbor highlights that the applicable regulation, § 125.6(a)(1), requires only that Eagle Harbor “not pay more than 50% of the **amount paid by the government** to it to firms that are not similarly situated.” (*Id.*, quoting § 125.6(a)(1) (emphasis added by Eagle Harbor).) The regulation does not contemplate applying the analysis only to certain CLINs. (*Id.*) The same is true for the implementing clause at FAR 52.219-14. (*Id.*) The critical numbers are the “amount paid by the government” and the amount that Eagle Harbor will not retain for itself. (*Id.*) Provided that Eagle Harbor's proposal demonstrates that it will retain more than half of the total contract price (“the amount paid by the government”), its proposal is compliant with the limitations on subcontracting. (*Id.*)

Similarly, the regulation does not authorize an area office to omit revenue from limitation on subcontracting calculations merely because it is based on a “plug-in” number. (*Id.*) Appellant's entire argument rests on the untenable assumption that the Area Office should have ignored CLIN 2000 altogether because there is some uncertainty associated with it. (*Id.*) Adopting Appellant's reasoning would require the Area Office and OHA to conclude—without any hard facts—that DOE will not actually pay the amount obligated for CLIN 2000. (*Id.* at 9.) Moreover, given that every contract has some degree of uncertainty regarding contract administration, Appellant's reasoning would render the “safe harbor” at 13 C.F.R. § 121.103(h)(3)(iii) largely meaningless. (*Id.* at 9-10.) There would be no size protest jurisdiction after a small business set-aside contract has been fully performed and all contract administration uncertainties are resolved. (*Id.* at 10.) As such, an area office will never be in a position to examine a prime contractor's actual performance, or the procuring agency's actual payments, to determine actual, historical compliance. (*Id.*)

Here, DOE indicated in the RFP, through the use of plug-in numbers, that it would pay between \$2 and \$2.5 million annually for CLIN 2000 services over the 10-year life of the contract. (*Id.*) Eagle Harbor proposed to retain all of this revenue by self-performing these services. (*Id.*) This revenue, like any other revenue, is an amount “paid by the government” and therefore must be included in the limitations on subcontracting calculations when assessing whether Eagle Harbor would comply. (*Id.*)

Eagle Harbor disputes the notion that there are “no actual services” associated with CLIN 2000. (*Id.*) The RFP included a Cost/Price Matrix (Attachment F) that offerors were required to complete as part of the Price volume. (*Id.*) The matrix included Direct Productive Labor Hours, which offerors were forbidden to alter, that were “provided for CLIN 1000 for evaluation purposes only.” (*Id.*, quoting RFP at 98.) Simply put, the level of effort and scope of work were specified in the matrix. (*Id.*) Conversely, DOE explained that no labor categories or labor hours

were provided for CLIN 2000, “Strategic Partnerships,” because “Strategic Partnership Projects vary in volume, scope and duration.” (*Id.*, quoting PWS at 18.) Unlike CLIN 1000, then, CLIN 2000 required work at an unknown level of effort. (*Id.* at 11.) Even so, CLIN 2000 is plainly for services, and specified three performance objectives: (i) “The Contractor shall plan and manage DOE contractor professional training . . .”; (ii) “The Contractor shall plan and manage additional training development and delivery as funded and directed”; and (iii) “The Contractor shall perform work to provide support to the DOE Learning Nucleus as funded.” (*Id.*, quoting PWS at 18.) Because of the unknown nature and scope of the work required, the matrix instead specified an “overall yearly cost for CLIN 2000.” (*Id.*)

In the Supplemental Appeal, Appellant claims that when work from CLIN 2000 becomes permanently appropriated and shifts to work under CLIN 1000, “the work will ultimately be performed by Eagle Harbor's subcontracting partners.” (*Id.*) This argument, according to Eagle Harbor, is unsupported speculation—Eagle Harbor never proposed that it would funnel all of the work ordered under CLIN 2000 to its subcontractors if DOE were to reallocate the work to CLIN 1000. (*Id.* at 12.) On the contrary, Eagle Harbor proposed to retain all of the work ordered under CLIN 2000. (*Id.*) Appellant's argument is also misleading because Eagle Harbor proposed to perform [XX]% of the dollar value of the work under CLIN 1000. (*Id.*) Additionally, Appellant mischaracterizes Eagle Harbor's Technical proposal in a misleading and disingenuous way. (*Id.*) Appellant points to a chart from Eagle Harbor's Technical proposal, but that chart shows “Team Eagle Harbor Capabilities,” not which entity will perform which performance objectives. (*Id.*)

Eagle Harbor acknowledges that it referred to itself and the subcontractors collectively as “Team Eagle Harbor” throughout its proposal. (*Id.*) Such verbiage is irrelevant, however, as the pertinent question is whether Eagle Harbor “will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated.” (*Id.*) Eagle Harbor's proposal unequivocally shows that Eagle Harbor will retain a majority of the revenue under the contract. (*Id.* at 13.)

Appellant also complains that CLIN 3000 “constitute[s] only a very small portion of the contract.” (*Id.*) Even so, there is no basis in fact or law to exclude CLIN 3000 from the limitations on subcontracting calculation. (*Id.*)

Eagle Harbor claims that it met its burden under 13 C.F.R. § 121.103(h)(3)(iii), because its price proposal clearly showed that it will not pay its subcontractors more than 50% of the amount paid to Eagle Harbor by the government. (*Id.*) In fact, Eagle Harbor will subcontract a minority of the total contract price to subcontractors. (*Id.* at 14.) By definition, under 13 C.F.R. § 121.103(h)(3)(iii), Eagle Harbor is not affiliated with its subcontractors under the ostensible subcontractor rule. (*Id.*) No further inquiry or evidence was needed by the Area Office. (*Id.* at 15.)

Eagle Harbor denies that it ever “admitted” that it will not self-perform the majority of CLIN 1000 work or receive a majority of the revenue under CLIN 1000. (*Id.*) This portion of Appellant's argument hinges on the baseless premise that CLIN 2000 should not be counted towards the limitations on subcontracting calculation. (*Id.*) The “admission” that Appellant alleges comes from an e-mail Eagle Harbor sent to the Area Office on September 26, 2024. (*Id.*)

Appellant conflates whether Eagle Harbor will perform the majority of the contract (majority of the services) with whether Eagle Harbor will perform the majority of the Training task area. (*Id.* at 16.)

### K. Motion to Reply and Opposition

On November 14, 2024, Appellant moved for leave to reply to Eagle Harbor's Response. A reply is warranted, Appellant contends, because Eagle Harbor's Response raises new issues not contained in, or relied upon by, the Area Office in the size determination. (Motion at 1.) Additionally, the Response contains inaccuracies. (*Id.*) Appellant reiterates its claim that the “primary and vital” requirements of the contract are training services. (*Id.* at 2.) Appellant further maintains that Eagle Harbor's Response consists of *post hoc* rationalizations that do not merit consideration by OHA. (*Id.*) OHA should reject “Eagle Harbor's attempt to write a new Size Determination to fill in the fatal blanks left by the Area Office.” (*Id.* at 4.)

Eagle Harbor opposes Appellant's motion. Eagle Harbor contends that the only purpose of Appellant's proposed Reply is to reinforce its original Appeal, which is contrary to OHA's standard rules of practice. (Opp. at 1.) Additionally, the proposed Reply mischaracterizes the record and introduces multiple arguments and allegations that Appellant could, and should, have raised sooner. (*Id.*) Eagle Harbor requests that OHA deny Appellant's motion and exclude the proposed Reply. (*Id.* at 4.) According to Eagle Harbor, Appellant fails to identify any “new” issues that Eagle Harbor raised in its Response, and has not shown why good cause exists to permit a reply. (*Id.* at 6.)

Under OHA's rules of procedure, a reply to a response generally is not permitted unless OHA so directs. 13 C.F.R. §§ 134.206(e) and 134.309(d). Here, OHA did not direct Appellant to reply, and the proposed Reply elaborates upon arguments that Appellant raised, or could have raised, in its original Appeal. Accordingly, Appellant's motion for leave to reply is DENIED and the proposed Reply is EXCLUDED from the record. *Size Appeal of Fed. Performance Mgmt. Sols., LLC*, SBA No. SIZ-6246, at 8 (2023); *Size Appeal of Focus Revision Partners*, SBA No. SIZ-6188, at 15 (2023).

## III. Discussion

### A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that the size determinations are 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 non-similarly-situated subcontractor is performing the primary and vital requirements of the contract, or when the prime contractor is unusually reliant upon a non-similarly-situated subcontractor, the firms are



affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(3). The rule “asks, in essence, whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor.” *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 7 (2010). Generally, “[w]here a concern has the ability to perform the contract, will perform the majority of the work, and will manage the contract, the concern is performing the primary and vital tasks of the contract and there is no violation of the ostensible subcontractor rule.” *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 12 (2011).

## B. Analysis

This case turns upon whether the Area Office properly determined that Eagle Harbor will comply with the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(3). As discussed *infra*, Appellant has not established that the Area Office clearly erred in reaching its decision. The appeal must therefore be denied.

The parties debate, as an initial matter, whether Eagle Harbor need only show that it will adhere to the limitations on subcontracting restrictions at 13 C.F.R. § 125.6. Sections II.H — II.J, *supra*. This argument stems from a “safe harbor” provision added to the ostensible subcontractor rule in 2023. The provision states:

In the case of a contract or order set-aside or reserved for small business for services, specialty trade construction or supplies, SBA will find that a small business prime contractor is performing the primary and vital requirements of the contract or order, and is not unduly reliant on one or more subcontractors that are not small businesses, where the prime contractor can demonstrate that it, together with any subcontractors that qualify as small businesses, will meet the limitations on subcontracting provisions set forth in [13 C.F.R.] § 125.6[.]

13 C.F.R. § 121.103(h)(3)(iii). In introducing this “safe harbor” provision, though, SBA made clear that it would apply only to “solicitations issued on or after” May 30, 2023, the effective date of the rule. 88 Fed. Reg. 26,164 (Apr. 27, 2023); *see also Size Appeal of Team Po'okela, LLC*, SBA No. SIZ-6304, at n.4 (2024). Since the RFP here was issued well before May 30, 2023, the “safe harbor” is not applicable in the instant case.

Nevertheless, although the “safe harbor” at 13 C.F.R. § 121.103(h)(3)(iii) is not available here, the Area Office reasonably determined that Eagle Harbor will comply with the ostensible subcontractor rule. Beginning with the question of whether Eagle Harbor, the prime contractor, will self-perform the primary and vital requirements of the contract, OHA has explained that the “primary and vital” requirements are those associated with the principal purpose of the acquisition. *Size Appeal of Innovate Int'l Intelligence & Integration, LLC*, SBA No. SIZ-5882, at 6 (2018); *Size Appeal of Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312, at 10 (2012); *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 17 (2011). Not all the requirements identified in a solicitation can be primary and vital, and the mere fact that a requirement is a substantial part of the solicitation does not make it primary and vital. *Id.* Frequently, the primary and vital requirements are those which comprise the bulk of the effort, or of the contract dollar value. *Size Appeal of Social Sols. Int'l, Inc.*, SBA No. SIZ-5741, at 12 (2016); *Size Appeal of*

*iGov Techs., Inc.*, SBA No. SIZ-5359, at 12 (2012). It is, however, also appropriate to consider qualitative factors, such as the relative complexity and importance of requirements. *Id.* OHA additionally will consider the CO's view of the primary and vital contract requirements, although the CO's comments are not dispositive. *Size Appeal of Jacob's Eye, LLC*, SBA No. SIZ-5955, at 10 (2018); *Size Appeal of BCS, Inc.*, SBA No. SIZ-5654, at 11 (2015); *Size Appeal of NEIE Med. Waste Servs., LLC*, SBA No. SIZ-5547, at 8 (2014); *Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5466, at 9 (2013).

Here, in its first size determination, the Area Office reviewed the solicitation and appropriately concluded that “the primary and vital functions of the procurement are: providing management services and oversight duties to support and oversee the training operations and maintenance” at the NTC. Section II.C, *supra*. The RFP stated that DOE “has a requirement to secure management services to support the operations and maintenance of the NTC in Albuquerque, NM, and acquire training and management services to support [[NTC's] training and oversight mission.” Section II.A, *supra*. In other words, the RFP sought a single contractor to manage and operate the entire NTC, to include training, facilities, information technology, and a variety of management support functions. *Id.* Based on its analysis of the RFP and the PWS, the Area Office found the principal purpose of this contract is to “provide for the management and oversight of [the NTC's] facilities operations, professional and technical training, and information technology.” Sections II.A and II.C, *supra*. The CO similarly opined that “[t]he purpose of this contract is to provide operational and maintenance support for the [NTC].” Section II.B, *supra*.

The Area Office observed that the bulk of the contract work is associated with CLIN 1000, and the task areas under CLIN 1000 focused largely on management and operation of the NTC. Sections II.A and II.C, *supra*. More specifically, the contractor will “operate and manage the systems and programs required to support training at the NTC,” and will “provide effective and efficient management, maintenance and oversight of facilities, maintenance, property, site safety, site security, and logistical support required to support NTC operations.” Section II.A, *supra*. The contractor will be responsible for “a full range of management support functions,” including but not limited to:

#### Financial Accounting System

- Management Assurance System
- Project Management
- Personal Property
- Fleet Management
- Work Processes
- Records Management

*Id.* The contractor also will “manage and operate all NTC Information Technology (IT) systems in compliance with applicable requirements in order to ensure effective system implementation, integration, and protection.” *Id.* Given the record before it, then, the Area Office did not err in concluding that the primary and vital work is, essentially, “a management function that would

ensure the most effective training staff, technology, and support operations at NTC.” Section II.C, *supra*.

The Area Office also reasonably determined that Eagle Harbor will self-perform the majority of the “primary and vital” contract requirements. As the Area Office noted, Eagle Harbor's proposal reflected that the proposed General Manager, Mr. Russell, will be an Eagle Harbor employee. Sections II.C and II.E, *supra*. Additionally, the managers of four of the five functional areas (the Director of Training, the IT Department Manager, the Real Property & Facilities Manager, and the Business Department Manager) will be employees of Eagle Harbor, subordinate only to Mr. Russell. Section II.E, *supra*. Eagle Harbor thus controls nearly all of the crucial managerial functions under the contract. Eagle Harbor's proposal further showed that it will self-perform a majority of the labor hours under CLIN 1000, the largest of the three CLINs, as well as a majority of all work under the entire contract. *Id.* Eagle Harbor will provide virtually all of the labor for three of the five task areas under CLIN 1000, and Eagle Harbor also proposed to self-perform CLINs 2000 and 3000 in their entirety. Sections II.E and II.H, *supra*. Accordingly, the record supports the Area Office's determination that Eagle Harbor, the prime contractor, will self-perform a majority of the “primary and vital” contract requirements.

On appeal, Appellant complains that the Area Office did not specify, in the second size determination, which requirements the Area Office deemed to be “primary and vital.” Sections II.F and II.G, *supra*. While this is true, the Area Office addressed the matter at length in the first size determination, and there were no changes to the RFP during the interval between the two size determinations. Sections II.A, II.C, and II.F, *supra*. Indeed, in remanding the case to the Area Office, OHA explained that the Area Office should be afforded an opportunity to examine changes to Eagle Harbor's proposal — not the solicitation — which had occurred during corrective action. Section II.D, *supra*. Under these circumstances, the Area Office's discussion of the “primary and vital” contract requirements from the first size determination remained intact, and it was unnecessary for the Area Office to have revisited the question in the second size determination.

Appellant further contends that the Area Office should have found that training services, alone, the bulk of which will be performed by Eagle Harbor's subcontractors, constitute the “primary and vital” requirements of this contract. Sections II.D., II.F, and II.H, *supra*. As discussed above, however, the Area Office could properly determine that the RFP as a whole does not support the conclusion that the principal purpose of this procurement is training. The RFP stated that DOE's objective is to acquire “management services to support and oversee the operations and maintenance of the NTC.” Section II.A, *supra*. Furthermore, the RFP did not attach particular importance to training work relative to other requirements in the solicitation. Although Training and Training Support were two of the five task areas under CLIN 1000 of the PWS, the PWS indicated that DOE considered all five task areas “vital and essential to the successful management and operation of the NTC.” *Id.* Nor were training functions in particular highlighted in the RFP's evaluation criteria. *Id.* Accordingly, while the RFP made clear that the contractor will, as part of its duties, “analyze, design, develop, deliver, evaluate, revise and retire training,” Appellant has not shown that the Area Office clearly erred in instead concluding that management and operation of the entire NTC is the primary purpose of this procurement. Under OHA precedent, it is not improper for a prime contractor to delegate significant functions to one

or more subcontractors, provided that the prime contractor will self-perform a majority of the primary and vital contract requirements. *E.g.*, *Social Sols. Int'l*, SBA No. SIZ-5741, at 12; *BCS*, SBA No. SIZ-5654, at 12-13; *Size Appeal of Tinton Falls Lodging Realty, LLC*, SBA No. SIZ-5546 (2014); *Size Appeal of TLC Catering*, SBA No. SIZ-5172 (2010). Eagle Harbor thus could appropriately delegate much of the Training and Training Support work to its subcontractors.

Appellant also argues that the Area Office's analysis of the primary and vital contract requirements is inconsistent with OHA's decision in *Size Appeal of Kuponov Gov't Servs., LLC*, SBA No. SIZ-5967 (2018), which pertained to a predecessor procurement for similar work at the NTC. Sections II.G and II.I, *supra*. This argument fails because OHA has long held that "a contract's primary and vital requirements are ascertained from the solicitation itself." *Size Appeal of Navarro Rsch. and Eng'g, Inc.*, SBA No. SIZ-6065, at 21 (2020) (quoting *Shoreline Servs.*, SBA No. SIZ-5466, at 9); *see also BCS*, SBA No. SIZ-5654, at 11. The Area Office therefore properly focused its review on the text of the instant RFP, as it is immaterial what the primary and vital requirements may have been for another procurement under a different solicitation. Furthermore, as Eagle Harbor observes, the *Kuponov* contract and solicitation are not in the record. Sections II.H and II.J, *supra*. Even if it had been inclined to do so, then, the Area Office could not have conducted a detailed comparison of the two solicitations.

Lastly, the Area Office reasonably concluded that Eagle Harbor will not be unduly reliant upon its subcontractors to perform the contract. As the Area Office correctly noted, OHA applies a four-factor test in assessing whether unusual reliance exists: (1) the proposed subcontractor is the incumbent contractor and is ineligible to compete for the procurement; (2) the prime contractor plans to hire the large majority of its workforce from the subcontractor; (3) the prime contractor's proposed management previously served with the subcontractor on the incumbent contract; and (4) the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract. *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850 (2017); *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017); *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716 (2016); *Size Appeal of Prof'l Sec. Corp.*, SBA No. SIZ-5548 (2014); *Size Appeal of Wichita Tribal Enters., LLC*, SBA No. SIZ-5390 (2012); *Size Appeal of SM Res. Corp., Inc.*, SBA No. SIZ-5338 (2012).

In the instant case, the Area Office found, and the record confirms, that none of the four factors is met. Sections II.C and II.F, *supra*. Neither of Eagle Harbor's proposed subcontractors is the incumbent contractor, so the first factor does not apply. The second factor is not present because Eagle Harbor has its own staff to perform the contract, and will hire additional staff, including incumbent personnel, but will not be reliant upon its subcontractors for labor. Merely retaining an incumbent workforce is not problematic, as "there is no violation of the ostensible subcontractor rule when a prime contractor proposes to hire incumbent personnel from a firm other than the proposed subcontractor." *Size Appeal of The Logistics Co., Inc.*, SBA No. SIZ-5975, at 10 (2018); *see also Size Appeal of Residential Enhancements, Inc.*, SBA No. SIZ-5931, at 15 (2018); *Size Appeal of Synergy Sols., Inc.*, SBA No. SIZ-5843, at 15 (2017); *Size Appeal of Alphaport, Inc.*, SBA No. SIZ-5799, at 11 (2016); *Size Appeal of Logistics & Tech. Servs., Inc.*, SBA No. SIZ-5482, at 7 (2013); *Size Appeal of J.W. Mills Mgmt., LLC*, SBA No. SIZ-5416, at 8 (2012); *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305, at 12-13 (2011). The third factor likewise is not met because Eagle Harbor's proposed managerial personnel, such as Mr.

Russell, were not previously employed by the subcontractors. Lastly, Eagle Harbor has been in operation since 2017, and according to its proposal, the company has performed at least four government contracts. Eagle Harbor thus did not rely solely on the experience of its two subcontractors to win the contract.

It is worth noting that “OHA seldom has found violation of the ostensible subcontractor rule under circumstances where a prime contractor will utilize multiple subcontractors, and none of those subcontractors will perform a majority of the work.” *Size Appeal of C2 Alaska, LLC*, SBA No. SIZ-6149, at 12 (2022); *see also Size Appeal of A-P-T Rsch., Inc.*, SBA No. SIZ-5798, at 13 (2016). Accordingly, the fact that Eagle Harbor will engage two subcontractors — Amentum and IB3 — reduces the likelihood that Eagle Harbor will be excessively reliant upon either firm.

In sum, the record supports the Area Office's determination that Eagle Harbor is not in violation of the ostensible subcontractor rule. Appellant has not established reversible error in the size determinations, because the record reflects that Eagle Harbor as the prime contractor will manage the contract and perform the bulk of the primary and vital contract requirements.

#### IV. Conclusion

Appellant has not proven that the size determinations are clearly erroneous. Accordingly, the appeal is DENIED, and the size determinations are AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE  
Administrative Judge