Cite as: *Size Appeal of Bowhead Enterprise, Science, and Technology, LLC*, SBA No. SIZ-6352 (2025)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Bowhead Enterprise, Science, and Technology, LLC Appellant, Re: DNI Emerging Technologies, LLC Appealed from Size Determination No. 05-2025-007	SBA No. SIZ-6352 Decided: May 2, 2025

APPEARANCES

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DECISION

I. Introduction and Jurisdiction

On December 11, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination No. 05-2025-007, denying a size protest filed by Bowhead Enterprise, Science, and Technology, LLC (Appellant) against DNI Emerging Technologies, LLC (DNI). The Area Office found that DNI, based on its size, was eligible for the subject procurement. On December 26, 2024, Appellant filed the instant appeal. Appellant maintains that the Area Office clearly erred in its determination, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination. 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 days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The RFP

On June 30, 2023, the U.S. Contracting Command-Aberdeen Proving Ground (Agency), issued Request for Proposal (RFP) No. W15P7T-23-R-0004 for Systems Engineering and Program Management (SEPM) Support. The solicitation was a 100% 8(a) small business set-aside. The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 541330 — Engineering Services — to the procurement, with a corresponding $47 million annual receipts size standard. Initial offers were due July 31, 2023, and final proposal revisions were due August 9, 2024.

Both Appellant and DNI submitted timely proposals. On November 12, 2024, the Contracting Officer (CO) announced DNI as the apparent awardee.

B. Protest

On November 19, 2024, Appellant, an unsuccessful offeror, filed a protest with the CO challenging the small business size status of DNI. (Protest at 1.) Appellant argued that DNI is ineligible for award under the Solicitation because it is in violation of the ostensible subcontractor rule in 13 C.F.R. § 121.103(h). (Protest at 2.)

Appellant pointed to the Source Selection Decision Document (SSDD), which contained information about DNI and its proposal, the only two past performance examples submitted with its proposal were from its "major subcontractor." (Exh. 3.) While DNI did submit other examples of past performance, the Agency refused to consider those because the affiliates were not going to be "major subcontractors" as described by the Solicitation, meaning that those entities were not going to be meaningfully involved in performance of the instant procurement. Accordingly, at least in terms of evaluations for this specific proposal, DNI was entirely reliant on its subcontractor for evidence of past performance.

Furthermore, public records show that DNI had only 12 different contract actions attributable to it leading up to the due date for proposals, with the first being awarded in September 2021. Of those contracts, a majority of them came after the third quarter of FY2023, in which proposals were due for this procurement. These contracts were also of comparatively small dollar volume, and had little relevance to did not involve the particular type of work required for the instant procurement. Simply put, DNI lacked both the past performance and the experience necessary to perform the work required by the Solicitation. (Protest at 4-5).

With this information in mind, it seems evident to Appellant that DNI is highly reliant upon its "major subcontractor" with that firm in question being Booz Allen Hamilton (Booz Allen), a large firm. DNI's own press releases show that DNI has in the past teamed with Booz Allen. Publicly available data also confirms that DNI and Booz Allen have an active relationship, with Booz Allen supporting DNI in many of its other projects. Therefore, Appellant asserted it seems highly probable Booz Allen is the firm cited with the requisite experience and expertise in the Agency SSDD. (Protest at 5.)

Appellant asserts that if so, DNI is in violation of the ostensible subcontractor rule. An analysis based on the ostensible subcontractor rule requires an assessment of (1) whether the subcontractor will perform the primary and vital requirements of the subject procurement, and (2) whether the prime contractor is unusually reliant on its subcontractor to perform the functions required under the contract. (Protest at 6, citing *Size Appeal of Leumas Residential, LLC*, SBA No. SIZ-6103, at 16 (2021), and *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 14 (2010).)

Appellant asserts the primary and vital requirements of the work for the instant procurement are engineering services. Here, particularly at the time of proposal submission in July 2023, DNI did not have the requisite past performance or experience that met the minimum evaluation criteria for the instant procurement. The SSDD also reflected that DNI could not and did not rely on the past performance or experience of any of its affiliates to meet the RFP requirements because DNI did not propose to use any affiliates as major subcontractors. Rather, DNI proposed only one "major subcontractor," which is almost certainly Booz Allen. (Protest at 6-7).

Accordingly, Appellant argues that because DNI lacked the experience necessary to actually perform the tasks required by the Solicitation, Booz Allen or another other than small subcontractor will actually be performing the contract's primary and vital requirements. DNI is thus in violation of the ostensible subcontractor rule, and other than small for purposes of this procurement.

C. Size Determination

On November 21, 2024, in accordance with 13 C.F.R. § 121.1006(a), the CO forwarded Appellant's protest to Area Office V for review. On December 11, 2024, the Area Office issued Size Determination No. 05-2025-007.

DNI is a Louisiana corporation organized May 3, 2000. It is a wholly owned subsidiary of Delaware Nation Investments, LLC, which is in turn owned by the Delaware Nation, a federally recognized tribe. The Area Office calculated DNI's size based upon its annual receipts, and taking account of the exception for tribal ownership at 13 C.F.R. § 121.103(b)(2) and found DNI to be a small concern. (Size Determination at 3-4.) The Area Office noted that violation of the ostensible subcontractor rule may exist when the prime contractor is a concern owned and controlled by an Indian tribe, even if the alleged ostensible subcontractor also is owned and controlled by the same Indian tribe. (Size Determination at 7, citing *Size Appeal of C2 Alaska, LLC*, SBA No. SIZ-6149 (2022); *Cherokee Nation Healthcare Servs*, SBA No. SIZ-5343, at 3-4.) Even if a concern meets the standard set in 13 C.F.R. § 121.103(h)(3)(iii), it does not eliminate SBA's obligation to investigate the other aspects of ostensible subcontracting.

Addressing Appellant's ostensible subcontractor rule allegations, the Area Office first noted Booz Allen is not a proposed subcontractor for this procurement. The Area Office went on to cite the rule that SBA will find a small business prime contractor is performing the primary and vital requirements of a contract for services, specialty trade construction or supplies, where

the prime contractor can demonstrate that it, together with any subcontractors that qualify as small businesses, will meet the limitations on subcontracting provisions of 13 C.F.R. § 125.6. (*Id.*, at 5, citing 13 C.F.R. § 121.103(h)(3)(iii).)

The Area Office found DNI stated in its proposal and response that it would be directly performing **[REDACTED PERCENTAGE]** of the direct labor. In combination with the other proposed small businesses, the total of direct labor exceeds the 50% requirement of 13 C.F.R. § 125.6. Therefore, under the regulatory standard DNI would be performing the contract's primary and vital requirements. (*Id.*, at 5-6).

The Area Office further found DNI proposed three subcontractors to perform in the base year of task order 001. Booz Allen is not one of them. The Area Office found that DNI will perform **[REDACTED PERCENTAGE]** of the information management requirements, **[REDACTED PERCENTAGE]** of the readiness management requirements, and **[REDACTED PERCENTAGE]** of the Business and Operations management requirements. The three management tasks combined account for 79.2 percent of the total contract. For key personnel, the PWS identified the Senior Systems Engineer; Senior Data Engineer; Senior INFOSEC Engineer; Program Manager; and Senior Systems Engineer to serve as Communications Systems Integration Team Lead. DNI will employ **[REDACTED PERSONNEL POSITIONS]**, while a subcontractor will employ the other key personnel positions.

The Area Office noted "[t]he initial step in an ostensible subcontractor analysis is to determine whether the prime contractor will self-perform the contract's primary and vital requirements." (*Id.*, at 7, citing *See Size Appeal of Innovate Int'l Intelligence & Integration, LLC*, SBA No. SIZ-5882 (2018).) The "primary and vital" requirements are those associated with the principal purpose of the acquisition. (*Id.*, 7 citing *See Size Appeal of Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312 (2012); *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302 (2011).)

While Appellant argues the primary and vital requirements of the work are engineering services, the Area Office found this is not actually the case. The Area Office concluded the primary purpose of the contract is not solely for engineering services, but rather for services to coordinate and manage the Army's Program Executive Office (PEO) Command, Control, Communications-Tactical (C3T) program, as confirmed by the procuring agency in the RFP and Statement of Work. This is a contract for systems engineering and program management services, and the PWS itself calls for "a diverse range of support services that span the total life cycle of Mission Command systems." The PWS requires "contractor-provided engineering and acquisition support services to augment PEO C3T's core Government personnel in support of PEO-wide program management, development, and fielding of Command, Control, and Communication systems." The core requirements are not limited to Technical Engineering but include Readiness Management, Business and Operations Management, and Information Management activities. Moreover, "[w]here a concern has the ability to perform the contract, is performing the majority of the work, and will manage the contract, the concern is performing the primary and vital tasks and there is no violation of the ostensible subcontractor rule." (*Id.*, at 8, citing *Team Po'okela, LLC*, SBA No. SIZ-6304 (2024).)

DNI provided examples of past performance within its proposal as defined in the RFP. DNI will be providing the management of this contract and none have been previously employed by its subcontractor. DNI is going to perform the primary and vital requirements of the contract and is not unduly reliant upon the subcontractor.

The Area Office concluded that DNI and its subcontractors were found not to be affiliated under the ostensible subcontractor rule and thus will not be treated as joint venture, for size determination purposes. Accordingly, DNI is small for the subject size standard, and therefore small for this procurement. (*Id.* at 7-8.)

D. Appeal

On December 26, 2024, Appellant filed the instant appeal. Appellant insists the Area Office erred in its decision. (Appeal at 1.) Appellant first asserts that the Area Office erred as a matter of law and fact in applying 13 C.F.R. § 121.103(h)(3)(iii) and concluding (erroneously) that DNI would perform the majority of the work. (Appeal at 5).

The Area Office reached this conclusion by finding that DNI, "[i]n combination *with the other proposed small businesses*," will meet the limitations on subcontracting set forth at 13 C.F.R. § 125.6. (emphasis supplied in Appeal.) This conclusion is erroneous because 13 C.F.R. § 121.103(h)(3)(iii) and 13 C.F.R. § 125.6 provide that a small business prime contractor is not in violation of the ostensible subcontractor rule only if it can demonstrate that the prime, along with any subcontractors that qualify as "similarly situated entities" will meet the limitations on subcontracting. (emphasis supplied in Appeal). *See, e.g., VSBC Protest of Elevated Techs., Inc.*, SBA No. VSBC-376-P (2024). (Appeal at 5-6).

The term "similarly situated entity" means "a subcontractor *that has the same small business program status as the prime contractor*." 13 C.F.R. § 125.1. "In addition to sharing the same small business program status as the prime contractor, a similarly situated entity must also *be small for the NAICS code that the prime contractor assigned to the subcontract the subcontractor will perform*." Thus, for an 8(a) contract, such as this one, a subcontractor is a "similarly situated entity" only if it is both a certified 8(a) participant and also "small" under the NAICS code assigned by the prime to the subcontract. (emphasis supplied in Appeal). (Appeal at 6-7).

In the case of a contract for services, such as the instant procurement, the limitation on subcontracting is 50% of the amount paid by the government to the small business prime contractor. *See* 13 C.F.R. § 125.6(a)(1). Specifically, the small business concern must agree that "it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated." In other words, even if the prime contractor subcontracts work to a small business generally, this work will nevertheless count against the prime contractor's limitation on subcontracting if the subcontractor is not "similarly situated." (*Id.*, at 7.)

Therefore, the Area Office erred as a matter of law when it concluded that DNI, "[i]n combination with the other proposed small businesses," generally (i.e., not similarly situated

small businesses) would "exceed[] the required 50 percent as established by 13 C.F.R. § 125.6." (*See* Ex. A at 7-8.) Given that this is a set-aside 8(a) contract, and DNI is an 8(a) participant, in order for any subcontractor to qualify in order to meet the limitations on subcontracting, it would have to itself be "similarly situated" — that is, an 8(a) participant. (*Id.*)

The Area Office found that DNI would only perform **[REDACTED PERCENTAGE]** of the contract — below the required 50%. (Ex. A at 5). To meet the 50% requirement would require DNI to use similarly-situated entities, and to qualify as such, the subcontractors had to have been both small and certified 8(a) participants. The failure of DNI to do so, despite the fact they were using small businesses generally, would mean that DNI would fail to meet the 50 percent threshold required by 13 C.F.R. § 125.6. (*Id.* at 7).

Appellant's second argument is the Area Office erroneously found DNI would perform the primary and vital requirements of the contract. This basis of this error was twofold — in that the Area Office found that the primary and vital requirements of the contract would be management services, and whether or not DNI would actually be providing said services. (*Id.* at 7-8.)

Appellant cites the contract title: Systems Engineering and Program Management Services (SEPM), noting that "Engineering" is the first service word to appear. (Exhibit B at 2). Appellant also notes that the PWS strongly emphasized the importance of engineering services, whereas emphasis on management services is comparatively lacking. While citing numerous other technical engineering requirements of the procurement, Appellant concludes that 85% of the requirements for Technical Factor 1 in the PWS require demonstrating engineering knowledge, again highlighting its relative importance over management services. This, along with this factor literally being Technical Factor 1, demonstrates that most important factor was about demonstrating technical knowledge in engineering. (Appeal at 11).

Moreover, to further supplement this case, the key personnel required by the Solicitation are largely engineering positions, and the NAICS code assigned for this procurement, as recognized by the size determination, is 541330 — Engineering Services. FAR 19.303(a)(2) directly states that the "contracting officer shall select the NAICS code which best describes the principal purpose of the product or service being acquired." (*Id.* citing 13 C.F.R. § 121.402(b); *Size Appeal of A-P-T Research, Inc.*, SBA No. SIZ-5798 (2016).)

Appellant further argues DNI will not perform the primary and vital services of the procurement. Appellant points to the longstanding precedent that for services (as opposed to construction contracts), the prime contractor does not perform the primary and vital requirements of a contract merely by supervising its subcontractors in their performance of work. (*Id.*, at 12 citing *E.g., Size Appeal of Hamilton Alliance, Inc.*, SBA No. SIZ-5698 (2015); *Size Appeal of Shoreline Servs.*, SBA No. SIZ-5466 (2013); *Size Appeal of Bell Pottinger Communications USA, LLC*, SBA No. SIZ-5495, at 5 (2013).)

Appellant asserts DNI did not have the requisite past performance to perform this contract. The Agency SSDD, which contains certain information about DNI and its proposal, evidences this. (Exhibit C). The SSDD stated DNI did not present any past performance

examples for itself, with the only past performance examples being from its "major subcontractor."

Appellant again notes, as in its initial Protest: "DNI, at the time of proposal submission, had been awarded 12 contracts that all had a very small dollar value, had very limited periods of performance due to them being only recently awarded, and did not involve work comparable to that being sought in this procurement." (*Id.*, at 13).

Finally, Appellant notes DNI is not providing the majority of the key personnel for this contract and is only providing personnel for one of the engineering key personnel positions. Moreover, when looking at the key personnel's listed order of importance, the DNI employee is the second-least important of the engineering key positions in the contract. Accordingly, it is fair to conclude DNI will not perform the primary and vital engineering requirements for this procurement. (*Id.*, at 14-15).

Appellant also alleges the Area Office erred in determining DNI was not unusually reliant on its subcontractors for the purposes of performing this procurement. Appellant again cites DNI would only perform **[REDACTED PERCENTAGE]** of the contract's total work, and the remainder would be performed by entities that are not similarly situated. (*Id.*, at 15). As discussed above, Appellant has argued DNI will not be performing the primary and vital requirements of the contract, and that DNI has no relevant past performance for this contract. Appellant thus concludes DNI would unusually reliant on its subcontractors for the subject procurement.

E. DNI's Response

On January 17, 2025, DNI responded to Appellant's protest.

On the issue of its compliance with the ostensible subcontractor rule, DNI responds by pointing to a recent revision of the regulation, effective May 30, 2023. (Response at 10, citing 88 Fed. Reg. 26,164, 26,166 (Apr. 27, 2023), codified at 13 C.F.R. § 121.103(h)(3)(iii).) The rule provides that in the case of contracts for services, specialty trade construction or supplies, a small business prime contractor is in compliance with the ostensible subcontractor rule if it, together with any subcontractors that qualify as small businesses, meets the limitations on subcontracting provisions of 13 C.F.R. § 125.6. This rule provides that in the case of a contract for services, such as this, it will not pay more than 50% of the amount paid it by the Government to firms that are not similarly situated. 13 C.F.R. § 125.6(a)(1). This rule applies to the instant procurement, because the RFP was issued June 30, 2023. (*Id.*, at 11.)

DNI argues that so long as it can demonstrate it will meet the limitations on subcontracting standard, the regulation mandates that SBA "will find" it is performing the primary and vital requirements and is not unduly reliant on any subcontractors. (*Id.*) This is further underscored by the fact that, when issuing the final rule, SBA explained that it "believes that meeting the applicable limitation on subcontracting requirement is sufficient to overcome *any claim* of the existence of an ostensible subcontractor." 88 Fed. Reg. at 26,166. (*Id.*, at 12, emphasis supplied in Response).

