

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

SIZE APPEAL OF:

Veteran Elevated Solutions, LLC,

Appellant,

Re: GD Resources LLC

Appealed from
Size Determination No. 02-2025-020

SBA No. SIZ-6356

Decided: June 2, 2025

APPEARANCES

Matthew T. Schoonover, Esq., John M. Mattox II, Esq., Timothy J. Laughlin, Esq.,
Haley M. Sirokman, Esq., Schoonover & Moriarty LLC, Olathe, Kansas, for Veteran Elevated
Solutions, LLC

Richard W. Arnholt, Esq., Sylvia Yi, Esq., Bass, Berry & Sims PLC, Washington, D.C.,
for GD Resources LLC

DECISION¹

I. Introduction and Jurisdiction

On March 7, 2025, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 02-2025-020, concluding that GD Resources LLC (GD Resources) is an eligible small business for the subject procurement. The Area Office found that GD Resources is not in violation of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(3), because GD Resources will comply with applicable limitations on subcontracting restrictions. On appeal, Veteran Elevated Solutions, LLC (Appellant), which had previously protested GD Resources' size, maintains that the size determination is clearly erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied.

¹ 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.

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 after 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 RFQ

On August 9, 2024, the U.S. Department of Veterans Affairs (VA) issued Request for Quotations (RFQ) No. 36C26225Q0006 for elevator preventative maintenance and repair at the Southern Arizona VA Healthcare System in Tucson, Arizona. (RFP, SF 1449.) The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned North American Industry Classification System (NAICS) code 238290, Other Building Equipment Contractors, with a corresponding size standard of \$22 million in average annual receipts. (*Id.*)

The RFQ explained that the contractor will perform “elevator and dumbwaiter preventative maintenance, inspections, and emergency call back services.” (RFQ at 23.) The contractor must “clean, adjust, and lubricate the equipment, determine the nature and extent of any work required to restore the elevators and dumbwaiter[s] to satisfactory service as determined by [VA], and if conditions warrant, furnish and install parts.” (*Id.*) Furthermore, “[t]he contractor's employees shall be manufacture[r] trained and qualified technicians with not less than three (3) years' experience working on elevators and safety devices.” (*Id.*)

The RFQ included the following “Special Standards of Responsibility” pursuant to Federal Acquisition Regulation (FAR) 9.104-2:

Contractor shall be required to provide fully qualified, and manufacturer trained or certified service, delivery, and management personnel in sufficient numbers to actively and efficiently service and support Elevator Preventative Maintenance and Repair during the contract period. The contractor shall submit valid proof of required qualifications in a capability statement to include any supporting certifications and Business License.

(*Id.* at 36, 40.) The RFQ warned that “[o]fferors who fail to meet any special standard of responsibility will not be eligible to receive contract award.” (*Id.* at 40.)

According to the RFQ, VA planned to award a single contract to the offeror with the lowest reasonable price. (*Id.* at 40-41.) After identifying an apparent awardee based on price, the CO “will then determine if the successful offeror is responsible using the general standards of responsibility and the special standards of responsibility applicable to this procurement.” (*Id.* at 41.)

Quotations were due August 22, 2024. (RFQ, Amendment 0001.) Appellant and GD Resources submitted timely quotations.

B. GD Resources' Quotation

GD Resources' quotation, dated August 22, 2024, explained that GD Resources is a certified SDVOSB “possess[ing] extensive experience with implementing staffing and management strategies.” (Tech. Proposal at 3.) GD Resources is headquartered in Gaithersburg, Maryland. (*Id.*)

The quotation stated that GD Resources will serve as the prime contractor for the effort, and will be responsible for “the majority of services under the contract to include: Contract Management, Project Management, and Labor.” (*Id.* at 4.) GD Resources will subcontract “a portion of the labor and the equipment” to [Company A]. (*Id.*) More specifically, [Company A] “will be tasked with the comprehensive maintenance and repair of the elevators as specified in the contract.” (*Id.* at 14.) The quotation indicated that “[Company A] has committed to dedicating approximately [XX]% of their service technician's time to this contract, ensuring that the elevators are maintained to the highest standards and remain fully operational.” (*Id.*)

According to the quotation, GD Resources “will retain overall management of the project, ensuring all subcontracted tasks are completed to the highest standards.” (*Id.*) GD Resources described the duties it will self-perform as encompassing “[f]requent meetings with [Company A] to review progress,” “[c]ontinuous monitoring of subcontractor performance, with a focus on quality, safety, and adherence to the schedule,” and “[e]nsuring that all maintenance activities, tests, and repairs are thoroughly documented and reported.” (*Id.*)

GD Resources' quotation identified [XXXXXX] as the proposed Project Manager, but did not specify which company would employ [XXXXXX]. (*Id.* at 4, 11.) The proposed elevator technician, [XXXXXX], was an [] employee [of Company A]. (*Id.* at 14, 17.) With its quotation, GD Resources provided copies of [XXXXXX]'s elevator technician certification and [Company A's] business license in the state of [XXXXXX]. (*Id.* at 16-18.)

For price, GD Resources proposed a fixed monthly price of \$[XXXXXX], totaling \$[XXXXXX] for each year of contract performance. (Price Proposal at 4-5.)

C. Protest

On October 3, 2024, the CO notified unsuccessful offerors, including Appellant, that GD Resources had been selected for award. On October 8, 2024, Appellant filed a protest with the CO challenging GD Resources' size. The protest alleged that GD Resources is affiliated with TK Elevator Corporation (TK Elevator), a large business, under the ostensible subcontractor rule. (Protest at 1.)

Appellant first highlighted that, pursuant to the ostensible subcontractor rule, a prime contractor and subcontractor are affiliated when the subcontractor will perform the “primary and vital” contract requirements, or when the prime contractor is unusually reliant upon the subcontractor. (*Id.* at 3.) Here, based on the RFQ, the primary and vital requirements are “routine and emergency elevator maintenance and repair services.” (*Id.* at 4.) In essence, “VA needs full-

service elevator work across 26 elevators at its Southern Arizona campus.” (*Id.*) GD Resources, though, is “a program management company,” based in Maryland, and does not employ any elevator mechanics. (*Id.*) GD Resources thus lacks the “qualifications, competency, and capability” to self-perform the required work. (*Id.*) As such, Appellant reasoned, GD Resources must rely on its subcontractor, TK Elevator, to perform the contract. (*Id.*)

Appellant alleged that GD Resources also likely relied upon TK Elevator to win the award. (*Id.* at 5.) The RFQ required offerors to demonstrate the ability to perform the contract. (*Id.*) Appellant contended that GD Resources “had to rely on TK Elevator's expertise and experience in pricing its offer and establishing the necessary qualifications because [GD Resources] is not an elevator company, and it does not possess any in-house elevator competence that would enable it to accurately price an offer for elevator services.” (*Id.*)

D. Protest Response

The CO forwarded Appellant's protest to the Area Office for review. On October 30, 2024, GD Resources responded to the protest. GD Resources highlighted that past performance was not an evaluation factor for this procurement. (Protest Response at 1.) Therefore, GD Resources maintained, prior experience with elevator maintenance is irrelevant. (*Id.*) Moreover, and contrary to the premise of the protest, GD Resources does have experience “managing and delivering maintenance contracts in similarly regulated settings.” (*Id.*) GD Resources asserted that it “does not rely on TK Elevator's expertise or resources beyond minor technician support.” (*Id.*) Furthermore, the quotation “presented other subcontractors as viable alternatives” to TK Elevator, namely [Company A]. (*Id.* at 1-2.)

GD Resources contended that it will self-perform the primary and vital requirements of the contract, which GD Resources defined as “contract management, supervision, reporting and documentation, quality control, compliance, and procurement of equipment and all parts.” (*Id.* at 2.) Conversely, “TK Elevator's involvement is limited to providing a part-time technician, who will work approximately [XXXX] under the strict scheduling and coordination managed entirely by [GD Resources].” (*Id.*)

Although GD Resources' quotation identified [Company A], rather than TK Elevator, as the proposed subcontractor, GD Resources explained that, after executing the contract on September 24, 2024, GD Resources had “re-engaged with our subcontractors to confirm their quotes,” and chose TK Elevator. (Protest Response, Attach. D at 2.) GD Resources then “submitted the selected subcontractor information to the VA” on September 30, 2024, and “VA promptly approved our subcontractor.” (*Id.*) The proposed Project Manager identified in the quotation, [XXXXX], was “associated with” [Company A]. (Letter from [GD Resources] to H. Goza (Dec. 9, 2024), at 2.) Accordingly, following the “change in subcontractor to TK Elevator,” GD Resources substituted [XXXXX], an employee of GD Resources, for [XXXXX]. (*Id.*) In addition, GD Resources substituted [XXXXX], an elevator technician employed by TK Elevator, for [XXXXX]. (Protest Response, Attach. F.) GD Resources provided a copy of [the technician's] International Union of Elevator Constructors (IUEC) card, reflecting that he typically is compensated at a wage of \$[XXX]. (*Id.* at 5-6.)

[illegible]

GD Resources also submitted to the Area Office an unsigned and undated “Tasks & Services Breakdown,” purporting to describe the respective responsibilities of GD Resources and TK Elevator. (Protest Response, Attach. E.) According to the “Tasks & Services Breakdown,” GD Resources will self-perform project management and administration, documentation and reporting, quality control and compliance, and materials and parts. (*Id.* at 1-2.) TK Elevator will be responsible for “all technical and hands-on maintenance services required for elevator operation, covering both routine and emergency tasks.” (*Id.* at 2.) This work includes preventative maintenance and inspection, scheduled maintenance and repairs, annual and periodic testing, emergency callback services, cleaning and lubrication, and out-of-scope repairs. (*Id.*) In total, “[GD Resources] will perform approximately [XX]% of the overall project scope, focusing on management, compliance, and supply functions, while [TK Elevator] will handle approximately [XX]% of the tasks related to direct elevator maintenance and repair.” (*Id.*, emphasis in original.)

The following tables were included in the “Tasks & Services Breakdown”:

GD Resources LLC		
Services	Monthly Cost	Yearly Cost
Project Management & Administration	[XXXXXX]	[XXXXXX]
Materials and Parts to be Furnished	[XXXXXX]	[XXXXXX]
Documenting/Reporting	[XXXXXX]	[XXXXXX]
Quality Control & Compliance	[XXXXXX]	[XXXXXX]
Monthly Cost	Yearly Cost	% of the Contract
\$[XXXXXX]	\$[XXXXXX]	[XX]%

TK Elevator Corp.				
Services	Approx. Work Hours Monthly	Approx. Work Hours Yearly	Monthly Cost	Yearly Cost
Preventative Maintenance and Inspection	[XX]	[XX]	[XXXXXX]	[XXXXXX]
Scheduled Maintenance and Repairs	[XX]	[XX]	[XXXXXX]	[XXXXXX]
Annual and Periodic Testing	[XX]	[XX]	[XXXXXX]	[XXXXXX]
Emergency Callback Services	[XX]	[XX]	[XXXXXX]	[XXXXXX]
Cleaning, Lubrication, and Adjustment Services	[XX]	[XX]	[XXXXXX]	[XXXXXX]
Vandalism and Out-of-Scope Repairs	[XX]	[XX]	[XXXXXX]	[XXXXXX]
Competency and Training of Personnel	[XX]	[XX]	[XXXXXX]	[XXXXXX]
Approx. Hourly Rate	Monthly Cost	Yearly Cost	% of the Contract	
[\$XXXXXX]	[\$XXXXXX]	[\$XXXXXX]	[XX]%	

(Id. at 3.)

E. Size Determination

On March 7, 2025, the Area Office issued Size Determination No. 02-2025-020, concluding that GD Resources is small for the subject procurement. The Area Office found that GD Resources is not in violation of the ostensible subcontractor rule. (Size Determination at 9.)

The Area Office explained, first, that GD Resources is a Maryland limited liability company (LLC), established in January 2023, and wholly-owned by Ms. Basso Ghee. (Id. at 5.) Ms. Ghee has the power to control GD Resources through her ownership interest. (Id.) Ms. Ghee holds no ownership or managerial interest in any other concerns. (Id.)

The Area Office noted that the alleged ostensible subcontractor, TK Elevator, is identified in the System for Award Management as other-than-small for all NAICS codes. (Id.) [Company A], on the other hand, is a small business but not an SDVOSB, so it is not a similarly-situated entity for purposes of SBA regulations. (Id. at 5-6.)

Turning to the protest allegations, the Area Office discussed the “four key factors” that OHA has found to be strongly indicative of unusual reliance:

- (1) the proposed subcontractor is the incumbent that is ineligible to compete for the procurement;
- (2) the prime contractor intends 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 on its subcontractor to win the contract.

(*Id.* at 6, citing *Size Appeal of Charitar Realty*, SBA No. SIZ-5806 (2017).) Applying this test, the Area Office found that neither the first nor the third factors are met, because GD Resources will not utilize the incumbent prime contractor, Panacea Group, LLC (Panacea), as a subcontractor. (*Id.* at 6-7.) Although TK Elevator is the incumbent subcontractor, GD Resources' quotation stated that GD Resources planned to subcontract to [Company A], not to TK Elevator. (*Id.* at 6.) The second factor also is not met, because there is no indication that GD Resources will hire personnel directly from Panacea, TK Elevator, or [Company A]. (*Id.*) The Area Office found that [XXXXX], the proposed Project Manager identified in the quotation, is an employee of [Company A]; according to GD Resources, though, [XXXXX] is no longer involved with the procurement. (*Id.* at 7.) Instead, GD Resources substituted one of its own employees, [XXXXX], as the new Project Manager. (*Id.*) As for the last factor, the Area Office found that GD Resources did rely on [Company A's] experience to win the award. This factor alone, however, is insufficient to establish undue reliance. (*Id.*)

The Area Office identified the contract's primary and vital requirements as “elevator and dumbwaiter preventative maintenance, inspections, and 24/7 emergency care,” all of which require manufacturer-trained technicians with at least three years of experience. (*Id.* at 8.) GD Resources' quotation, dated August 22, 2024, made clear that GD Resources will subcontract such work entirely to [Company A], while GD Resources would perform only supervisory functions. (*Id.* at 7-8.) As such, the Area Office concluded, “the subcontractor is performing the primary and vital duties of the contract and [GD Resources] is merely overseeing the performance.” (*Id.* at 8.)

Nevertheless, the Area Office found that GD Resources is not in violation of the ostensible subcontractor rule, based on the “safe harbor” provision at 13 C.F.R. § 121.103(h)(3)(iii). (*Id.* at 8-9.) 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[.]

(*Id.* at 9.)

The instant procurement was assigned a NAICS code for specialty trade construction, so the Area Office considered whether GD Resources will meet the limitations on subcontracting restriction at 13 C.F.R. § 125.6(a)(4). (*Id.* at 8-9.) GD Resources provided a “Tasks & Services Breakdown” reflecting that it will not subcontract more than 75% of the contract value. (*Id.* at 9.) As such, although the Area Office reiterated that GD Resources “is not performing any of the functions related to the primary and vital requirements,” the subcontracting arrangement does not contravene the ostensible subcontractor rule, based on the “safe harbor” provision at 13 C.F.R. § 121.103(h)(3)(iii). (*Id.*) The receipts of GD Resources alone do not exceed the size standard, so GD Resources is a small business for the subject procurement. (*Id.* at 11.)

F. Appeal

On March 24, 2025, Appellant filed the instant appeal. Appellant contends that the Area Office committed clear error by relying on the “Tasks & Services Breakdown” — a “self-serving estimate” prepared by GD Resources in response to the protest — to find no ostensible subcontractor affiliation between GD Resources and its subcontractor(s). (Appeal at 1.) Appellant also moves to introduce new evidence, specifically a sworn declaration from Mr. Ron Myhre, an employee of Elevated Technologies, Inc., one of Appellant's joint venturers. Mr. Myhre attests that, contrary to the size determination, TK Elevator, not [Company A], is GD Resources' subcontractor for this procurement.² (Motion at 2.)

Appellant argues that, after determining that GD Resources will not self-perform any portion of the primary and vital contract requirements, the Area Office apparently requested a breakdown of GD Resources' expected costs for the procurement. (Appeal at 6.) The Area Office repeatedly stated that TK Elevator is not the subcontractor identified in the quotation, so GD Resources presumably would not have disclosed information concerning its relationship with TK Elevator. (*Id.*) As such, the size determination is fundamentally flawed, as the Area Office failed to consider how much work TK Elevator will perform. (*Id.* at 6-7.)

Furthermore, under 13 C.F.R. § 121.1009(b), the Area Office had both the authority and the obligation to seek clarification after discovering that GD Resources' protest response was inconsistent with its quotation. (*Id.* at 7-8.) This alone is grounds for remand, as OHA precedent establishes that failure to resolve such conflicts constitutes clear error. (*Id.* at 8-9, citing *Size Appeal of Precision Standard, Inc.*, SBA No. SIZ-4858 (2007) and *Size Appeal of Mark Dunning*

² Under OHA's rules of procedure, new evidence may be admitted in a size appeal proceeding at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). By separate Order dated May 14, 2025, OHA granted Appellant's motion and admitted Mr. Myhre's declaration into the record.

Indus., Inc., SBA No. SIZ-5284 (2011).) Appellant reiterates that Mr. Myhre's declaration shows that TK Elevator, not [Company A], is GD Resources' actual subcontractor. (*Id.* at 9.)

Appellant concludes that the Area Office improperly relied solely on GD Resources' self-serving statements. (*Id.* at 10.) Rather, “where a proposal fails to identify performance obligations between a contractor and its subcontractor(s), the SBA should disregard any representations submitted in response to a size protest that conflict with the concern's proposal.” (*Id.*, citing *Warrior Serv. Co., LLC v. United States*, 149 Fed. Cl. 594 (2020).) Regardless, Appellant maintains that GD Resources' “miniscule” workload cannot comprise 25% or more of the contract value. (*Id.*) Because GD Resources will not self-perform even a portion of the primary and vital contract requirements, Appellant reasserts that the Area Office should have found that GD Resources violated the ostensible subcontractor rule. (*Id.* at 11.)

G. GD Resources' Response

On April 9, 2025, GD Resources responded to the appeal. GD Resources contends that Appellant has not met its burden of proving error in the size determination. (Response at 1.)

GD Resources asserts that as of the pertinent date for determining size, August 22, 2024, GD Resources' quotation identified [Company A] as its subcontractor, not TK Elevator. (*Id.* at 3.) The subsequent engagement of TK Elevator occurred only afterwards. (*Id.*) Accordingly, GD Resources argues, TK Elevator's role is irrelevant to the ostensible subcontractor analysis. (*Id.*, citing *Size Appeal of Warrior Serv. Co., LLC*, SBA No. SIZ-6046 (2020).) GD Resources maintains that the Area Office “correctly relied on information regarding [Company A's] portion of the contract” in reaching its decision. (*Id.*)

GD Resources next contends that the Area Office properly applied 13 C.F.R. § 121.103(h)(3)(iii). (*Id.* at 4.) The subject procurement is one for specialty trade construction, and GD Resources' quotation and supplemental documentation showed that GD Resources will not subcontract more than 75% of the contract value. (*Id.*)

GD Resources rejects Appellant's claim that the Area Office relied solely on GD Resources' “self-serving” cost breakdown. (*Id.*) GD Resources distinguishes the current situation from that in *VSBC Protest of Winergy, LLC*, SBA No. VSBC-424-P (2025) where the protested concern failed to come forward with any evidence that it would comply with the limitations on subcontracting. (*Id.* at 5.) Here, GD Resources contends, the evidence provided was consistent with its quotation. (*Id.*)

H. Supplemental Appeal

On April 9, 2025, after its counsel reviewed the Area Office file under an OHA protective order, Appellant supplemented its appeal. Appellant reiterates its contentions that the Area Office clearly erred by (1) considering [Company A] to be the subcontractor rather than TK Elevator and (2) finding that GD Resources will comply with the limitations on subcontracting. (Supp. Appeal at 1.)

Appellant maintains that the Area Office's decision was predicated on the false premise that [Company A], not TK Elevator, was GD Resources' intended subcontractor. (*Id.* at 2.) Although GD Resources' quotation referred only to [Company A], GD Resources informed the Area Office that, in late September 2024, GD Resources had substituted TK Elevator for [Company A], along with a new Project Manager and a new elevator technician, and had sought VA's approval of these changes. (*Id.* at 2-3.) In effect, then, GD Resources substantially revised its quotation on September 30, 2024, and the Area Office should have utilized this date as the date of final proposal revisions for purposes of its analysis. (*Id.* at 4.) Had the Area Office done so, the Area Office would have concluded that TK Elevator was GD Resources' subcontractor. (*Id.* at 4-5.) Furthermore, all four factors of the unusual reliance test would be met since TK Elevator also was the incumbent subcontractor to Panacea. (*Id.* at 5-6.)

Appellant attacks the “Tasks & Services Breakdown,” which apparently formed the basis for the Area Office's determination that GD Resources will meet limitations on subcontracting restrictions. (*Id.* at 7-8.) According to Appellant, the “Tasks & Services Breakdown” is unreliable since it is unsupported by sworn evidence and differs from the subcontract between GD Resources and TK Elevator. (*Id.* at 8, citing *VSBC Protest of Elevated Techs., Inc.*, SBA No. VSBC-376-P (2024).) The breakdown improperly attributes the costs of parts and materials to the prime contractor, contrary to 13 C.F.R. § 125.6(a)(4). (*Id.* at 10.) Removing this amount alone would bring GD Resources' share down to [XX]%. (*Id.*) Appellant further asserts that the breakdown misattributes certain tasks, such as documentation and quality control, to GD Resources that will be performed by TK Elevator under the subcontract. (*Id.*) Adjusting for these tasks, GD Resources' work would fall to only [XX]% of the contract costs. (*Id.* at 12.) Appellant posits that TK Elevator will supervise itself in many respects which will likely bring GD Resources' involvement below the 25% threshold required by 13 C.F.R. § 125.6(a)(4). (*Id.* at 13-14.) Additionally, the “Tasks & Services Breakdown” utilized an “approximate” wage of \$[XXX] per hour for TK Elevator's technician, yet GD Resources disclosed to the Area Office that [the technician] is compensated [XXXXXXX]. (*Id.* at 14 fn. 6.) In sum, Appellant asserts, GD Resources did not persuasively show that it will meet limitations on subcontracting restrictions. (*Id.* at 14-15.)

I. Supplemental Response

On May 28, 2025, GD Resources responded to the Supplemental Appeal. GD Resources argues that “[t]he entirety of [the] Supplemental Appeal relies on information that cannot be considered in the ostensible subcontractor analysis.” (Supp. Response at 1.)

GD Resources first reiterates its view that TK Elevator's involvement is not relevant to the analysis because TK Elevator was not identified as GD Resources' subcontractor in the quotation. (*Id.* at 1-2.) According to 13 C.F.R. § 121.404(a), size normally is assessed as of the date a concern submits its initial offer including price. (*Id.* at 2.) When GD Resources submitted its quotation with price on August 22, 2024, [Company A] was identified as GD Resources' sole subcontractor. (*Id.*) As such, GD Resources contends, TK Elevator's later involvement is immaterial. (*Id.*) GD Resources denies any suggestion that it misled VA, and asserts that it relied on information from multiple prospective subcontractors in developing its quotation. (*Id.*) Furthermore, “[i]t is well-settled law that changes of approach occurring after the date to

determine size do not affect a firm's compliance with the ostensible subcontractor rule because size is assessed as of that specific date.” (*Id.* at 3, quoting *Size Appeal of Warrior Serv. Co., LLC*, SBA No. SIZ-6046, at 7 (2020) *aff'd sub. nom. Warrior Serv. Co., LLC v. United States*, 149 Fed. Cl. 594 (2020).)

GD Resources reasserts that, in any event, the Area Office properly found that GD Resources will comply with the limitations on subcontracting. (*Id.*) In accordance with 13 C.F.R. § 121.103(h)(3)(iii), for a specialty trade construction procurement, SBA will find that the prime contractor is not in violation of the ostensible subcontractor rule if the prime contractor will pay less than 75% of the contract value to non-similarly situated subcontractors. (*Id.*) Here, the “Tasks & Services Breakdown” confirms that GD Resources will pay less than 75% to its subcontractor, TK Elevator. (*Id.* at 4.) The subcontract with TK Elevator also shows that TK Elevator will receive less than 75% of the contract. (*Id.*) Additionally, the pricing information originally provided by [Company A] also was less than 75% of the contract value. (*Id.* at 5.) As such, GD Resources contends that it will comply with the limitations on subcontracting. (*Id.*)

Even though compliance with the limitations on subcontracting bars any violation of the ostensible subcontractor rule, GD Resources maintains that it will not be unusually reliant on any subcontractor to perform this contract. (*Id.*) GD Resources claims that none of the four factors for unusual reliance are met. (*Id.* at 5-7.) Panacea, rather than TK Elevator or [Company A], is the incumbent contractor. (*Id.* at 6.) While TK Elevator performed work under the incumbent contract, GD Resources contends that this is not enough to deem TK Elevator the incumbent contractor. (*Id.*, citing *Size Appeal of Lynxnet, LLC*, SBA No. SIZ-5609, at 8 (2014).) GD Resources also will not hire any personnel from [Company A] or TK Elevator. (*Id.*) In the quotation, an [Company A] employee, [XXXXX], was identified as the proposed Project Manager. (*Id.*) However, the new Project Manager is an employee of GD Resources. (*Id.*) Lastly, GD Resources refutes Appellant's allegation that it lacks the experience to perform the contract. (*Id.*) Although GD Resources does not have elevator repair experience, the RFQ did not specify this as one of the evaluation factors. (*Id.*) The inclusion of a more experienced subcontractor is thus irrelevant to the analysis. (*Id.*, citing *Size Appeal of Martin Bros. Constr., Inc.*, SBA No. SIZ-5945, at 12 (2018).)

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 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).

B. Analysis

I agree with Appellant that the Area Office erred in assessing GD Resources' size as of August 22, 2024, rather than as of September 30, 2024. SBA regulations provide that a prime contractor's compliance with the ostensible subcontractor rule is determined “as of the date of the final proposal revision for negotiated acquisitions.” 13 C.F.R. § 121.404(f). Here, GD Resources submitted its quotation on August 22, 2024, and no formal discussions were conducted. Sections II.A and II.B, *supra*. As GD Resources itself informed the Area Office, however, GD Resources made substantial changes to its original quotation in late September 2024. In particular, GD Resources substituted TK Elevator for [Company A] as the sole proposed subcontractor; substituted [XXXXX] for [XXXXX] as the proposed Project Manager; and substituted [XXXXX] for [XXXXX] as the proposed elevator technician. Section II.D, *supra*. GD Resources sought, and obtained, VA's approval of these changes on September 30, 2024. *Id.* Accordingly, because GD Resources significantly revised its quotation in late September 2024, the Area Office erred in examining GD Resources' size as of August 22, 2024. Had the Area Office examined GD Resources' size as of the proper date — September 30, 2024 — the Area Office would have found that TK Elevator, not [Company A], was GD Resources' proposed subcontractor.

Nevertheless, although I agree with Appellant that the Area Office erred in examining GD Resources' size as of August 22, 2024, Appellant has not shown that this error would have altered the outcome of the case. The record reflects that, after concluding that GD Resources, the prime contractor, will not self-perform the “primary and vital” contract requirements, the Area Office proceeded to consider whether GD Resources might still avoid ostensible subcontractor affiliation by demonstrating its compliance with applicable limitations on subcontracting restrictions. Section II.E, *supra*. The Area Office's approach was grounded in a “safe harbor” provision added to the ostensible subcontractor rule in 2023, permitting that:

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). OHA has characterized this provision as “a ‘bright line’ test,” which “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.” *Size Appeal of Bowhead Enter., Sci., and Tech., LLC*, SBA No. SIZ-6352, at 15 (2025). Furthermore, although the safe harbor provision

itself is silent as to the manner in which a prime contractor may “demonstrate” — prior to contract performance — its future adherence to limitations on subcontracting restrictions, SBA regulations elsewhere explain that such compliance is assessed through tangible evidence such as “invoices, copies of subcontracts, or a list of the value of tasks performed.” 13 C.F.R. § 125.6(f)(4).

In the instant case, GD Resources proffered credible evidence to show its compliance with limitations on subcontracting restrictions, specifically: (1) its quotation; (2) the subcontract between GD Resources and TK Elevator, dated September 26, 2024; and (3) the “Tasks & Services Breakdown.” The quotation indicates that GD Resources will be paid a fixed monthly price of \$[XXXXXX], totaling \$[XXXXXX] for each year of contract performance. Section II.B, *supra*. Meanwhile, according to the subcontract, GD Resources will pay TK Elevator a “fixed unit price” of \$[XXXXXX] per month, or \$[XXXXXX] annually. Section II.D, *supra*. These totals are corroborated by the “Tasks & Services Breakdown,” which reflects that GD Resources will pay TK Elevator \$[XXXXXX] per year, while retaining \$[XXXXXX]. *Id.* On appeal, Appellant correctly observes that, of the amount retained by GD Resources, \$[XXXXXX] is for parts and materials. Sections II.D and II.H, *supra*. Pursuant to the applicable limitations on subcontracting provision at 13 C.F.R. § 125.6(a)(4), any supply costs should be excluded before applying the formula. Deducting \$[XXXXXX] from the original contract price of \$[XXXXXX], though, still means that GD Resources will subcontract only approximately [XX]% of the contract value to TK Elevator (*i.e.*, \$[XXXXXX] of the remaining \$[XXXXXX]). Given this record, then, the Area Office reasonably concluded that GD Resources will not subcontract more than 75% of the contract value. Because GD Resources persuasively demonstrated, with supporting evidence, that it will adhere to the applicable limitations on subcontracting restrictions, GD Resources is not in violation of the ostensible subcontractor rule, based on the plain language of 13 C.F.R. § 121.103(h)(3)(iii).

OHA has long held that an error is harmless when “rectifying the error would not have changed the result.” *Size Appeal of Lukos, LLC*, SBA No. SIZ-6047, at 17 (2020) (citing *Size Appeal of Melton Sales & Serv., Inc.*, SBA No. SIZ-5893, at 14 (2018) and *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850, at 17 (2017)). Such is the case here, because although the Area Office erred in assessing GD Resources' size as of August 22, 2024, rather than as of September 30, 2024, and consequently erred in finding that GD Resources will subcontract to [Company A] rather than to TK Elevator, these mistakes were immaterial, since the Area Office appropriately found that GD Resources is not in violation of the ostensible subcontractor rule, the sole question presented in Appellant's protest.

IV. Conclusion

For the above reasons, the appeal is DENIED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge