

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

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEALS OF:

ProActive Technologies, Inc., and
CymSTAR Services, LLC,

Appellants,

RE: Aviation Training Consulting, LLC

Appealed From
Size Determination Nos. . 5-2016-025 and
-026

SBA No. SIZ-5772

Decided: August 24, 2016

APPEARANCES

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DECISION¹

I. Procedural History and Jurisdiction

On March 30, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination Nos. 05-2016-025 and -026 finding that Aviation Training Consulting, LLC (ATC), is a small business for the subject procurement. On April 14 and 15, 2016, ProActive Technologies, Inc. (ProActive), and CymSTAR Services, LLC (CymSTAR) (collectively, Appellants) appealed the size determination to the SBA Office of Hearings and Appeals (OHA). Because the two appeals involved the same size determination and pose similar issues, OHA consolidated them.

Appellants ProActive and CymSTAR as well as intervenor Aero Simulation, Inc. (ASI), maintain that the size determination is flawed and should be overturned. ATC and intervenor the U.S. Department of the Air Force (Air Force) contend that the size determination is correct and that it should be affirmed. For the reasons discussed *infra*, the appeals are GRANTED in part, and the matter is remanded to the Area Office for further review.

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. Appellants received the size determination on March 31, 2016, and filed the instant appeals within fifteen days of receiving the size determination, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation

On May 28, 2015, the Air Force issued Request for Proposals (RFP) No. FA8621-15-R-6338 for Operations, Maintenance, and Support (OM&S) of the B-52 Training System (TS). The Contracting Officer (CO) set aside the procurement for small businesses and assigned North American Industry Classification System (NAICS) code 336413, Other Aircraft Parts and Auxiliary Equipment Manufacturing, with a corresponding size standard of 1,000 employees. ATC submitted its initial offer on July 13, 2015, and its final proposal revisions on December 15, 2015.

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

B. The Performance Work Statement

The Performance Work Statement (PWS)² sets out the mission as follows:

The principal mission of the B-52 Training System (TS) is to ensure high and medium fidelity simulators and training systems are available for aircrew members and maintenance personnel to support creditable training, maintain proficiencies, and increase skill levels. The B-52 TS consists of Aircrew Training Devices (ATD) and Maintenance Training Devices (MTD).

(PWS § 1.1.)

The B-52 TS consists of 10 ATDs, one System Integration Laboratory (SIL), and 17 MTDs. Only the SIL is located in the contractor facility. The other devices are located on various Air Force bases. The ATDs simulate the necessary visual, motion, and aural cues to provide ground training of aircrew members. ATDs include Weapon System Trainers (WST), Offensive Station Mission Trainers (OSMT), a Cockpit Procedures Trainer (CPT), and Electronic Warfare Simulators (EWS). (*Id.* § 1.3.) The SIL is composed of major components to train all B-52 aircrew positions in stand-alone or integrated missions, as well as Distributed Mission Operations (DMO). (*Id.*) The MTDs simulate fault isolation and remove/replace maintenance activities for ground training of various B-52 aircraft subsystems, to train B-52 maintenance personnel. (*Id.*)

Tasks on this RFP include:

1. Program Management.

The contractor will develop and execute a Management Plan, an Integrated Master Plan, and a correlated Integrated Master Schedule to execute all tasks and provide the following required key personnel: Program Manager; Configuration/Data Management Specialist; Training System Support Center (TSSC) Director; Contracting Manager; Senior Systems Engineer; Lead Computer Programmer; Information System Security Officer(s); System Network Administrator; Contractor Logistics Support (CLS) Site Managers; and Concurrency Engineer. (*Id.* §§ 2.1.1 and 2.1.2.)

2. Engineering Management.

The contractor will develop and implement a Systems Engineering Management Plan including a contractor-developed functional and performance based acceptance test program for all modified trainers/devices to verify their compliance with their specifications, Engineering Change Proposal (ECP) requirements, TSSC requirements, and the PWS. (*Id.* §§ 2.2.1 and 2.2.8.) The contractor will maintain a Design Criteria List (identifying source documents for modifications), report inconsistencies and problems in design criteria along with recommended solutions; develop, implement and maintain a Software Development Plan, inventory and

² Citations are to the amended version of the PWS dated June 19, 2015.

maintain software media and licenses, and conduct System Design Reviews. (*Id.* §§ 2.2.3 and 2.2.5.) Also, the contractor will develop an obsolescence mitigation plan and will develop and implement a Configuration Management system for all ATDs. (*Id.* §§ 2.2.6 and 2.2.7.)

3. CLS for ATDs.

The contractor will plan, operate, and seek to improve the CLS system for the OM&S of all B-52 ATDs and TS facilities, subsystems, and equipment. (*Id.* § 3.) CLS Site Managers will be dedicated solely to CLS functions and will perform program management tasks relating to CLS. (*Id.* § 3.1.1.) CLS personnel shall assist ATD users in the operation of the training devices, including set-up, power-on/off, daily operational readiness testing, initialization, and other assistance such as mission generation. (*Id.*)

The PWS indicates that the contractor will provide maintenance and logistics support to ensure a minimum 95% availability rate. (*Id.* § 3.3.) The PWS includes a detailed description of what is counted as “availability” as opposed to “maintenance loss time”. (*Id.*) Contractor work includes preventive and unscheduled maintenance, troubleshooting, repair, bench check, re-assembly, and testing; calibration and operational checks to correct malfunctions and verify the adequate and proper serviceable condition of components, subsystems, or systems. (*Id.*) The WST has special system operation requirements. (*Id.* § 3.6.)

4. TSSC for ATDs.

The TSSC provides lifecycle sustainment on the B-52 ATDs. It holds resources to support all ATD software, hardware, documentation, mission generation, database, and firmware changes. (*Id.* § 4.3.) The contractor will operate and maintain the TSSC in a fully operational status, including all program and technical management functions, and will perform all maintenance to support and maintain the SIL in serviceable condition at all times to support developmental activities. (*Id.*) The TSSC designs and implements modifications for concurrency, fidelity, or obsolescence, and implements DMO System Standard updates. (*Id.*)

5. DMO support for WSTs.

The contractor will ensure that the WSTs are integrated into the DMON System and interoperate with other DMO Federate Systems. (*Id.* § 4.3.11.)

6. Concurrency and fidelity modifications/upgrades for ATDs and MTDs.

The PWS states that the contractor will modify/upgrade B-52 TS devices to meet concurrency and fidelity requirements. Concurrency upgrades match ATD and MTD capability to the weapon system. Fidelity upgrades are improvements (*e.g.*, due to obsolescence, training requirements, reliability requirements, technology insertion, etc.) to the ATDs and MTDs. (*Id.* § 4.) The contractor will maintain B-52 TS concurrency with the B-52 aircraft for all ATDs and MTDs through design, implementation, and verification of modifications. (*Id.*)

There are three specific modifications described in the appendices to the PWS.

(1) Combat Network Communications Technology (CONNECT) Upgrade. Development activities include software and hardware design, development, integration, and testing to verify functional compliance and physical characteristics with all CONNECT requirements. (PWS App. 6 § 2.) This upgrade provides a training environment concurrent with the aircraft in the areas of integrated communications capability, in-flight conventional weapons retargeting, aircraft re-tasking, improved operator interface design, and an enhanced situational awareness environment to support conventional weapon delivery functions. (*Id.* § 4.) The CONNECT upgrade is to be installed on three B-52 WSTs and two OSMs, and the SIL. (*Id.* § 1.)

(2) Identification Friend or Foe (IFF) Mode S/5 Upgrade. The contractor will design, develop, integrate, test, kit proof, produce, and sequentially install the hardware, firmware, and software for the IFF, Mode S/5 upgrade on three WSTs, one Cockpit Procedures Trainer (CPT), and the SIL. (PWS App. 7 § 1.) The IFF Mode S/5 aircraft upgrade increases combat efficiency, improves situational awareness, and reduces the potential of fratricide by providing high confidence and accurate friendly aircraft identification. At aircraft upgrade conclusion, the B-52H aircraft will have an APX-119 Transponder with an installed Mode S/5 capability and removal of the APX-64 system. (*Id.* § 4.)

(3) 1760 Internal Weapons Bay Upgrade (IWBU), Increment 1.1. The contractor will design, develop, integrate, test, kit proof, and sequentially install the software for this item on three B-52 WSTs and two OSMs, and the SIL. (PWS App. 8 § 1.)

7. Relocation of ATDs and MTDs, as required.

The contractor will initially relocate, inspect, and test the SIL and B-52G WST Flight Station to the contractor's facility. (PWS §§ 6.1.2.1, 6.1.2.2 and 6.1.2.5.)

8. Contract transition activities.

At the end of the CLS, TSSC, and contract performance periods, the contractor will relocate the SIL and B-52G WST Flight Station to the successor contractor's facility and participate in other transition activities. (*Id.* §§ 6.2.2, 6.3.1, 6.3.3, and 6.3.4.)

9. ATD and MTD studies and analysis efforts as requested.

Upon request by the Air Force, the contractor will submit proposals for studies and analysis relating to current and future aspects of the B-52 TS. (*Id.* § 2.1.16.)

C. Evaluation Criteria

The RFP stated that proposals would be evaluated using three evaluation factors: (1) Technical Capability, (2) Past Performance, and (3) Price. The Technical Capability factor consisted of four subfactors: Program Management; Contractor Logistics Support (CLS); Training Systems Support Center (TSSC); and Trainer Modifications. (RFP § M.2.1.) The RFP explained the relative weight of these factors and subfactors as follows:

- The Trainer Modifications subfactor is as important as the Past Performance factor, and each is more important than the TSSC subfactor;
- The TSSC subfactor is more important than either the Program Management subfactor or the CLS subfactor;
- The Program Management subfactor and the CLS subfactor are of equal importance; and
- The Program Management subfactor and the CLS subfactor are each more important than Price.

(*Id.*) The non-Price factors, collectively, were significantly more important than Price. (*Id.*)

Under Technical Capability, all subfactors were to be rated on technical risk (Low, Moderate, or High). (*Id.* § M.2.2.) The Program Management and CLS subfactors would also be rated for technical acceptability (Acceptable or Unacceptable), while the Training Systems Support Center (TSSC), and Trainer Modifications subfactors would be given an adjectival rating (Outstanding, Good, Acceptable, Marginal, or Unacceptable). (*Id.*)

D. ATC's Teaming Agreement and Proposal

ATC proposed itself as the prime contractor, and Rockwell Collins Simulation and Training Solutions, LLC (Rockwell) as its principal subcontractor.³

ATC and Rockwell entered into a Teaming Agreement (TA) outlining the terms of their arrangement for the procurement. The TA provides that ATC, as the prime contractor, “will perform no less than 51% of the overall work effort.” (TA, Exh. A ¶ 3.) Further, ATC “will perform that portion of any major modification required to be compliant with 13 C.F.R. § 121.406 as a small business provider of manufactured products.” (*Id.*) ATC committed to using its best efforts to award Rockwell “a subcontract for up to 45% of the overall work effort primarily in support of engineering design, development, installation, testing, relocation, upgrading and modification of all current and new training devices.” (*Id.*, ¶ 6.) Rockwell also will house the SIL at a facility in Sterling, Virginia. (*Id.*) The TA provided that ATC would have principal responsibility for preparing and submitting the proposal, and that ATC “shall direct and coordinate all contacts” with the Air Force pertaining to the preparation of the proposal and performance. (TA, ¶ 1.1.)

ATC's proposal stressed the importance of the modifications to the training devices. On the first page of Volume I, Executive Summary, was a graphic entitled “Team ATC's Program Overview” detailing the history of the B-52 TS contracts and emphasizing the importance of the modifications in order to achieve concurrency between the training devices and the aircraft. The

³ Rockwell Collins Simulation and Training Solutions, LLC is a wholly-owned subsidiary of Rockwell Collins, Inc., a large business.

proposal noted that “Team ATC's early delivery of trainer modifications restores B-52 TS concurrency and increases [Air Force] training effectiveness.” (Proposal, Vol. I, at 1.) The proposal further stated that “[Rockwell] will re-locate the B-52 SIL to their Top Secret — certified facility in Sterling, Virginia where they will develop, test, and integrate all major trainer modifications and updates.” (*Id.* at 2.)

The proposal stated that the Program Manager will be an ATC employee who reports to ATC's President/CEO, and who will oversee two CLS site managers and the TSSC Director. (*Id.* at 3.) The Deputy Program Manager for Major Modifications will be Rockwell's employee, and he and the “major modification team” will be co-located in Rockwell's facility with the SIL. (*Id.* at 4.)

Proposal Volume II, Technical Capability, is organized into four sections corresponding to the evaluation subfactors: 1.0 - Program Management; 2.0 - Contractor Logistics Support; 3.0 - Training Systems Support Center; and 4.0 - Trainer Modifications. Section 4.0, pertaining to the Trainer Modifications, is longer than the other three sections combined. (Proposal Vol. II at 98-209.) The proposal stated that ATC “understand[s] the criticality of returning the B-52 TS to a level of concurrency with the aircraft to maximize aircrew training effectiveness.” (*Id.* at 5.) With regard to teaming arrangements, the proposal stated that “ATC has teamed with [Rockwell] as the subcontractor providing engineering experience for the TSSC and major modification efforts.” (*Id.* at 39.) The proposal included a table identifying [XXXXXXX] as a Rockwell responsibility and [XXXXXXX] as an ATC responsibility. (*Id.*) A second table identified [XXXXXXX] as solely a Rockwell responsibility. (*Id.* at 41.) The proposal noted that Rockwell developed the SIL and previously completed major modifications to the SIL, the WST, and the OSMT. (*Id.* at 98.) The SIL in Sterling, Virginia, is mentioned several times in the proposal, either generally or as Rockwell's facility. (*E.g., id.* at 36, 107, 116, 121.) Nowhere in the proposal is there a reference to a proposed facility anywhere in Virginia that will be under ATC's control.

Proposal Volume III, Past Performance, included five past projects: [XXX] for ATC and [XXX] for Rockwell. ATC noted its own specialty in sustainment and its past experiences which included [XXXXXXXXXX] contracts. ATC highlighted Rockwell's in-depth experience on its [XXXXXXXXXX] contracts. (Proposal Vol. III at 1-2.)

Volume III, Past Performance, contained a section titled “Business Relationships”. This section listed ATC's places for contract work as: Altus, Oklahoma; Barksdale AFB; and Minot AFB. There was no mention of ATC acquiring or leasing a facility in Sterling, Virginia, for this procurement. This same section listed Rockwell's places for contract work as Sterling, Virginia; Barksdale AFB; and Minot AFB.

ATC proposed the following pricing relevant to this dispute:

Description	Total Price
CLIN 0001 Program Management CY 16	[X]
CLIN 0022 CLS CY16	[X]
CLIN 0017 Initial SIL Relocation	[X]
CLIN 0030 1760 IWBW Development	[X]
CLIN 0031 IFF Mode S/5 Development	[X]
CLIN 0032 IFF Mode S/5 Production	[X]
CLIN 0033 CONECT WST/OMST Development	[X]
CLIN 0034 CONECT WST Production for All WST Devices	[X]
CLIN 0038 CONECT OMST Production for all OSMT Devices	[X]

(Proposal Vol. IV, Pricing Matrix.)

E. Discussions

During discussions, the Air Force inquired how ATC intended to comply with 13 C.F.R. § 121.406, and with the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). In response, ATC acknowledged it [XXXXXXXXXXXXXXXXXXXXX]. (ATC Response to Discussion Questions (Nov. 5, 2015) at 1.) Nevertheless, ATC asserted, ATC is in compliance with both rules, will perform more than 55% of the work, including all of [XXXXXXXXXXXXXXXXXXXXX XXXXXXXX]. (*Id.*) ATC asserted that Rockwell's portion of the work amounted to “closer to [XX]% of our initial bid price”. (*Id.*)

In response to follow-up discussion questions, ATC stated that, with respect to the ostensible subcontractor rule, ATC will perform approximately [XX]% of the total dollar value of the contract, and [XX]% of its services aspects. (ATC Response to Discussion Questions (Nov. 20, 2015) at 2.) Further, ATC has “extensive relevant experience in design, integration, production, installation, and testing of trainer modifications” for a different Air Force program, [XXXXXXXXXX]. (*Id.*) As for 13 C.F.R. § 121.406, ATC clarified that it will be the manufacturer of the end items, and will not provide these items as nonmanufacturer. (*Id.* at 3.) ATC stated that “[XXXXXXXXXXXXXXXXXXXXX].” (*Id.* at 4.) Revisions to ATC's proposal accompanied these responses.

F. Protests

On February 16, 2016, the CO announced that ATC was the apparent successful offeror. On February 23, 2016, ProActive and CymSTAR, two unsuccessful offerors, filed size protests against ATC with the CO. Both protests alleged that ATC is not an eligible small business for this procurement because ATC is unduly reliant on its ostensible subcontractor, Rockwell. Both protests further alleged that Rockwell, not ATC, will perform the complex engineering modifications and upgrades that are the primary and vital requirements of the contract, that ATC lacks the capability to do this work, and that, based on the protesters' own discussions with Rockwell about teaming on this RFP, Rockwell had demanded a large share of the contract, including leading TSSC effort and housing the SIL. Both protesters also alleged that ATC is not

the manufacturer of the end items being purchased. ProActive further contended that ATC has no facility capable of performing manufacturing-related activities. The CO referred the protests to the Area Office for a size determination.

G. Area Office Proceedings

On March 3, 2016, ATC submitted its completed SBA Form 355 and supplement, its proposal, the TA, its response to the protest allegations, the declaration of its company president, Mr. Robert Cox, and other information requested by the Area Office. ATC contended that it is an eligible small business and that it is not in violation of either 13 C.F.R. § 121.406 or the ostensible subcontractor rule.

ATC characterized its relationship with Rockwell as “similar to that of a construction firm and an architect. ATC is using plans (or blueprints) developed by [Rockwell] in order to build the final product.” (ATC Response to Protests at 2.) ATC acknowledged that the three TS upgrades described in the RFP “are the most important primary areas for work”. (*Id.* at fn.1.) Mr. Cox similarly averred that “[t]hese concurrency upgrades are the most important primary areas for work under the [RFP]. In fact, they account for approximately half of the value of the overall contract.” (Cox Decl. ¶ 5.) ATC observed that, although the RFP does contain “requirements not related to the design and manufacture of B-52 TS modifications (such as services relating to program management, contractor logistics support, and training systems support center services)”, the selection of a manufacturing NAICS code confirms that “the [CO] deemed the manufacture and acquisition of the TS system to be the [] primary and vital requirements of the [RFP].” (ATC Response to Protests at 3.)

With regard to 13 C.F.R. § 121.406, ATC pointed to [XXXXXXX] contending that ATC would perform 70% of the RFP's manufacturing efforts on the upgraded CONECT components, as opposed to Rockwell's 30% contribution. Rockwell's efforts focus largely on [XXXXXX XX], while ATC will [XXXXXXXXXXXXXXXXX]. (ATC Response to Protests at 9-11, 14; Cox Decl. ¶¶ 11, 13, 14, 15, 18, 28; Supplement to Form 355, Items 6-7.) On [XXXXXXXXXXXX], ATC will be responsible for 100% of the manufacturing effort. (ATC Response to Protests at 9, 11; Cox Decl. ¶ 19.) ATC stated that production would occur “at ATC's newly-leased production facility in Sterling, Virginia, at which its employees — and only its employees — will complete the engineering, modifications, assembly, and integration of the B-52 TS components.” (ATC Response to Protests at 5; Cox Decl. ¶¶ 20-21.)

Regarding the ostensible subcontractor allegations, ATC argued to the Area Office that “ATC is performing the primary and vital portion of the contract — manufacturing the B-52 TS upgrades.” (ATC Response to Protests at 13.) The protesters' view of the TA is incorrect, ATC asserted, and under the TA, ATC will perform no less than 51% of the work and Rockwell will perform no more than 45% of it. (*Id.* at 7.) Further, the Program Manager is a long-time ATC employee who has never been employed by Rockwell. (*Id.*) Countering the protesters' allegations that ATC lacks relevant experience, ATC pointed out that ATC has successfully managed CLS, TSSC, and training device support for 15 years, and has been the prime contractor on 93% of its Defense contracts. (*Id.* at 18.) Rockwell was chosen because it “has a head start on development of the upgrade for the simulators” and its utilization would save engineering costs. (*Id.* at 19.)

Further, only two proposed employees, the senior systems engineer and the concurrency engineer are Rockwell employees, and the incumbent employees who will be hired are currently ProActive's employees, not Rockwell's. (*Id.* at 20.)

On March 4, 2016, ProActive submitted to the Area Office, to supplement its protest, a resume and LinkedIn profile of Mr. Rayner “Van” Anderson along with other materials. The Area Office declined to consider this information as a late, improperly-filed protest. (Size Determination at 2-3.)

H. Size Determination

On March 30, 2016, the Area Office issued Size Determination Nos. 5-2016-025 and - 026 finding that ATC is an eligible small business for the instant RFP. The Area Office first found that ATC is affiliated with four other entities, but that the combined employees of these concerns are below the applicable size standard of 1000 employees. (Size Determination at 3.)

The Area Office then examined whether ATC is affiliated with Rockwell for this procurement. The Area Office noted that a manufacturing NAICS code was assigned to the procurement, and found that “[t]he selection of NAICS [code] 336413 means that the procuring agency determined that a manufactured item was the principal nature of the procurement.” (*Id.* at 9.) The Area Office considered whether ATC is the manufacturer of the end items being procured or is compliant with the nonmanufacturer rule. The Area Office found that “[t]he end item under this procurement is TS upgrades”, specifically the CONECT, 1760 IWBu, and IFF Mode S/5 upgrades. (*Id.* at 10.) The Area Office determined that Rockwell will “provide ATC with the technical design for ATC's building of the new upgrades”, and that Rockwell will provide design, engineering and testing support for the upgrades after they are integrated into the SIL by ATC. (*Id.*) However, ATC will source parts and components from a variety of vendors for use in the upgrades, and will “fabricate items to build new components.” (*Id.*) ATC will then integrate the discrete components into a cohesive whole. The Area Office concluded that ATC is the manufacturer of the TS upgrades because “ATC will be acquiring, manufacturing, transforming, and assembling the component parts necessary to complete the CONECT, 1760 IWBu, and IFF Mode S/5 Upgrades. ATC will also complete the integration and installation of these end items into the B-52 TS devices.” (*Id.*)

Turning to the ostensible subcontractor rule, the Area Office found that ATC will not be unusually reliant upon Rockwell to perform the contract. The Area Office highlighted that ATC will self-perform a majority of the work, and will manage the contract. Indeed, “[n]early all of the key personnel outlined in the solicitation are ATC employees”, although “[t]he Deputy Program Manager that is a Rockwell employee will be at Rockwell's facility overseeing Rockwell's work on the procurement.” (*Id.* at 12.) The proposal and teaming agreement clearly define Rockwell's role, and ATC and Rockwell will not co-mingle personnel at a common facility. (*Id.* at 12-13.) Further, although Rockwell has prior experience with the B-52 TS, ATC too has relevant corporate experience. The Area Office found that “ATC has fifteen years of program management in CLS, TSSC and training device support.” (*Id.* at 12.) Therefore, “[t]his is not a situation where the subcontractor is handling the primary and technical aspects of the

contract, while the prime contractor is handling ancillary administrative tasks like managing the contract and customer support.” (*Id.*)

The Area Office found that Rockwell also will not perform the primary and vital contract requirements. According to the Area Office, “[t]he primary purpose of the contract is to ensure that updated simulators and training systems are available for aircrew members and maintenance personnel at the Air Force Bases.” (*Id.* at 13.) Although Rockwell will perform important tasks, such design and development of the CONECT upgrade, testing upgrades, and housing the SIL, “the[se] tasks alone fall far short of the contract's overall purpose.” (*Id.* at 12.) The Area Office stated that “[o]nce Rockwell's design is completed, ATC will manufacture/assemble the CONECT upgrade at its own facility.” (*Id.* at 11-12.) In addition, “ATC will perform the majority of the substantive work on the 1760 IWBW upgrade and the IFF Mode S/5 upgrade.” (*Id.* at 12.)

The Area Office likened the instant case to *Size Appeal of CymSTAR Services, LLC*, SBA No. SIZ-5329 (2012), which involved a predecessor contract for operations, maintenance, and support of the B-52 TS. In that case, OHA concluded that the challenged firm was the manufacturer of the end items to be produced, and did not contravene the ostensible subcontractor rule. (*Id.* at 13.) The Area Office commented that the challenged firm in *CymSTAR* committed to “perform nearly all of the work on the CLS and TSSC portions of the contract”, while leaving “most of the work” on TS modifications to its large business subcontractor. (*Id.*)

Finding no violation of either 13 C.F.R. § 121.406 or the ostensible subcontractor rule, the Area Office determined that ATC is not affiliated with Rockwell and therefore is an eligible small business for the instant RFP. (*Id.*)

I. OHA Filings

On April 14, 2016, ProActive appealed the size determination to OHA. On April 15, 2016, CymSTAR appealed the size determination. Because the two appeals challenged the same size determination and presented similar issues, OHA consolidated the appeals. ASI, another unsuccessful offeror, intervened in the dispute. On April 26, 2016, the Air Force announced that it would undertake corrective action on the source selection in response to bid protests filed at the U.S. Government Accountability Office. OHA therefore suspended further activity on the size appeals pending the outcome of the corrective action. On May 10, 2016, the Air Force reaffirmed the award to ATC. Following review of the Area Office file under the terms of a protective order, Appellants filed supplements to their appeals, and intervener ASI filed a brief in support of the appeals. On June 3, 2016, the CO for the Air Force filed a statement opposing the appeals. On June 6, 2016, ATC responded to the appeal petitions, supplements, and to ASI's brief.

1. ProActive's Appeal and Supplemental Appeal

ProActive contends that the Area Office incorrectly found that ATC is in compliance with 13 C.F.R. § 121.406 and with the ostensible subcontractor rule. According to ProActive, the

Area Office “misunderstood the ‘primary and vital’ contract requirements, overstated the level of effort ATC would expend on those primary and vital requirements, grossly understated the degree of reliance by ATC on Rockwell for this contract, and otherwise failed to analyze “all aspects of the relationship between the prime and subcontractor’, as is required by 13 C.F.R. § 121.103(h)(4).” (ProActive Appeal, at 3.)

ProActive argues that the primary and vital requirements of the RFP are the trainer modifications, and specifically the CONECT upgrade. The trainer modifications are crucial because they are “necessary to make the training simulators concurrent with the aircraft.” (*Id.*) In addition, trainer modifications are the most complex and costly contract tasks. (*Id.* at 3-4.) ProActive highlights that, under the RFP's evaluation criteria, the Trainer Modifications subfactor is the most heavily weighted within Technical Capability, the most heavily weighted evaluation factor. Moreover, the Trainer Modifications subfactor is, by itself, equal in importance to Past Performance, the second-most heavily weighted factor.

While conceding that it could not review ATC's proposal at the time of the initial appeal, ProActive predicts that “as much as 25% of the contract value lies in the TS upgrades”, and “as much as two-thirds of that cost consists of Rockwell's systems design, development (including software development) and implementation, component fabrication, and preparing specifications for integration and assembly — by far the largest single cost element in its proposal.” (*Id.* at 5.) ProActive reiterates that the CONECT upgrade/modification “is the primary and vital contract requirement.” (*Id.* at 8.) Thus, Rockwell, not ATC, will be responsible for the primary and vital aspects of the procurement because “Rockwell will perform all engineering, design and development work with respect to the very large CONECT upgrade and will house the SIL where CONECT testing will occur.” (*Id.*)

ProActive distinguishes *Size Appeal of CymSTAR Services, LLC*, SBA No. SIZ-5329 (2012), cited in the size determination. A crucial difference between *CymSTAR* and the instant case, ProActive asserts, is that “the previous contract did not contain required upgrades, such as CONECT, and this contract does!” (*Id.* at 7, emphasis in original).

ProActive argues that the Area Office also should have found ATC unusually reliant upon Rockwell. Whereas ATC lacks expertise or experience with the B-52 program, Rockwell has “extensive institutional knowledge from its 9-year tenure of prior B-52 contracts engineering and producing TS upgrades.” (*Id.* at 5.) Further, “ATC has no engineering expertise regarding complex training system modifications”, work that is at the heart of this procurement. (*Id.* at 9.)

ProActive claims that Rockwell's engineering design work will “specify every part to be incorporated, and the exact methods of manufacture or assembly”, and that ATC's role will consist of “merely executing Rockwell's detailed instructions.” (*Id.* at 6.) Thus, ProActive reasons, ATC will add no meaningful value to the CONECT upgrade/modification. The fact that ATC may be responsible for managing the contract is immaterial because “[i]t is axiomatic to state that a contractor cannot manage work that it does not understand.” (*Id.* at 9.)

ProActive argues that the Area Office also incorrectly found ATC to be manufacturer of the TS upgrades. ProActive observes that, under SBA regulations, firms that perform only

“minimal operations” on the end item are not considered the manufacturer. (*Id.* at 10-11, citing 13 C.F.R. § 121.406(b)(2).) Here, “Rockwell will supply the critical engineering, design and development efforts and the vast majority of the value in the manufactured items.” (*Id.* at 11.) “By comparison, the efforts of ATC in procuring and assembling COTS components specified by Rockwell, and assembling those with components engineered, designed and specified by Rockwell, according to Rockwell's detailed instructions, amount to slight value added.” (*Id.* at 12.) The Area Office should have concluded that ATC is performing only minimal work on the TS upgrades, and is not the manufacturer.

On May 26, 2016, after reviewing the record under the terms of an OHA protective order, ProActive supplemented its appeal. ProActive renews its argument that “the ‘primary and vital’ contract requirements are the complex engineering upgrades that are the heart of the [TS] modifications.” (ProActive Supp. Appeal, at 2.) Based on ATC's proposal and supplemental information ATC submitted to the Area Office, ProActive claims that the TS upgrades account for [XX]% of ATC's awarded contract price, [XXXXXXXXXXXXXXXX], and that Rockwell will supply more than [XXXXXXXXXXXXXXXX] to accomplish the TS upgrades. (*Id.* at 3-4.) ProActive contends that “Rockwell is performing [XXXXXXX] of the TS upgrade work [XXXXXXXXXX], including [XXXXXXXXXXXXXXXX].” (*Id.* at 5.) ATC, on the other hand, is “[XXXXXXXXXXXXXXXXXXXXXXXXXXXXX].” (*Id.* at 3.) Based on this record, the Area Office should have concluded that Rockwell will perform the primary and vital requirement of the contract. (*Id.* at 6.)

ProActive attacks the Area Office's determination that ATC will not be unusually reliant upon Rockwell. ProActive insists that the Area Office made at least four significant factual errors which are “unsupported in or contradicted by the record”. (*Id.*) First, the Size Determination suggests that two Rockwell employees, the senior systems engineer and the concurrency engineer, would transition to employment with ATC. (*Id.* at 8, citing Size Determination at 9.) Such a transition, though, is not reflected in ATC's actual proposal, and therefore casts doubt on the Area Office's conclusion that ATC will manage the contract. In ProActive's view, “ATC's proposal plainly demonstrates that there was no intention to shift these management personnel and functions over to ATC from Rockwell upon award of the contract.” (*Id.* at 9.)

Second, the Area Office erred in finding that ATC would perform assembly at its own facility in Sterling, Virginia. (*Id.* at 10, citing Size Determination at 12, 13.) ProActive maintains that “ATC's technical proposal makes no mention of [XXXXXXXXXXXXXXXX].” (*Id.* at 11, emphasis in original.) Consequently, the Area Office should have concluded that ATC would perform all assembly at Rockwell's SIL, further increasing ATC's dependence upon Rockwell.

Third, the Area Office erred in finding that ATC has the experience and expertise to perform the TS upgrades. (*Id.* at 12, citing Size Determination at 13.) While ATC does have experience relevant to the CLS and TSSC requirements, “these are separate requirements [from the TS upgrades], and experience supporting those does not prove ATC's ability to support the complex TS upgrades, *i.e.*, the major modifications that are by definition beyond the capability of the TSSC.” (*Id.* at 12.) As evidence of ATC's lack of experience and expertise, ProActive

maintains that ATC did not propose to [XXXXXXXXXXXXXXXXXXXXX]. “[R]ather, ATC's [XXXX] lie exclusively in categories labeled [XXXXXXXXXXXXXXXXXXXXX].” (*Id.* at 13.)

Fourth, the Area Office erred in finding that, aside from the CONECT upgrade, ATC would “perform the majority of the substantive work” on the other two upgrades identified in the RFP. (*Id.*, quoting Size Determination at 12.) According to ProActive, Rockwell will perform [XX]% of work on one of these upgrades, and at least [XX]% of the work on the other. (*Id.* at 14.) “ATC's reliance upon Rockwell for these two smaller upgrades again confirms, rather than refutes, its reliance upon Rockwell.” (*Id.*)

ProActive also argues that the Area Office incorrectly applied the three factor test set forth at 13 C.F.R. § 121.406(b)(2) when it determined that ATC would be manufacturer of the TS upgrades. ProActive asserts that “[XXXXXXXXXXXXXXXXXXXXXXXXXXXXX].” (*Id.* at 17.) By comparison, “ATC's value added is limited, and tightly circumscribed, to [XXXXXXXXXXXXXXXXXXXXX].” (*Id.* at 18.) Had the Area Office properly considered factors such as the relative value and importance of the firms' contributions and their respective capabilities to perform the work, the Area Office could not reasonably have concluded that ATC is the manufacturer of the TS upgrades.

2. CymSTAR's Appeal and Supplemental Appeal

CymSTAR contends that the Area Office “erred in its findings of both fact and law in deciding that ATC's subcontractor will not perform the primary and vital requirements of the contract and that ATC was not unusually reliant upon its subcontractor.” (CymSTAR Appeal, at 1.)

CymSTAR complains that the Area Office made no determination of which contract requirements are primary and vital, and did not conduct a proper analysis of whether ATC or Rockwell was performing those requirements. The Area Office essentially concluded that ATC is compliant with the ostensible subcontractor rule “as long as ATC is managing the contract and ATC is performing a significant portion of the work, even if that work is not for a primary and vital requirement”. (*Id.* at 9.) Such reasoning is flawed and contrary to law, CymSTAR asserts. Indeed, OHA has found violation of the ostensible subcontractor rule when a subcontractor would perform the primary and vital contract requirements, notwithstanding that the subcontractor's work represented a modest portion of the total proposed cost. (*Id.*, citing *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5192 (2011).)

CymSTAR argues that “this contract's primary and vital requirement is the provision of three complex Engineering Modifications to the B-52 TS training devices.” (*Id.* at 10.) The fact that the CO assigned a manufacturing NAICS code, 336413, confirms that “the principal purpose of this acquisition is manufacturing.” (*Id.*) The Air Force likewise emphasized the importance of the training device modifications in the RFP's evaluation criteria, giving the greatest weight to the Trainer Modifications subfactor. Other aspects of the procurement were assigned lesser weight in the evaluation, and the RFP further stated that the Program Management and CLS subfactors would be evaluated on a pass/fail basis. CymSTAR posits that “[h]ad the Air Force considered those requirements to be primary and vital, it would not have merely evaluated them

on an acceptable/unacceptable basis.” (*Id.* at 10-11.) The trainer modifications also are the contract's most complex and important tasks. More routine services such as CLS and the TSSC are “essentially without value if these engineering modifications are not successful in configuring the training devices to be concurrent with the aircraft configuration.” (*Id.* at 11.)

CymSTAR contends that Rockwell, not ATC, will perform the primary and vital requirements. The size determination makes clear that “ATC has subcontracted the design and development of these trainer modifications to [Rockwell].” (*Id.* at 12.) Furthermore, ATC lacks “the experience, facilities, or engineering staff” to perform the work. (*Id.*)

CymSTAR argues that the Area Office also erred in concluding that ATC is not unusually reliant on Rockwell. The Area Office committed five significant factual errors, and did not meaningfully address the arguments and evidence cited in CymSTAR's protest.

First, the Area Office incorrectly found that ATC “has experience in this field”. (*Id.* at 13, quoting Size Determination at 13.) “While it is true that ATC has experience in performing the CLS function, ATC utterly lacks experience in performing the primary and vital requirement of the contract, the complex engineering and manufacturing of the trainer modifications.” (*Id.*) In addition, although the Area Office concluded that ATC will be the manufacturer of the trainer modifications, the Area Office did not address the fact that ATC has no manufacturing experience, including fabrication, assembly and test. (*Id.*) CymSTAR observes that “ATC has performed virtually no work under NAICS code 336413”, and that “ATC has never performed a contract that is anywhere near as large and complex as this acquisition.” (*Id.* at 16-17.)

Second, the Area Office erred in determining that ATC controlled proposal submission and content. According to CymSTAR, ATC lacks the engineering expertise and experience to have drafted, or even to have substantively reviewed, the portions of the proposal pertaining to the trainer modifications. (*Id.* at 14.)

Third, the Area Office incorrectly concluded that ATC will manage the contract with its own employees. Although ATC will employ the Program Manager, “it is [Rockwell's] Deputy Program Manager who will manage the performance of the primary and vital requirements of the contract, including the design of the trainer engineering modifications, the operation of the [SIL], and the conduct of much of the testing and quality assurance.” (*Id.*) Thus, CymSTAR argues, ATC will be reliant upon Rockwell “to manage the most complex and important parts of contract performance.” (*Id.*)

Fourth, the Area Office erred in finding that ATC “will build components/upgrades in its own facility.” (*Id.*, quoting Size Determination at 13.) ATC currently has no such facility, nor the necessary workforce, machinery, and production processes. (*Id.*) Further, the size determination exaggerates ATC's role in the manufacturing process, as ATC will merely purchase major components and assemble them into an end item. (*Id.* at 15.)

Fifth, the mere fact that ATC “will perform a significant portion of the contract” is not sufficient evidence that ATC is compliant with SBA regulations. (*Id.*, quoting Size Determination at 13.) “What is more relevant is that there is a significant portion of the work,

including the complex engineering and software design efforts needed to perform these three trainer modifications and future modifications, that ATC simply cannot perform and for which ATC must totally rely upon [Rockwell].” (*Id.*)

CymSTAR contends that the Area Office also erred in attempting to be consistent with OHA's prior decision in *Size Appeal of CymSTAR Services, LLC*, SBA No. SIZ-5329 (2012). In so doing, the Area Office overlooked important differences between the earlier procurement and the instant RFP. CymSTAR highlights that, in the prior contract, trainer modifications were mere options that might be ordered at the Air Force's discretion. (*Id.* at 19.) Trainer modifications were not heavily weighted in the prior solicitation's evaluation criteria, and the Air Force instead had identified CLS services as the primary and vital requirement prior to the submission of proposals. (*Id.* at 19-20.) The facts of the instant case are markedly different, because trainer modifications are priced and included as contract line items, trainer modifications are heavily weighted in the evaluation criteria, and there is no language in the instant RFP identifying CLS as the primary and vital requirement. (*Id.* at 20.) In addition, unlike ATC, the challenged firm in *CymSTAR* had significant experience and expertise with trainer modifications. CymSTAR maintains that “rather than look to OHA's previous decision as determinative, the Area Office should have undertaken an extremely fact-specific ostensible subcontractor analysis on the basis of the solicitation and proposal at issue.” (*Id.* at 21.)

On May 26, 2016, after reviewing the record under the terms of an OHA protective order, CymSTAR supplemented its appeal. CymSTAR contends that ATC's response to the protests overstated the importance and difficulty of its own work on the contract, while minimizing Rockwell's role. The Area Office erred in adopting ATC's “self-serving and misleading description of the contract work”. (CymSTAR Supp. Appeal, at 2.)

CymSTAR notes that ATC devoted [XXXXXXX] of its technical proposal, some 111 pages, to discussing its approach for the Trainer Modifications. (*Id.* at 3.) Within the Trainer Modification portion of ATC's proposal, [XXXXXX] were used to describe the approach for hardware design and software design and development. (*Id.* at 4.) By comparison, “**ATC's proposal allocates [XXXX] of its narrative and [XXXX] to address its [XXXXXXXXXXXXX] work for the trainer modifications.**” (*Id.*, emphasis in original.) CymSTAR concludes that “the contents of ATC's proposal serves as an overwhelming admission that the primary and vital requirements of the contract are [XXXXXXXXXXXXXXXXXXXXX].” (*Id.* at 5.)

CymSTAR contends that ATC's proposal also confirms ATC's “utter lack of experience in performing the complex engineering and software design efforts” and ATC's “total reliance upon [Rockwell's] experience and expertise to perform this contract.” (*Id.* at 6.) CymSTAR offers several quotes from ATC's proposal in which ATC “trumpets the experience” of Rockwell and “seek[s] credit for [Rockwell's] engineering staff”. (*Id.* at 6-8.)

CymSTAR renews its contention that ATC was reliant upon Rockwell to draft the Trainer Modifications portion of the proposal. CymSTAR asserts that ATC failed to correct errors in cross-references within the Trainer Modifications discussion. In CymSTAR's view, these errors demonstrate that “ATC blindly accepted and inserted [Rockwell's] draft of the

trainer modification section, [XXXXXXXXXXXXXXXXXXXX], without any meaningful review or editing.” (*Id.* at 9.)

3. ASI's Brief

ASI argues that the Area Office failed to consider all aspects of the relationship between ATC and Rockwell, as required by 13 C.F.R. § 121.103(h)(4). Instead, ASI contends, the Area Office based its decision on the “obviously self-serving” information ATC submitted in response to the protests. (ASI Brief, at 2.) According to ASI, “there is no evidence in the Size Determination that the Area Office considered *any* evidence or documents other than those prepared by ATC.” (*Id.* (emphasis in original).)

ASI agrees with the Appellants that “[t]he primary and vital requirements of this contract are the complex engineering upgrades required to be performed to the B-52 flight simulators.” (*Id.*) ASI observes that the Trainer Modifications subfactor and the Past Performance factor were given the greatest weight under the RFP's evaluation scheme. However, “Past Performance is not a part of contract performance.” (*Id.* at 3.) It therefore is evident that the trainer modifications are the most important requirement within the RFP. (*Id.*)

ASI highlights that the Area Office found that “[t]he SIL will be relocated to Rockwell's facility in Sterling, Virginia, where it will develop, test, and integrate all major trainer modifications and updates.” (*Id.*, quoting Size Determination at 6.) The Area Office further determined that “Rockwell will perform design and development of the CONECT upgrade, will perform testing of the upgrades in its own facility, and will house the SIL in its own facility.” (*Id.*, quoting Size Determination at 13.) These facts are sufficient to conclude that Rockwell will perform the primary and vital contract requirements. According to ASI, “ATC's plan to [XXXXXXXXXXXXXXXXXXXXXXXXXXXX] developed solely by Rockwell, requires [XXXXXXXXXXXXX]” and therefore “is clearly not the most important or largest part of the trainer modification tasks.” (*Id.* at 3-4.)

ASI criticizes the Area Office's reliance on *Size Appeal of CymSTAR Services, LLC*, SBA No. SIZ-5329 (2012). ASI asserts that, in *CymSTAR*, trainer modifications were options that could potentially be ordered in the future. By contrast, the instant RFP “included priced Trainer Modification CLINs which were deemed by the Air Force to be the most important program requirements.” (*Id.* at 5.)

ASI compares the instant case to *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466 (2013), where OHA determined that a subcontractor would perform the primary and vital requirements, in contravention of the ostensible subcontractor rule. Likewise, in the instant case, “the ‘primary and vital requirements’ of the B-52 TS contract are the sophisticated engineering, design, test and integration services Rockwell is to provide.” (*Id.*) As a result, the appeals should be granted.

4. The CO's Statement

The CO asserts that Appellants mischaracterize the primary and vital requirements of the contract:

Simply put, every training system contract I've managed has had one primary and vital requirement: *to ensure the training devices are available so that aircrews and maintainers get the training they need, when they need it.* Trainer availability is always our number one priority. This is no different for the B-52 Training Systems (TS), the subject solicitation.

(CO's Statement at 1 (emphasis in original).) Further, the ultimate customer, the Air Force Global Strike Command, “has repeatedly stated its number one priority is continued operations to accomplish training (*i.e.* trainer availability). (*Id.*) The CO emphasizes that the importance of availability is the reason why first line of the PWS states, “The principal mission of the B-52 [TS] is to ensure high and medium fidelity simulators and training systems are available for aircrew members and maintenance personnel. . . .” (*Id.*, quoting § PWS 1.1.) Thus, in light of this RFP, CLS “is in fact the primary requirement.” (*Id.*) “[T]he main function of the B-52 TS contract has been and will continue to be trainer availability.” (*Id.* at 3.)

The CO maintains that all other tasks in the RFP support the primary requirement of system availability. (*Id.* at 2.) The TSSC supports lifecycle sustainment including minor upgrades so trainers match the configuration and feel of the actual aircraft. (*Id.*) Engineering Change Proposals (ECPs or trainer modifications) are larger in scale than what the TSSC does. (*Id.*) Studies are used to analyze workarounds for obsolete parts to keep the trainers functioning effectively, and program management ensures that “all the pieces come together so that the trainers stay available.” (*Id.*)

The CO disputes Appellants' argument, in their protests and appeals, that because trainer modifications are expensive and are given heavy weight in the evaluation criteria, they are necessarily the primary and vital requirement of the contract. (*Id.*) According to the CO, trainer modifications “are merely a support function to trainer availability.” (*Id.*) The CO explains that trainer modifications are part of nearly every contract for simulators, since the underlying aircraft are modified continually and trainers must keep pace. Normally, though, such modifications are unknown at the time the solicitation is issued. (*Id.*) In the instant RFP, the actual requirements for three trainer modifications were known, so offerors were instructed to propose solutions to those actual, known requirements. (*Id.*) Thus, the Air Force “sought a contractor who could accomplish the primary function of the contract, and also accomplish trainer modifications to bring the systems back to concurrency with the aircraft.” (*Id.* at 3.)

5. ATC's Response

On June 6, 2016, ATC responded to the appeal petitions, supplements, and ASI's brief. ATC contends that the size determination “was thorough, well-supported, and correct”, and attributes the appeals to “mere disagreement”. (ATC Response at 1.) Specifically, ProActive, CymSTAR, and ASI present no evidence showing error in the size determination. “[I]nstead,

they rely on incorrect guesses, unsupported inferences, and internally inconsistent supposition.” (*Id.* at 2.)

ATC describes its relationship with its subcontractor Rockwell, acknowledging that Rockwell has the institutional knowledge of and experience with the B-52 TS and upgrades due to its past contract work from 1999 to 2012, including its development of the existing SIL. (*Id.*) Rockwell has unique knowledge of major modifications to the TS, and has authored the design approach to the instant CONECT upgrade. (*Id.* at 4, citing Cox Decl. ¶¶ 10-11.) ATC points out that Rockwell is not the current incumbent on this contract; ProActive is. (*Id.* at 3.)

Next, ATC summarizes the TA noting, among other things, that ATC has final authority for the proposal, direct contact with the customer, and will perform not less than 55% of the overall work effort, while Rockwell would perform no more than 45% of the overall effort. (*Id.* at 4.) That work would be “primarily in support of engineering design, development, installation, testing, relocation, upgrading and modification of all current and new training devices.” (*Id.*) More specifically, in addition to housing the SIL, Rockwell's work is to provide [XX]. (*Id.* at 5, citing Cox Decl. ¶¶ 8-10 and Size Determination at 8.)

ATC characterizes its own role as “much more substantial” as ATC will “*actually build* the upgrades and integrate them” into the trainers. (*Id.* (emphasis in original).) ATC will [XX]. (*Id.*) ATC will do all tasks involved in the manufacturing and assembly of the kit, except for overhead, testing, and quality control. (*Id.*) ATC's work includes “significant engineering”, and ATC “will perform [XXXXXXXXXXXX] for the CONECT kit upgrade.” (*Id.* at 5-6 (emphasis in original), citing Cox Decl. ¶¶ 15-17 and Size Determination at 10.) ATC “has complete responsibility” to manufacture, deliver, and install the IFF Mode S/5 and 1760 IWBW upgrades into the trainers and the SIL. (*Id.* at 6, citing Cox Decl. ¶¶ 5, 13.) Also, ATC “is performing all of the CLS and TSSC work”. (*Id.*, citing Cox Decl. ¶ 5.) In sum:

ATC is performing the lion's share of the upgrade work. Of the nearly \$[XXXXXX] worth of work to be performed associated with the upgrades, ATC is performing tasks valued at about \$[XXXXXXX]. . . . Over half this amount, moreover, is derived from the production of the [XXXX]. Rockwell is only performing about \$[XXXXXXX]. . . . Much of Rockwell's costs, moreover, are [XXXXXXX], which reflects Rockwell's role in [XXXXXXX].

(*Id.* (internal citations omitted), citing Cox Decl. ¶ 28.)

Regarding program management, ATC points out it has “unquestioned control and authority over the project.” (*Id.* at 6.) ATC's president is in charge of the overall effort, and the Program Manager, who is ATC's employee, has never worked for Rockwell. (*Id.* at 6-7.) The Program Manager has “full authority and autonomy to execute the program”. (*Id.* at 7, quoting Proposal Vol. II at 5-6.) ATC will employ the two CLS Site Directors and the TSSC Director and will hire mostly incumbent workers now on ProActive's payroll. (*Id.* at 7.)

As for Appellants' claims that ATC lacks a facility to perform the work, ATC states:

The modification and upgrade work will take place in ATC's production facility (the lease of which is being finalized), in Sterling, Virginia. Cox Decl. ¶ 20. This facility will be staffed completely with ATC engineers and technicians; [XXXXXXX XXXXXXXXXXXXXXXX]. *Id.* at 21. After production, the CONECT end-item kit will be tested at the SIL, which will be housed in Rockwell's Sterling, Virginia facility. *Id.* at 22.

(*Id.* at 8.) ATC notes that although the SIL will be located at a Rockwell facility, ATC will relocate the SIL from its present location. (*Id.*) Further, once the CONECT kits pass testing at the SIL, “ATC will complete the integration of the kits” into the trainers, “with very little assistance from Rockwell”. (*Id.*)

Next, ATC reviews the findings in the size determination. ATC emphasizes that the Area Office found: (1) the assignment of a manufacturing NAICS code demonstrates that “a manufactured item was the principal nature of the procurement”, and the modifications and upgrades are the end items being procured; (2) ATC is the manufacturer of the end items; (3) ATC is not unduly reliant on Rockwell; (4) the primary purpose of the procurement is to assure that training systems are available for aircrew and maintenance personnel; and (5) Rockwell is not ATC's ostensible subcontractor. (*Id.* at 8-10, citing and quoting Size Determination at 10-13.) Finally, the size determination concluded ATC is an eligible small business. (*Id.* at 10.) ATC asserts Appellants have failed to show clear error in the size determination.

ATC maintains that the Area Office correctly determined that ATC is the manufacturer of the end-item being procured. Because the Air Force selected a manufacturing NAICS code, the “primary and vital function” of the RFP is the acquisition of a manufactured end item, and that end item, as the Area Office determined, is the TS upgrades. (*Id.* at 11, citing Size Determination at 10.) The Area Office correctly determined that ATC is manufacturing these upgrades, because ATC will source the discrete components, fabricate them into an assembly and integrate and install them into the trainers. (*Id.*) The components have no value outside of the procurement, and it is ATC's efforts that transform them into a usable product. (*Id.*) “As a result of ATC's efforts, the Air Force will receive production kits that have never been produced before.” (*Id.* at 13.) ATC's work “far exceeds minimal operations”; it will “transform discrete components (procured or fabricated by ATC) into the desired end-item” and install the end item. (*Id.* at 11-12, citing *Size Appeal of OSG, Inc.*, SBA No. SIZ-5718 (2016) and *Size Appeal of Nordic Sensor Techs., Inc.*, SBA No. SIZ-4373 (1999).) ATC asserts that ProActive's appeal and supplemental appeal contain no evidence to support its claims of error, only its “belief” and “mischaracterizations”. (*Id.* at 12.)

A specific mischaracterization in ProActive's appeal supplement is the allegation that Rockwell will perform [XXXXXXX] for the manufacture of TS upgrades. (*Id.*, citing ProActive Supp. Appeal at 17.) According to ATC, most of Rockwell's [XXXXXXX] are for development of the design, the “blueprints” of the upgrades; of Rockwell's alleged [XXXXXXX] for upgrades, [XXXXXXX] of them are under [XXXXXXXXXX]. (*Id.*, citing Supplement to Form 355, Item 9.) In addition, some of Rockwell's work is for testing, work that the size regulation excludes from

consideration when determining the manufacturer of an end item. (*Id.*, citing 13 C.F.R. § 121.406(b)(2)(i)(A).) ATC maintains that [XXXXXXXX] work should not be included in the determination of the manufacturer, because it is “not manufacturing work”. (*Id.* at 13.) [XXXXXXXXXXXXXXXXXXXX], on the other hand, are the manufacturing work for the completed and installed upgrades that the Air Force is procuring. (*Id.*) Thus, ATC is performing nearly 70% of the manufacturing effort, by the value of the work performed. (*Id.*) Further, ATC is responsible for about [XXXXXXXXXXXXXXXX], and all material costs. (*Id.* and n.5.)

ProActive also mischaracterizes ATC's facility space by claiming that ATC has only the Oklahoma site, and that the upgrade development, integration and production will occur at Rockwell's SIL. (*Id.* at 14, citing ProActive Supp. Appeal at 18.) ATC states “As noted in [ATC's] Response [to the protests], ATC is finalizing a lease of a nearly-7,000 square foot facility where the actual *production efforts* will occur and that will be staffed entirely by ATC engineers and technicians. (*Id.*, citing Cox Decl. ¶¶ 20-21 (emphasis in original.)

ATC also takes umbrage at ProActive's assertion that ATC is performing only “minimal operations” on the upgrades, like a consumer would if assembling a prepackaged IKEA bed. (*Id.* at 13-14 and n.6.) To the contrary, here Rockwell is “would simply provide the bed's instructions”, whereas ATC would have to acquire the materials and parts, fabricate non-existing parts, engineer and modify the parts, deliver them to Rockwell's facility for testing, then deliver and install the bed. (*Id.* at 14.)

Turning to the ostensible subcontractor rule, ATC contends that, because this procurement was assigned a manufacturing NAICS code, and because ATC was found to be the manufacturer of the end items, the issue of which firm will perform the primary and vital requirements of the contract has already been resolved — ATC is. (*Id.* at 15, citing *Size Appeal of Marwais Steel Co.*, SBA No. SIZ-3884 (1994) and 76 Fed. Reg. 8222, 8225 (Feb. 11, 2011).) Thus, “OHA should decide that, as a matter of logic, ATC is performing the contract's primary and vital requirements.” (*Id.*) ATC maintains that the Area Office need not have analyzed the ATC's proposal under the ostensible subcontractor rule at all. (*Id.* at 15-16.)

ATC highlights that, according to the CO's response to the appeals, the primary and vital requirements of the contract are “to ensure the training devices are available so that aircrews and maintainers get the training they need, when they need it.” (*Id.* at 16-17, quoting CO's Statement at 1.) ATC also cites various OHA decisions in support of the proposition that the primary and vital requirements are associated with the principal nature or purpose of the acquisition. (*Id.* at 17.)

As for Appellants' suggestions that the CONECT upgrade alone is the primary and vital requirement, ATC again points to the CO's statement that “Trainer Modifications are merely a support function to trainer availability.” (*Id.* at 18, quoting CO's Statement at 2.) ATC analogizes to *Size Appeal of TLC Catering*, SBA No. SIZ-5172 (2010), where OHA concluded that while the sandwiches were an important part of a contract for the provision of box lunches, the primary and vital requirement is the service of the entire meal. (*Id.*) Like the sandwiches there, the CONECT upgrade is an important part of the contract, but it is not the primary and vital function of the contract. (*Id.*) ATC, by performing all of the CLS work, is performing what the Air Force

says is the primary requirement of the contract. (*Id.* at 19.) The TS modifications are important too, but ATC is performing most of the work relating to the upgrades, while Rockwell's role is limited to design and testing work. ATC will perform all of the [XXXXXXXX], and is also responsible for integration and installation of the end items into the TS devices. (*Id.* at 19-20 (citing Cox Decl. ¶¶ 15, 19, 24).)

ATC claims that, of the nearly \$[XXXXXX] in work associated with the upgrades, ATC is performing \$[XXXXXXXXXXXX], and the “[XXXXXX] of this amount” is for production of the CONECT upgrade. (*Id.* at 20, citing Cox Decl. ¶ 28 and Supplement to Form 355, Item 7.) Rockwell is performing \$[XXXXXXXX], about \$[XXXXXXXX] related to development of the CONECT upgrade, not its production. (*Id.*) ATC will perform 70%, and Rockwell 30%, of the manufacturing effort on the upgrades. (*Id.*)

Further, the portions of the contract other than the upgrades — Program Management, CLS, and TSSC — exceed the combined value of the upgrades. (*Id.* at 20-21, citing Suppl. Cox Decl. ¶ 9.) ATC will perform about [XXXXXXXXXXXXXX] for the contract as a whole. (*Id.*) ATC contrasts the situation here with OHA decisions where violations of the ostensible subcontractor rule were found where the prime contractor had “no meaningful role” in performing the primary and vital requirements. (*Id.* at 21, citing *Size Appeal of WG Pitts Co.*, SBA No. SIZ-5575 (2014), *Size Appeal of Red River Comp. Co., Inc.*, SBA No. SIZ-5512 (2013), *Size Appeal of CardioMetrix, Inc.*, SBA No. SIZ-4051 (1995).)

Alternatively, ATC also contends that it is not unusually reliant on Rockwell, based on the “four key factors” discussed by OHA in *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5116 (2016). (*Id.* at 21.) First, Rockwell, while a large concern, is not the incumbent contractor, contrary to CymSTAR's suggestions. (*Id.* at 21-22, citing CymSTAR Supp. Appeal, at 12.) Rockwell is not a current incumbent that is now ineligible to bid. (ATC Response at 22.)

Second, ATC will not be hiring Rockwell's workforce, in contrast to the situation in *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011). (*Id.* at 22.) The Project Manager is ATC's employee, the Senior Systems and Concurrency Engineers will be ATC's employees, their employment at Rockwell having ended a year ago, and incumbent personnel will become ATC's employees. (*Id.* at 22, citing Cox Decl. ¶¶ 21, 25, 26.) ATC also contends that OHA has held that hiring a subcontractor's employees does not indicate unusual reliance. (*Id.* at 23, citing *Size Appeal of GiaCare & Medtrust JV, LLC*, SBA No. SIZ-5690 (2015).) Further, OHA has long held that hiring incumbent non-managerial personnel is not indicative of unusual reliance. (*Id.* at 23, citing *Size Appeal of SM Res. Corp., Inc.*, SBA No. SIZ-5538 (2012).)

Third, ATC will manage the work. Under the Proposal, ATC's President tops the management chain, and under him is ATC's Program Manager, who “has full authority” and is “the focal point for overall contract management and execution”. (*Id.* at 23.) The Program Manager has worked for ATC since 2008 and never worked for Rockwell. (*Id.* at 24.) Next ATC tackles the allegation, by both CymSTAR and ProActive, that the Deputy Program Manager, a Rockwell employee, will actually manage the work. (*Id.* at 25-26.) ATC notes the TA states that ATC will manage the work and that Rockwell's work is limited to support of the modification

effort. (*Id.* at 25, citing TA Append.¶ 6.) Further, the Deputy Program Manager reports to the ATC's Program Manager, who reports to ATC's President. (*Id.*)

Fourth, ATC has relevant experience. Contrary to Appellants' "unfounded" claims, ATC has the experience, facilities, and staff needed to write the proposal and to complete the production work. (*Id.* at 27.) The Air Force determined ATC is a responsible contractor, and Appellants' claims on appeal amount to disagreement with the CO's responsibility determination. (*Id.*) ATC cites OHA decisions in *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228 (2011) and *Size Appeal of Public Communications Services, Inc.*, SBA No. SIZ-5008 (2008) for the proposition that SBA does not make responsibility determinations. Further, some of the upgrades have never been produced before, and thus, no contractor has had experience producing them. (*Id.* at 28.) ATC also defends the inclusion in its proposal of Rockwell's past performance with the CONECT upgrades, noting that the solicitation permitted subcontractor experiences, and that OHA has found no unusual reliance for relevant subcontractor experiences permitted by the solicitation. (*Id.* at 29, citing *Size Appeal of Bering Straits Logistics Services, LLC*, SBA No. SIZ-5277 (2011) and *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279 (2011).) Appellants' claims that ATC lacks relevant experience also owe to their too-narrow view of the RFP's primary and vital requirements. (*Id.* at 29.) The RFP is not limited to the complex engineering and software design efforts needed for the three modifications, but comprises the provision of "an available B-52 training system," including upgrades, program management, and CLS and TSSC services. (*Id.*) Finally, ATC contends that it does have "significant relevant experience", pointing to its 15 years' successful program management in CLS, TSSC, and training device support. (*Id.* at 30-31.)

As for Appellants' contention that ATC lacks necessary facilities and is thus reliant on Rockwell, ATC responds that the RFP did not require detail about the production facility, only the SIL. (*Id.* at 31.) Further, ATC plans to lease its own production facility and informed the Air Force during discussions that "assembly, integration and testing" would be performed "at an ATC leased facility." (*Id.*, quoting ATC Response to Discussion Questions (Nov. 20, 2015) at 4). The fact that the SIL will be at Rockwell's facility does not make ATC unduly reliant on Rockwell either, because only the testing will be done at the SIL. (*Id.* at 32.) ATC will do most of the work on the upgrades, and will hire a third party (not Rockwell) to relocate the SIL. (*Id.*)

Finally, ATC and Rockwell are performing discrete tasks under the proposal, with Rockwell primarily providing design plans in support of the modification development. (*Id.* at 35.) ATC "will actually build the upgrades — the most technically complex and challenging work". (*Id.*) ATC will perform [XXXXXXXXXXXXXXXXXXXXXXXXXXXX]. (*Id.*) Thus, under any metric, ATC is performing the primary and vital requirements of the contract. (*Id.* at 36.)

ATC contends that ASI's arguments "largely parrot" those of Appellants, in that ASI asserts that the trainer modifications are the primary and vital requirements and that ATC is unduly reliant on Rockwell to perform them. (*Id.*) ASI asserts that Rockwell will perform [XX]% of the work under the CLINs it will participate in, but ASI's math is not clear. (*Id.* at 38.)

6. New Evidence

With their filings, ProActive, CymSTAR, and ATC moved to introduce new evidence. ProActive seeks to introduce part of its March 4, 2016 protest supplement, indicating that ATC hired Mr. Anderson, a former Rockwell employee, to serve as ATC's Technical Program Manager. ProActive explains that the Area Office declined to consider this information as untimely. CymSTAR offers a redacted Source Selection Decision Document. ATC opposes Appellants' new evidence, but moves to introduce its own new evidence, a Supplemental Declaration of Mr. Cox. Appellants and ASI object to ATC's new evidence.

III. Discussion

A. Standard of Review

Appellants have the burden of proving, by a preponderance of the evidence, all elements of their appeals. Specifically, Appellants must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

ATC argues persuasively that, because this procurement was assigned a manufacturing NAICS code and calls for the delivery of manufactured products (*i.e.*, the modifications to the B-52 training devices), the key issue in this case is whether ATC is compliant with 13 C.F.R. § 121.406. ATC points in particular to SBA's commentary in the *Federal Register* stating that “[w]here a procuring agency has classified a procurement as a manufacturing procurement and is also acquiring services”, the prime contractor must meet the requirements of 13 C.F.R. § 121.406 but “need not perform any specific portion of the accompanying services.” 76 Fed. Reg. 8,222, 8225 (Feb. 11, 2011); *see also* 74 Fed. Reg. 55,694, 55,697 (Oct. 28, 2009) (identical commentary in proposed rule). SBA further explained that, if a manufacturing NAICS code is assigned to a procurement consisting of both manufacturing and services, a determination that the prime contractor meets the requirements of 13 C.F.R. § 121.406 resolves the question of whether the prime contractor is compliant with the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4):

In classifying the procurement as a manufacturing/supply procurement, the procuring agency must have determined that the “principal nature” of the procurement was supplies. As a result, any work done by a subcontractor on the services portion of the contract cannot rise to the level of being “primary and vital” requirements of the procurement, and therefore cannot be the basis o[f] affiliation as an ostensible subcontractor.

Id. OHA likewise has reached similar conclusions in its case decisions. In *Size Appeal of M1 Support Services, LP*, SBA No. SIZ-5297 (2011), for example, OHA rejected the notion that a

procurement assigned a manufacturing NAICS code was nevertheless predominantly for services, and proceeded to analyze the case solely through the lens of 13 C.F.R. § 121.406.

In the instant case, the Air Force assigned the RFP a manufacturing NAICS code, 336413. Section II.A, *supra*. Consistent with the above commentary, the choice of a manufacturing NAICS code indicates, almost by definition, that the principal purpose of the procurement is manufacturing. Federal Acquisition Regulation (FAR) 19.303(a)(2) (“The contracting officer shall select the NAICS code which best describes the principal purpose of the product or service being acquired.”); 13 C.F.R. § 121.402(b). Other factors also support the notion that the procurement here is primarily for manufacturing. While the RFP did contemplate certain services in addition to manufacturing, the RFP’s evaluation scheme emphasized the paramount importance of manufacturing relative to services. Thus, Trainer Modifications, although nominally a subfactor under Technical Capability, was weighted equally in importance to Past Performance, the second most important of the three evaluation factors. Section II.C, *supra*. In addition, offerors would be assigned an adjectival rating for the Trainer Modifications subfactor, but the CLS and Program Management subfactors would be evaluated only a pass/fail basis, further underscoring the relative importance of the manufacturing aspects of the procurement. *Id.* Similarly, while the Air Force argues on appeal that CLS services are the primary contract requirement, such services apparently constitute only a small portion of contract value, based on [XXXXXXX]. Section II.D, *supra*. By regulation, when there is no single NAICS code that applies to the full range of products or services being acquired, the procurement typically will be classified under the NAICS code which represents the greatest percentage of contract value. FAR 19.102(d) and 19.303(a)(2); 13 C.F.R. § 121.402(b)(2). On this record, then, I conclude that the principal purpose of this procurement is the modifications to the B-52 training devices. The central issue in this case, therefore, is whether the Area Office erred in determining that ATC is compliant with 13 C.F.R. § 121.406.

Pursuant to 13 C.F.R. § 121.406, when a manufacturing or supply contract is set aside for small businesses, the prime contractor either must be the manufacturer of the end items being acquired, or must fall within certain non-manufacturer exceptions. 13 C.F.R. § 121.406(a). “The manufacturer is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired.” 13 C.F.R. § 121.406(b)(2). A concern that performs “minimal operations” upon the end item is not the manufacturer. *Id.* In addition, for size purposes, there can be only one “manufacturer” of an end item. *Id.*; *Size Appeal of Sea Box, Inc.*, SBA No. SIZ-5613 (2014). The regulations specify three factors to be considered in deciding whether a concern is the “manufacturer” of an end item: (1) the proportion of total value in the end item added by the concern, excluding costs of overhead, testing, quality control, and profit; (2) the importance of the elements added by the concern to the function of the end item, irrespective of their relative value; and (3) the concern’s technical capabilities, such as plant, facilities and equipment. 13 C.F.R. § 121.406(b)(2)(i); *Size Appeal of NMC/Wollard, Inc.*, SBA No. SIZ-5668 (2015).

In the instant case, I must agree with Appellants and ASI that, although the Area Office recited the three-part test found at 13 C.F.R. § 121.406(b)(2)(i), the Area Office did not fully

analyze ATC's proposal against these elements. As a result, it is appropriate to remand this case for further review.

With regard to the first element of the test — the proportion of total value in the end item added by the concern, excluding costs of overhead, testing, quality control, and profit — the size determination is silent as to the respective dollar values of ATC's and Rockwell's contributions to trainer modifications. Section II.H, *supra*. Further, this information cannot easily be ascertained by OHA on appeal. Although ATC's proposal is in the record, the proposal itself does not clearly delineate the dollar values of ATC's and Rockwell's contributions. Section II.D, *supra*. Nor did the size determination quantify, or explain, which CLINs or aspects of the procurement were considered in assessing this element of the test. ATC argues in response to the appeals, for instance, that “development” and “installation” are appropriately deemed part of the manufacturing process, but that CLIN 33 should have been excluded because it constitutes “design work”,⁴ and that Rockwell's testing efforts should have been deducted. Section II.I.5, *supra*. Thus, the record is not sufficiently developed for OHA to determine the relative proportion of total value in the modifications added by ATC and Rockwell.

Similarly, the Area Office did not clearly address the second element of the test, the relative importance of ATC's and Rockwell's contributions to the end items. On this point, Appellants and ASI emphasize that, because this procurement calls for the manufacturing of a limited quantity of developmental items (*i.e.*, items that have never before been produced and must first be developed), it is the complex design and development efforts that are the crucial aspects of the manufacturing process. Appellants and ASI highlight that, according to the size determination, Rockwell will perform most, if not all, of the development of the trainer modifications. Thus, the Area Office remarked in the size determination that “Rockwell will provide ATC with the technical design for the building of the new upgrades”, leaving ATC to perform less substantial activities such as the purchase and assembly of components based on Rockwell's detailed instructions. Section II.H, *supra*. ATC's technical proposal similarly suggests that Rockwell alone is responsible for the development of the modifications, stating that “[XXXXXXXXXXXXXXXXXXXXXXXXXXXXX].” Section II.D. ProActive further highlights that, during the size review, the Area Office obtained data about the number of labor hours that would be expended by ATC and Rockwell respectively, but the Area Office apparently did not examine this information, and in any event did not discuss it in the size determination. Had the Area Office reviewed this information, ProActive contends, it would have found that development is the most important aspect of the manufacturing process because “[XXXXXXXXXXXXXXXXXXXXXXXXXXXXX].” Section II.I.1, *supra*.

I agree with Appellants and ASI that more detailed review of the second element of the test is needed here. It is not clear from the existing record whether ATC's role in the manufacturing process is limited solely to the acquisition and assembly of parts, as Appellants and ASI maintain. Even if ATC's role is circumscribed in this manner, though, 13 C.F.R. § 121.406 recognizes that “the assembly of parts and components, into the end item being acquired” may constitute manufacturing. OHA has likewise reached similar conclusions in prior

⁴ It is worth noting, though, that both the RFP and ATC's proposal describe CLIN 33 as “CONNECT Development”, not design. Section II.D, *supra*.

decisions. *E.g.*, *Size Appeal of Lanzen Fabricating North, Inc.*, SBA No. SIZ-4723, at 4 (2005) (“assembly of components to produce the required end item is sufficient to designate the assembler as manufacturer of the end item”); *Size Appeal of Nordic Sensor Techs., Inc.*, SBA No. SIZ-4373 (1999). On the other hand, OHA's prior case decisions involving assembly of components have not also involved the production of developmental items, much less a proposal to subcontract that development to another concern. Based on the circumstances presented here, then, it appears possible that Rockwell, rather than ATC, might be found to be the manufacturer of the trainer modifications.

The third element of the test requires a review of the concern's technical capabilities, such as plant, facilities, and equipment. As CymSTAR correctly observes, the Area Office failed to discuss these issues at all in the size determination. In addition, 13 C.F.R. § 121.406(b)(2) instructs that in order for a concern to be deemed the manufacturer, the concern must use “its own facilities”. *See also Size Appeal of Rich Chicks, LLC*, SBA No. SIZ-5556, at 7 (2014). This issue is potentially significant here because, although ATC indicated during discussions and in its response to the protests that it planned to obtain a facility, it is not clear that such an approach is reflected in ATC's actual proposal. Size, though, is determined as of the date of final proposal revisions, 13 C.F.R. § 121.404(d), and OHA has long held that “documents created in response to a size protest may not be used to contradict an offeror's actual proposal.” *Size Appeal of Onopa Management Corp.*, SBA No. SIZ-5302, at 16 (2011). As a result, more analysis is needed to examine ATC's technical capabilities and whether ATC had actually proposed to perform manufacturing in its own facilities as of the date of its final proposal revisions.

IV. Conclusion

For the above reasons, the appeals are GRANTED in part. The Area Office did not adequately examine the issue of whether ATC is compliant with 13 C.F.R. § 121.406, and the matter is REMANDED for further review of this issue. In light of this outcome, it is unnecessary to rule upon the parties' motions to introduce new evidence on appeal. *E.g.*, *Size Appeal of W&T Travel Services, LLC*, SBA No. SIZ-5721, at 16 (2016); *Size Appeal of DefTec Corp.*, SBA No. SIZ-5540, at 9 (2014).

KENNETH M. HYDE
Administrative Judge