Moreover, the record clearly demonstrates DNI will comply with the limitations on subcontracting. DNI will retain approximately **[REDACTED PERCENTAGE]** of the total amount to be paid by the Army, which exceeds the 50% threshold required by the regulation. By virtue of doing so, DNI does not need to rely on any "similarly situated" subcontractors to meet the mentioned 50% threshold. DNI is therefore not unduly reliant on any subcontractors because it will comply with the limitations on subcontracting at 13 C.F.R. § 125.6(a)(1). (*Id.*, at 12).

DNI concedes that while the Area Office did correctly conclude DNI is performing the primary and vital requirements of the subject procurement, it made several errors in its underlying analysis to reach this conclusion. First, instead of addressing "the amount paid by the government" as required by 13 C.F.R. § 125.6(a)(1), the Area Office relied on the "percent of the direct labor" and found that the "total of direct labor exceeds the required 50 percent as established by 13 C.F.R. § 125.6." (Size Determination at 5-6.) Second, the Area Office miscalculated the amount of labor DNI would perform, stating DNI would only perform **[a minority percentage]** of the labor when in fact DNI proposed to perform **[a majority percentage]**. Third, having erroneously understated the amount of work that DNI would perform, the Area Office incorrectly considered labor performed by "other proposed small businesses" rather than assessing whether they were "similarly situated." DNI contends Appellant's appeal is based solely on the third error specifically from the Area Office, arguing that it failed to consider whether the other small businesses are 8(a) small businesses and therefore "similarly situated." (Response, at 13).

DNI argues OHA has consistently held an area office's error is harmless when rectifying the error would not have changed the result." (*Id.*, at 14 citing *Size Appeal of Melton Sales & Service, Inc.*, SBA No. SIZ-5893, at 13 (2018); *Size Appeal of OSG, Inc.*, SBA No. SIZ-5718, at 14 (2016); *Size Appeal of OSG, Inc.*, SBA No. SIZ-5728, at 6-9 (2016).)

Accordingly, OHA should affirm the Area Office's determination that DNI is a small business and not unduly reliant upon its subcontractors for the purposes of the subject procurement.

Moreover, DNI argues that because SBA's new regulation established a brightline test for determining compliance with the ostensible subcontractor rule on certain contracts, OHA does not need to further evaluate the traditional ostensible subcontractor factors — OHA can and should affirm the size determination based solely on DNI's compliance with the limitations on subcontracting standard. While the Area Office did acknowledge the new regulation, it nevertheless concluded that it "does not eliminate SBA's obligation to investigate the other aspects of ostensible subcontracting." (Size Determination at 6.) In doing this, the Area Office relied on *Size Appeal of AHNTECH, INC*, SBA No. SIZ-6319 (2024), which held that OHA will remand a case for further review when an area office does not fully explore allegations raised in the underlying protest. But this reliance on *AHNTECH* is misplaced, as the cited principle does not apply in this instance given that the Area Office clearly considered the issue of DNI's compliance with the limitations on subcontracting and that case did not involve or interpret SBA's new regulation at 13 C.F.R. § 121.103(h)(3)(iii). (Appeal, at 15-6).

Since SBA's regulation now mandates that SBA find an awardee is performing the primary and vital requirements, and is not unduly reliant on subcontractors, so long as it demonstrates compliance with the limitations on subcontracting, the Area Office's consideration of DNI's compliance is accordingly the only exploration of Appellant's ostensible subcontractor allegation needed. (*Id.*, at 16).

F. Supplemental Pleading

On January 17, 2025, Appellant filed a Supplemental Pleading. Appellant emphasizes that, by its own admission, DNI proposed to subcontract work to three subcontractors — **[Subcontractor 1, Subcontractor 2, and Subcontractor 3]**. The appeal file conclusively establishes that none of these entities are "similarly situated" to DNI — meaning that none of these entities are certified SBA 8(a) concerns that are "small" under the assigned NAICS code. The Area Office's own calculations show without **[Subcontractor 3's]** workshare, DNI does not meet or exceed the limitation on subcontracting requirement of at least 50%. (Supp. Pleading at 8).

Appellant maintains that some of DNI's own arguments undermine its case. SBA's regulations require that the prime contractor meet the limitations on subcontracting requirements for each contract period — in other words, the calculation is not aggregated over the life of the contract. (*Id.*, citing 13 C.F.R. 125.6(d)). In its submission, DNI noted that it would retain **[more]** than 50% of the contract revenue (subcontracting out **[minority dollar figure]** of **[total dollar figure]** in total burdened labor cost—meaning, DNI proposed to retain **[minority dollar figure]** — leaving it with **[remainder dollar figure]** in cushion under the requirement). However, DNI then went on to note that "during the base period [DNI] will receive **[a majority percentage]** of the revenue." (*See* DNI Resp. at 7.) By definition, this means that DNI will receive substantially less than 50% of revenue in the option years, which is a violation of the subcontracting requirements. (Supp. Pleading at 8-9). For this reason alone, OHA should grant the appeal.

Appellant also emphasizes again that the primary and vital requirements of the contract are for engineering services. The record demonstrates that the Area Office clearly erred in making this determination, or rather failing to do so. The Size Determination is vague in that the Area Office does not state what, in its view, the contract's primary and vital requirements actually are, and moreover its own files do not document how the Area Office ultimately came to its conclusion. (*See* Size Determination generally). Because the Area Office failed to properly document how it came to its determination, and with said determination being unduly vague, its conclusion that DNI will perform the contract's primary and vital requirements is clearly erroneous. (Supp. Pleading at 10).

Furthermore, another interpretation of the Size Determination could be that, even if it did determine the contract's primary and vital requirements, the Area Office clearly erred in determining that engineering services are not to be the "principal purpose" of the acquisition.

The appeal file clearly shows the Area Office failed to consider the PWS's actual requirements which demonstrate how engineering services permeate multiple aspects of the PWS and which make them the primary and vital services of the contract, as Appellant has consistently identified throughout the course of these proceedings in its size protest and appeal. Rather, it would appear the Area Office relied upon DNI's response to the size protest, in which DNI erroneously claimed that PWS section 3.3, Technical Engineering Support, was the sole engineering requirement for the contract and that only 20.8% of the labor hours were for engineering. Again as Appellant has noted throughout, the engineering requirements went far beyond PWS § 3.3, encompassing PWS § 3.2, as well as large portions of §§ 3.4 and 3.7. (Supp. Pleading at 12).

Regardless of which interpretation one subscribes to, the Area Office's determination that DNI would perform the "primary and vital" contract requirements was nevertheless erroneous. OHA has consistently held that for services (as opposed to construction contracts), the prime contractor does not perform the primary and vital requirements of a contract merely by supervising its subcontractors in their performance of work. (*Id.*, at 14, citing *Size Appeal of Hamilton Alliance, Inc.*, SBA No. SIZ-5698 (2015); *Size Appeal of Shoreline Servs.*, SBA No. SIZ-5466 (2013); *Size Appeal of Bell Pottinger Communications USA, LLC*, SBA No. SIZ-5495, at 5 (2013).)

Both in terms of DNI's staffing proposals and its technical proposal against its past performance proposal, the record clearly shows the extent to which DNI will rely upon its claimed subcontractors (most notably, **[Subcontractor 1]**) to provide the specific experience which the proposal claims to possess. The Pleading outlines the ways in which — beyond just considering that many of DNI's claims in its technical proposal are unsupported — those claims which are supported overwhelmingly would not be present in the technical proposal at all if not for the past performance provided by **[Subcontractor 1]**. (*Id.*, at 14-19). More broadly, the appeal file shows that the Area Office clearly erred as a matter of fact with regard to each factual finding supporting the Area Office's legal conclusion that DNI is not unusually reliant upon its subcontractors. For this, OHA should sustain the appeal. (*Id.*, at 20).

Finally, Appellant claims that the Area Office erred in matters of law as well as fact.

Appellant refers to the Area Office's reliance on the four *Dover Staffing* factors.[1] However, as SBA made clear in recently revising its regulations, no one factor is dispositive and all aspects of the relationship between the prime and ostensible subcontractor are to be considered, not merely the four *Dover Staffing* factors. 13 C.F.R. § 121.103(h)(3)(i). Here, the Area Office erred by only considering the four *Dover Staffing* factors but failed to consider all aspects of the relationship between the DNI and its subcontractors. (*Id.*, at 21.)

Appellant maintains that when considering all the relevant factors, DNI is clearly in violation of the ostensible subcontractor rule. Its own proposal demonstrates it will not meet the limitation on subcontracting requirement; it will perform **[a minority percentage]** of the work during the contract's base and option periods. One of its subcontractors will perform the

[1] *Size Appeal of Dover Staffing, Inc.*, SBA No. SIZ-5300 (2011)).

contract's primary and vital requirements. The majority of the required key personnel positions required by the Solicitation will come from another subcontractor. To the extent that DNI employees will perform any work relevant to the contract requirements, the tasks will be menial. (*Id.*, at 22).

Accordingly, OHA should sustain this size appeal.

G. DNI's Response to Supplemental Pleading

On January 31, 2025, DNI responded to Appellant's Supplemental Pleading. Appellant, in its initial size protest in this matter, did not acknowledge SBA's revised regulation at 13 C.F.R. § 121.103(h)(3)(iii). While Appellant did mention this new regulation in its appeal, it chose to limit its line of argumentation in this respect to the Area Office's consideration of whether DNI's subcontractors were "similarly situated." Appellant did not otherwise challenge the Area Office's reliance on 13 C.F.R. § 121.103(h)(3)(iii) or allege that this regulation does not apply to IDIQ contracts.

Only now in its supplemental pleading does Appellant raise the argument that the regulation cannot apply to IDIQ contracts on the basis that subcontracting revenue figures are "illusory." (Supp. Pleading at 8). Nothing in the regulation's text lends credence to such an interpretation. SBA's preamble for the issuance of the final failed to address or raise the subject of excluding IDIQ contracts or contracts with "uncertain" options from the protections that the new rule provides. (Supp. Response at 2).

DNI raises policy reasons to argue Appellant's interpretation does not make sense. Since size protests regarding ostensible subcontractor affiliation can, by definition, be filed only at the time of award itself — not when an agency awards future task orders or options — SBA must have anticipated it would be able to determine that a concern will meet the limitations on subcontracting at the time award is made. To do otherwise would defeat the entire purpose of the regulation. Since SBA only has size protest jurisdiction at the initial award of the *work covered by the solicitation*, SBA should determine compliance with the limitations on subcontracting based on the scope of the RFP. In other words, the only contract subject to the limitations on subcontracting, and which is the subject of the size protest and appeal, is Task Order 0001. (*Id.* at 2-3.) (emphasis supplied in Supp. Response).

More broadly, Appellant's supplemental pleading confirms that there are no genuine issues of material fact. (*Id.* at 7). Appellant does not dispute the CO made compliance with the limitations on subcontracting applicable to Task Order 0001 rather than the entire IDIQ contract, nor that DNI will retain **[a majority]** of the total amount to be paid by the Army on Task Order 0001. (Exhibit E). Appellant also does not dispute that DNI's teaming agreements with its subcontractors limits the combined role of these subcontractors cumulatively to **[less than half]** of the total work required by the contract.

DNI maintains Appellant has had multiple opportunities to contest facts in the record showing DNI will retain, but has not done so, focusing only on irrelevant and misleading arguments. In the absence of any factual dispute, OHA should consider granting summary

judgment on its own initiative and affirm the Size Determination below in accordance with 13 C.F.R. § 134.212(b) without further consideration of the additional issues below. (*Id.* at 7).

The fact remains that the Area Office correctly determined the primary and vital requirements of the subject procurement. While Appellant continues to insist the contract is only for engineering services, the plain language of both the RFP and the PWS strongly indicate otherwise. The Army seeks a contractor to provide, among other things "*PEO-wide program management*." (Exhibit B). That contract's title is "Systems Engineering and *Program Management"* further underscores this point. (*Id.*, at 8) (emphasis supplied in Response).

While Appellant takes issue with the Area Office's documentation of its reasoning the Area Office is not — and should not have to be — required to document every aspect of its decision-making process if the basis for its conclusions are readily apparent. It is unclear what documentation or evidence Appellant seeks from the Area Office to support its conclusion that the RFP and PWS themselves do not already provide. Appellant cites to no authority for the requirement that the Area Office document how it arrived at its decision. OHA's role is to review the Area Office's factual findings and legal conclusions for clear error which findings and conclusions were provided in the instant case. (*Id.*, at 8-9, citing *Navarro Research and Engineering, Inc.*, SBA No. SIZ-6065, at 10, 23 (2020).)

Regarding the argument that DNI is unusually reliant upon its subcontractors, DNI is performing the majority, approximately **[REDACTED PERCENTAGE]**, of the total contract work and the vast majority, approximately **[REDACTED PERCENTAGE]** of the management-related services under the contract and receive the majority, **[REDACTED PERCENTAGE]**, of the revenue. (*See* Application, Exhibit E). The Area Office was thus correct in its determination on that point. Furthermore, the Area Office was correct in determining DNI will provide the management personnel, none of whom have been previously employed by its subcontractor. (*Id.*, at 10.) (*See* Application, Exhibit D).

In addition, none of DNI's proposed subcontractors are incumbent contractors, and DNI does not plan to hire any personnel from the firms listed by Appellant **[Subcontractors 1, 2, and 3]**. Appellant's argument that DNI's proposed key personnel are not currently employed by DNI is also irrelevant, as this is not one of the factors in 13 C.F.R. § 121.103(h)(3)(i) or the *Dover Staffing* case. In sum, OHA's traditional indicia of unusual reliance are completely absent from the record. This is not a situation in which DNI teamed with an ineligible incumbent to front the small business work for the incumbent. DNI's relationship with its team is completely arm's length and the relationship exists only for the SEPM contract. (*Id.*, at 19).

DNI maintains the record also shows the Area Office had all these considerations in mind when making its determination. Appellant argues the Area Office erred by only considering the four *Dover Staffing* factors and not considering all aspects of the relationship between DNI and its subcontractors. This argument has been thoroughly addressed by OHA. *Size Appeal of NorthWind-CDM Smith Advantage JV, LLC*, SBA No. SIZ-6053 (2020) was a similar case. There, appellant made similar arguments the Area Office did not evaluate all aspects of the relationship between the prime and subcontractor. OHA nevertheless decided that "[t]he mere fact that the Area Office did not comment specifically on one or more documents does not

establish that the Area Office failed to consider those matters or that the Area Office committed any error." *Size Appeal of iGov Technologies, Inc.*, SBA No. SIZ-5359 (2012) has a similar holding. (*Id.*, at 21.)

H. Appellant's Motion for Leave to Reply and DNI's Opposition

On January 31, 2025, Appellant filed a motion for leave to Reply to DNI's Response, together with the Reply. Appellant argues OHA would benefit from this additional briefing regarding the legal and factual issues in the appeal and response to arguments presented by DNI. Appellant claims that DNI's Response contained numerous new arguments to which Appellant was entitled to respond, and that the request to submit a reply will not prejudice any non-moving party. Furthermore, OHA's regulations permit the judge to either request or grant leave to file a reply and OHA has discretion to allow sur-replies as requested by other parties. 13 C.F.R. § 134.206(e).

On February 14, 2025, DNI responded. DNI argues Appellant had not demonstrated good cause to file an additional brief. DNI contends that Appellant is largely just rehashing arguments made previously or raising new arguments it could have made in its supplemental pleading. Furthermore, allowing for more briefings would unnecessarily complicate, rather than facilitate, OHA's resolution in the instant case.

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge so directs. 13 C.F.R. § 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, OHA did not direct Appellant to file a reply, the proposed reply was filed after the close of record, and Appellant has not persuasively explained why a reply is necessary. Accordingly, the motion is DENIED, and the reply is EXCLUDED from the record. *Size Appeal of Fed. Performance Mgmt. Sols., LLC*, SBA No. SIZ-6246 (2023); *Size Appeal of Focus Revision Partners*, SBA No. SIZ-6188 (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 determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb a 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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

Appellant has not shown that the Area Office clearly erred in finding DNI an eligible small business. I therefore deny this appeal and affirm the size determination.

This appeal hinges on the ostensible subcontractor rule and the "primary and vital" requirements of the instant Solicitation. More specifically, beyond just the issue of being unusually reliant upon subcontractors is whether or not the Area Office erred in determining that DNI would meet the limitations on subcontracting by doing so with small businesses generally, as opposed to "similarly situated entities," as Appellant claims the rule requires. Regarding the "primary and vital requirements" issue, beyond whether or not DNI would be adequately performing these requirements is also the underlying issue of what, specifically, these requirements actually are.

Under the ostensible subcontractor rule a contractor and its ostensible subcontractor are treated as joint venturers and thus affiliated for size determination purposes. An ostensible subcontractor is a concern which "is not a similarly situated entity. . . and performs primary and vital requirements of a contract, or of an order, or is a subcontractor upon which the prime contractor is unusually reliant." 13 C.F.R. § 121.103(h)(3). A "similarly situated" entity is defined as a subcontractor that has the same small business program status as the prime contractor. 13 C.F.R. § 125.1.

SBA has recently revised its rule on whether a contractor is performing the primary and vital requirements of a contract:

> In the case of a contract or order set-aside or reserved for small businesses 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 § 125.6 of this chapter.

13 C.F.R. § 121.103(h)(3)(iii) (emphasis supplied).

Thus, the rule as now revised does apply a "bright line" test as DNI maintains. If the contract is for services, specialty trade construction or supplies, the regulation mandates a finding that the small business prime contractor is performing the primary and vital requirements if it, together with its small business subcontractors, meets the limitations on subcontracting provisions of 13 C.F.R. § 125.6.

The limitations on subcontracting rule provides:

> In the case of a contract for services (except construction), it will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated. Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded. Other direct costs may be excluded to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service, such as airline travel, work performed by a transportation or disposal entity under a contract assigned the environmental remediation NAICS code (562910), cloud computing

> services, or mass media purchases. In addition, work performed overseas on awards made pursuant to the Foreign Assistance Act of 1961 or work required to be performed by a local contractor, is excluded.

13 C.F.R. § 125.6(a)(1).

Appellant's main argument is that the Area Office erred in determining DNI would perform the primary and vital contract requirements. As evidence of this, Appellant cites DNI's cost proposal showing that out of the eleven key personnel engineer positions, DNI is providing **[a minority]** of them, whereas **[Subcontractor 1]** is providing **[the majority]**. This, combined with the fact that DNI is also supplying the Program Manager, further underscores the work split in the instant procurement, that DNI is simply managing the contract effort instead of providing the primary and vital requirements.

Appellant also emphasized throughout its pleadings the degree to which DNI would need to rely on **[Subcontractor 1]**, in particular. Appellant pointed to the appeal file, showing that **[Subcontractor 1]** personnel dominate three key tasks of the PWS — Sections 3.2, 3.3, and 3.4. **[Subcontractor 1]** is to provide the entirety of the engineers required for PWS section 3.3, and all of the personnel. (Appeal File, Ex. E). Moreover, DNI's Technical Proposal acknowledges the "elevated cybersecurity risks" involved in incorporating innovative technologies, but the only past performance example to "demonstrate" this expertise is Example 4, for **[Subcontractor 1]**. Similarly, while the technical proposal claims that "Team DNI has completed **[A REDACTED NUMBER OF]** Office Estimates," (Exh. D at 23), Appellant notes that the only past performance example to reference Program Office Estimates was, again, Example 4, for **[Subcontractor 1]**. (Exh. F at 18.) (Supp. Pleading at 15-16).

Appellant claims that, in sum, these examples show that when one attempts to substantiate any specific claim in DNI's technical proposal the expertise of "Team DNI" is, in fact, the expertise of **[Subcontractor 1]**. (Supp. Pleading At 17-18).

DNI, in turn, responded to these assertions in its own filings.

To start, DNI's proposal itself shows the following: DNI is the prime contractor. Its subcontractor team members are **[Subcontractors 1, 2, and 3.]** (Exh. G at 2). The role of the prime contractor, DNI, is to lead and manage the execution of the PEO C3T SEPM contract, as well as to provide and maintain accountability across all entities for all dimensions regarding performance of the subject procurement, whether those categories pertain to cost, technical factors, scheduling factors, etc. (*Id.*) The proposal states that DNI is to provide personnel and capabilities in for tasks outlined in the PWS in at least some capacity or another.

[Subcontractor 1], according to the proposal, is to be involved in PWS Tasks 3.0-3.7, and takes on a significant portion of the engineering services for the procurement. (Exh. G at 2). **[Subcontractor 2's]** role is to provide cost estimating, financial analysis, schedule management, and risk analyses for the large scale programs across PEO C3T in the subject procurement, which is covered by PWS Task 3.5.

Appellant evidenced its contention about **[Subcontractor 1]** performing the vast majority of the primary and vital requirements of the procurement by noting that five out of six key personnel resumes called for in the PWS section 3.2 — and eleven out of twelve of the key personnel provided in DNI's proposal — were engineers. (Supp. Appeal at 11-12). The Solicitation, in actuality, required only five key personnel, not twelve as claimed by Appellant. (Exh. B.1 at 19-21.) Furthermore, DNI's proposal shows a total of **[REDACTED]** resumes for key personnel, corresponding to the key personnel required by the PWS, plus an additional key INFOSEC engineer. (Exh. E). DNI's proposal also shows that it is providing **[at least half of a different number]** of the key personnel, not 1 of 12. *See id.* at 10-18.
Furthermore, **[REDACTED]** of the four "engineering" key personnel positions identified by Appellant are, positions primarily involved in contract management and coordination which will be provided by DNI. (Exh. E.)

Taking a broader look at the subject procurement beyond just engineering, DNI's cost proposal demonstrated that it will not only be performing a **[REDACTED MAJORITY PERCENTAGE]** of the total contract work, but also that it will be performing **[REDACTED GREATER MAJORITY PERCENTAGE]** of the key program management tasks, including **[REDACTED PERCENTAGE]** of the Information Management requirement, **[REDACTED PERCENTAGE]** of the Readiness Management requirement, and **[REDACTED PERCENTAGE]** of the Business and Operations Management requirement. (Ex. E).

Appellant made the argument that DNI has not demonstrated experience in Information Management, and consequently intimated that DNI would therefore rely on **[Subcontractor 1]** to complete those particular Task Orders. Beyond that argument being nothing more than speculation, there is no requirement for a prime contractor, or any other entity, to demonstrate prior "experience" in a certain task order in order to perform a Solicitation's primary and vital requirements. The Solicitation itself did not require that DNI prove prior experience performing certain tasks in order to support or validate its proposed technical approach, not did it require offerors to substantiate their technical approach with the contents of their past performance. (Supp. Resp. at 14). Furthermore, "[w]hether an awardee is capable of performing a contract is the province of the CO, not the Area Office, and cannot be a basis of an affiliation finding under the ostensible subcontractor rule." *Size Appeal of Inquiries, Inc.*, SBA No. SIZ-6008, at 22 (2019).

In sum, across a wide variety of factors, it appears that DNI meets the limitations on subcontracting requirements, beyond just the fact that DNI will perform an overall majority of the total contract work. For instance, DNI will retain **[a majority percentage]** of the total amount to be paid by the Army on Task Order 0001, (roughly **[majority dollar figure]** out of **[total dollar figure]**). (Exh H). DNI also contends that the management and coordination work will account for **[the vast majority]** of the total effort of the subject procurement. (Supp. Resp. at 10).

Though Appellant disputes these by noting that DNI will receive substantially less than 50% of revenue in the option years, DNI's counterargument is that since size protests are only

filed only at the time of award itself — not when an agency awards future task orders or options. Again, Appellant's argument is based upon speculation.

Appellant's other allegations regarding DNI's reliance on the other firms were shown to be largely speculative. That Appellant initially accused DNI of unduly relying upon Booz Allen in its initial Size Protest before pivoting to **[Subcontractors 1, 2, and 3]** is highly illustrative of this point.

There is also the issue of what the "primary and vital" requirements of the procurement actually are. Much of Appellant's argument is centered on this, as it pertains to DNI's reliance on its subcontractors, percentage of total labor, etc. DNI may perhaps be outsourcing significant elements of the engineering aspect of the subject procurement to some of its subcontractors. But the plain language of both the RFP and the PWS are clear that engineering is not the only aspect of the subject procurement. The plain language of the RFP clearly indicates that the Army is not simply hiring engineers but seeks a contractor to "augment PEO C3T's core Government personnel in support of PEO-wide program management." (Ex. B.1 ¶ 1.1.) This includes a "diverse range of support services" covering "engineering and acquisition support. In addition to engineering, the contractor is sought to provide, among other things "PEO-wide program management." (Exhibit B). That the name of the contract is "Systems Engineering and Program Management**"** further underscores this point. (Ex. B.1 at 2).

DNI also cites OHA precedent to bolster this point, as "[t]he primary and vital [contract] requirements stem from the contract's principal purpose" and thus are typically "those which account for the bulk of the effort, or of the contract dollar value." *Size Appeal of Emergent, Inc.*, SBA No. SIZ-5875, at 8 (2017). DNI's cost proposal showed **[the vast majority]** of the work consisted of management-related tasks, whereas only **[a small minority]** of the work is for technical engineering services. (Response at 18).

That Appellant cited no precedent supporting its position that the Area Office should be required to document "how" it arrived at the decision is also worth noting. OHA held the opposite in *Navarro Research and Engineering, Inc.*, SBA No. SIZ-6065, stating that while "the size determination did not expressly state which requirements were primary and vital, the Area Office nevertheless clearly considered that issue." (*Navarro* at 13). Such appears to be the case here — the Area Office clearly considered the relevant issues at hand in making their determination.

To the extent that DNI is subcontracting portions of the procurement, it is doing so well within the limits permitted by the regulation, as its teaming agreements with its subcontractors limit the combined role of these subcontractors cumulatively to less than 50% of the total work required by the contract — with that total work including both engineering and Program Management services. SBA stated in its final version of the revisions to the ostensible subcontractor rule that "a prime contractor should be able to use the experience and past performance of its subcontractors to strengthen its offer." *See* 88 Fed. Reg. 26,164, 26,166; 13 C.F.R. § 121.103(h)(3)(ii).

By contrast, OHA has never required that a prime contractor take a "significant role" in each required task area of a particular Solicitation in order to be considered performing the primary and vital requirements, even before the revisions to the regulation. The program management aspects of the subject procurement are a primary and vital part of the contract, as clearly demonstrated at many different points throughout the record and through the plain language of the PWS. **[Subcontractor 1]** may be doing the heavy lifting with respect to the Solicitation's engineering requirements specifically, but those do not in and of themselves constitute the primary and vital requirements, and in fact constitute less total work than the program management aspect of the contract does.

To circle back to the revised rule, the standard is now that of a brightline rule, where in respect to a services, specialty trade construction, or supply contract: "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 § 125.6 of this chapter." 13 C.F.R. § 121.103(h)(3)(iii), (emphasis supplied). SBA itself also noted during the issuance of the rule that it "believe[d] that meeting the applicable limitation on subcontracting requirement is sufficient to overcome ***any claim*** of the existence of an ostensible subcontractor." 88 Fed. Reg. 26,164, 26,166 (Apr. 27, 2023), (emphasis supplied).

When the subject procurement is viewed in the aggregate — between the engineering, the program managements, and all other requirements — DNI is performing a majority of the total work required by the contract. The specific methods and mechanisms through which a proposal seeks to comply with the pertinent regulations are irrelevant so long as they are being complied with. After comprehensive review — especially in light of the recent revisions — the record strongly indicates that DNI is compliant with the limitations on subcontracting. That DNI is meeting the applicable limitations on subcontracting, in turn, provides sufficient evidence to overcome Appellant's claim — indeed, any claim — regarding the existence of an ostensible subcontractor.

Accordingly, after careful review all the factors at hand, Appellant has not demonstrated that the Area Office breached the high standard of "clear error" in determining that DNI met the limitations on subcontracting. I must therefore DENY this appeal and AFFIRM the size determination.

IV. Conclusion

Appellant has not demonstrated clear error of fact or law in the Area Office's size determination. Therefore, I DENY the appeal, and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge