United States Small Business Administration
Office of Hearings and Appeals

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF: A-P-T Research, Inc, Appellant, RE: Alphaport, Inc. Appealed From Size Determination No. 04-2016-049	SBA No. SIZ-5798 Decided: December 19, 2016

APPEARANCES

J. Dale Gipson, Esq., Tracy A. Marion, Esq., Lanier Ford Shaver & Payne, P.C., Huntsville, Alabama, for Appellant

Jonathan T. Williams, Esq., Patrick T. Rothwell, Esq., Julia Di Vito, Esq., Jacqueline K. Unger, Esq., PilieroMazza PLLC, Washington, D.C., for Alphaport, Inc.

DECISION[1]

I. Introduction

On September 1, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office) issued Size Determination No. 04-2016-049 concluding that Alphaport, Inc. (Alphaport) is not affiliated with its subcontractors, Millennium Engineering and Integration Company (Millennium) and Science Applications International Corporation (SAIC), under the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4). A-P-T Research, Inc. (Appellant), which had previously protested Alphaport's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied.

[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.

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. Solicitation and Protest

On January 22, 2016, the National Aeronautics and Space Administration (NASA) issued Request for Proposal (RFP) No. NNK16567219R for the Safety and Mission Assurance Support Services III (SMASS III) procurement. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 541330, Engineering Services. NAICS code 541330 ordinarily is associated with a size standard of $15 million, but the RFP indicated that the work fit within the exception for Military and Aerospace Equipment and Military Weapons, which utilizes a size standard of $38.5 million. Initial offers were due February 29, 2016, and final proposal revisions were due July 11, 2016.

The RFP's Performance Work Statement (PWS) indicated that the contractor would perform mission assurance, engineering, and risk assessment services in support of NASA's Safety and Mission Assurance (SMA) Directorate. (PWS § 1(a).) The PWS divided the required work into three categories: "Contract/Program Management"; "Technical Integration"; and "Technical Disciplines".

Under "Contract/Program Management," the contractor would be responsible for "manag[ing] and administer[ing] all contract activity" and would facilitate cross-department communications, common processes, performance measures, and overall safety and health. (*Id.* § 2.1.) The contractor also would be responsible for "interfac[ing] with internal and external organizations . . . to assure the technical and organizational integration of SMA activities across all disciplines." (*Id.*) According to the Level of Effort (LOE) estimates provided with the RFP, "Contract/Program Management" would account for 1,880 hours annually, approximately 1.6% of the total labor hours during the base year of the SMASS III contract. (RFP, Attachment L-01, at 2.) The RFP estimated that "Contract/Program Management" work would be performed by one full-time analyst. (*Id.*)

Under "Technical Integration," the contractor would be responsible for "provid[ing] overall technical SMA program integration for all contract related functions." (PWS § 3.1.) The contractor would assist in the development of "integrated SMA schedules, resources, and related milestones" as well as "integrated SMA technical and organizational analyses and assessments." (*Id.*) In addition, the contractor would perform technical reviews, coordinate hardware and software evaluations, and facilitate technical resolutions of SMA issues. (*Id.*) According to the LOE estimates, "Technical Integration" would account for 3,760 labor hours during the base year of contract performance. (RFP, Attachment L-01, at 2.) Using an1880-hour work year

equivalence, the RFP estimated that "Technical Integration" work would require two full-time engineers of varying experience. (*Id.*)

Under "Technical Disciplines," the contractor would be responsible for "discipline-specific technical work," including "technical assessments, reviews, analyses, surveillance, inspection, [and] reporting." (PWS § 4.) The contractor also would conduct and review operational safety analyses, reliability and maintainability assessments, and software safety analyses, and would monitor problems and corrective actions. (*Id.* §§ 4.1.1, 4.1.2, 4.2.2.) Further, the contractor would support selected hardware and software systems, specialized engineering areas, safety activities, regulatory compliance, and supplier performance management. (*Id.* §§ 4.1.1 and 4.2.3.) According to the LOE estimates, "Technical Disciplines" would account for 111,860 hours during the base year of contract performance, or approximately 95.2% of total labor hours. (RFP, Attachment L-01, at 2.) Within "Technical Disciplines," work associated with PWS § 4.2, "Quality Engineering and Assurance," and PWS § 4.1, "Safety and Reliability Engineering and Assurance," were estimated to consume the most labor hours: 52,864 hours and 25,488 hours, respectively. (*Id.*) Based on an1880-hour work year equivalence, the RFP estimated that "Technical Disciplines" work would require 15 specialists and 44.5 engineers of varying experience. (*Id.*)

The RFP stated that NASA would evaluate proposals using three evaluation factors: Mission Suitability, Cost, and Past Performance. The Mission Suitability factor consisted of two subfactors: Management Approach and Technical Approach. In making the award decision, Cost would be more important than Mission Suitability, which would be more important than Past Performance. (RFP § M.1.) The RFP instructed offerors to submit up to three past performance references for the prime contractor, and up to three past performance references for each major subcontractor. (*Id.* § L.16.) The RFP stated that past performance references should exceed $5 million in dollar value. (*Id.*)

On July 29, 2016, the CO announced that Alphaport was the apparent awardee. On August 4, 2016, Appellant, an unsuccessful offeror and the incumbent on the predecessor SMASS II contract, protested Alphaport's size. Appellant alleged that Alphaport is not a small business because it is affiliated with its subcontractors, Millennium and SAIC, under the ostensible subcontractor rule. (Protest at 2-3.) More specifically, Appellant asserted that "[t]he primary and vital requirements of SMASS III are clearly the performance of highly-technical safety-related services with the purpose of reducing risk to NASA", and that Alphaport lacked experience and expertise in such matters. (*Id.* at 5.) The CO forwarded Appellant's protest to the Area Office for review.

Alphaport responded to the protest on August 17, 2016, and submitted a copy of its proposal, its completed SBA form 355, and other documents. Alphaport maintained that the primary and vital requirements of the SMASS III contract are the services described in the "Technical Disciplines" portion of the PWS, and that Alphaport will perform the bulk of this work. (Protest Response at 3, 5-6.)

B. Proposal and Teaming Agreement

Alphaport's proposal[2] described the company as "***an experienced prime contractor with relevant and significant past performance in providing [SMA], knowledge management, and engineering services for NASA***." (Proposal, Vol. II, at 1 (emphasis in original).) Millennium and SAIC were proposed as Alphaport subcontractors. (Proposal, Vol. I, at 3-4.) According to the proposal, Alphaport, Millennium, and SAIC together have "uniquely supported SMA efforts for NASA space flight programs and projects." (*Id.* at 5.) The proposal noted that Alphaport was seeking to enter into a formal mentor-protégé relationship with Millennium. (*Id.* at 3.)

The proposal identified three key positions: Program Manager, Business Analyst, and Phase-in Manager. (*Id.* at 20-21.) According to the proposal, the Program Manager and Business Analyst are "critical for contract execution," whereas the Phase-in Manager is "critical to phase-in" and is provided [XXXXX]. (*Id.* at 20.) The proposal explained that the Business Analyst "supports the PM with data and reporting needed to efficiently and effectively execute the contract" and is responsible for reporting requirements, projections, and scheduling. (*Id.*) The proposal further stated the Program Manager has complete authority to direct staff, manage resources, and make on-site decisions, but ultimately reports to Alphaport's Chief Operating Officer and Chief Executive Officer. (*Id.* at 20, 25.)

Alphaport's proposal designated two current employees of Millennium, [XXXX] and [XXXX], to serve as Program Manager and Business Analyst, respectively. (*Id.* at 21-23.) According to the proposal, [XXXX] and [XXXX] "will transition to Alphaport immediately following the contract award" and "[are] not being proposed as key personnel on any concurrent proposals." (*Id.* at 24.) The proposal designated Alphaport's [XXXX] to serve as Phase-in Manager. (*Id.* at 23.2.)

Alphaport proposed [XXX] employees, including [XXX] engineers of varying expertise, for the base year of the SMASS III contract. (Proposal, Vol. IV, at 27-28.) Of these [XXX] personnel, Alphaport would provide [XXX], while Millennium and SAIC would furnish [XXX] and [XXX], respectively. (*Id.*) Of the [XXX] engineers proposed, Alphaport would be responsible for [XXX], Millennium for [XXX], and SAIC for [XXX]. (*Id.*)

Allocated according to portion of the PWS, Alphaport would be responsible for [XX]% of the hours required for "Contract/Program Management", [XX]% of the hours required for "Technical Integration", and [more than 50]% of the hours required for "Technical Disciplines". (*Id.*) When similarly allocated, Millennium would be responsible for [XX]% of the hours required for "Contract/Program Management" and [XX]% of the total hours required for "Technical Disciplines". (*Id.*) Millennium would, however, provide [XX]% of the total engineering hours required for PWS § 4.4 "Range Safety," PWS § 4.6 "Metrology and Calibration Support Activities," and PWS § 4.7 "Expendable Launch Vehicle (ELV) Payload Safety Program." (*Id.*) SAIC would be responsible for [XX]% of the labor hours required for "Contract/Program Management" and [XX]% of the hours required for "Technical Disciplines". (*Id.*)

[2] Citations are to Alphaport's final revised proposal.

For past performance, Alphaport provided three of its own prior contracts and three for Millennium. According to the proposal, each of the six prior contracts involved work in two or more of the "Technical Disciplines" described in the PWS. (Proposal, Vol. II, at 3.) The proposal stated that two of Alphaport's prior contracts involved work similar to the "Quality Engineering and Assurance" and "Safety and Reliability Engineering and Assurance" portions of the PWS. (*Id.*) Two of Alphaport's three prior contracts were valued in excess of the $5 million threshold established by the RFP. (*Id.* at 3-4.) The remaining contract would not expire until March 2018, so its total value was undetermined. (*Id.*)

Prior to submitting its proposal, Alphaport entered into Teaming Agreements with both SAIC and Millennium. (SAIC Teaming Agreement at 1; Millennium Teaming Agreement at 1.) Each Teaming Agreement stipulated that Alphaport would award a subsequently-negotiated subcontract for "the provisions of technical and professional services" as required to "support[] active NASA Programs and Projects ... providing mission assurance, engineering, and risk assessment in the disciplines of safety, reliability, and quality." (SAIC Teaming Agreement at ¶ 1.1 and Ex. A; Millennium Teaming Agreement at ¶ 1.1 and Ex. A.) According to the Teaming Agreements, SAIC's anticipated work share was [XX]%, and Millennium's anticipated work share was "guaranteed [XX]% or as mutually agreed". (SAIC Teaming Agreement at Ex. A; Millennium Teaming Agreement at Ex. A.) The Teaming Agreements stated that each team member would "bear its own costs, fees, liabilities and other expenses" when performing its responsibilities under the SMASS III contract. (SAIC Teaming Agreement at ¶ 4.1; Millennium Teaming Agreement at ¶ 4.1.)

C. Size Determination

On September 1, 2016, the Area Office issued Size Determination No. 04-2016-049, denying Appellant's protest and concluding that Alphaport is a small business for the instant procurement.

The Area Office determined that the primary and vital requirements of the SMASS III procurement are "the overall management and the technical integration of all work". (Size Determination at 6.) The Area Office reasoned that the PWS called for "a wide range of technical services", and that "[t]he most technically experienced engineering firm in the world could not win this contract unless it could provide the management and technical integration required." (*Id.* at 5.) According to the Area Office, the RFP placed significant emphasis on management approach within the Mission Suitability evaluation factor. (*Id.*) The Area Office was unpersuaded by Appellant's argument that the RFP was assigned NAICS code 541330, Engineering Services. The Area Office stressed that "[t]he fact the procurement has an engineering NAICS code designation is not dispositive of its primary and vital requirement." (*Id.* at 3, quoting *Size Appeal of BCS, Inc.*, SBA No. SIZ-5654, at 12 (2015).) Because Alphaport will be "responsible for substantially all contract management labor hours and 100% of technical integration labor hours," Alphaport is not unusually reliant upon its subcontractors to perform these requirements. (*Id.* at 7.)

The Area Office found that, even if engineering services were the primary and vital requirements of the procurement, Alphaport still would not be in violation of the ostensible subcontractor rule. The Area Office noted that "Alphaport is responsible for far more hours with its own engineers than either of its subcontractors." (*Id.* at 7.) In fact, "Alphaport employees are performing a distinct plurality" of the engineering services. (*Id.*) Although Millennium alone will perform the work in three sections of the "Technical Disciplines" portion of the PWS, "these *three* disciplines, *even when cumulated*, account for less than 10% of the total contract labor." (*Id.*, emphasis in original.) The Area Office stated that Alphaport's lack of experience under NAICS code 541330 does not establish that Alphaport must rely upon its subcontractors. A concern must be judged on "the specific tasks and responsibilities that it has actually performed", as the concern may have performed relevant work but under a different NAICS code. (*Id.* at 2- 3.)

The Area Office found that "all three key employees will be employed by Alphaport and will report directly to and be supervised by Anthony Miranda, Alphaport's Chief Operating Officer." (*Id.* at 11-12.) Further, other than the Program Manager and Business Analyst hired from Millennium, "Alphaport will not hire a single additional employee from either Millennium or SAIC to perform this contract." (*Id.* at 12.)

The Area Office found that Alphaport's receipts do not exceed the $38.5 million size standard. (*Id.* at 16.) Therefore Alphaport is a small business for the SMASS III procurement.

D. Appeal and Supplemental Appeal

On September 16, 2016, Appellant filed the instant appeal. Appellant maintains that the size determination is clearly erroneous and requests that OHA reverse.

Appellant contends that the Area Office incorrectly found that overall management and technical integration are the primary and vital requirements of the contract. Rather, in Appellant's view, the PWS and LOE estimates establish that "the primary and vital requirements are highly technical SMA services." (Appeal at 5.) "While there may have been a 'wide range of services' encompassed in the PWS, those services are technical SMA services and the importance of technical (as opposed to solely management) proficiency, and thus the primary and vital requirements of the RFP, is reflected primarily in [the "Technical Disciplines" section] of the PWS." (*Id.* at 7.) Citing *Size Appeal of Iron Sword Enterprises, LLC*, SBA No. SIZ-5503 (2013), Appellant argues that the prime contractor must do more than "merely manage the subcontractor's performance" of the primary and vital requirements. (*Id.* at 6-7.) Appellant further asserts that, by finding that "Technical Integration" work is primary and vital, the Area Office essentially confirmed the paramount importance of "Technical Disciplines," because "the Technical Integration work is derivative of the SMA Services described in [Technical Disciplines]." (*Id.* at 7.)

Appellant insists that overall management and technical integration cannot represent the primary and vital requirements of the SMASS III procurement because these efforts account for only 1.6% and 3.2% of the hours required based on the LOE estimates. (*Id.* at 8.) OHA has explained that "[f]requently, the primary and vital requirements are those which account for the

bulk of the effort, or of the contract dollar value." (*Id.* (quoting *Size Appeal of Social Solutions International, Inc.*, SBA No. SIZ-5741, at 12 (2016).) Given that so few hours are devoted to management and technical integration, such activities do not represent the primary and vital requirements. (*Id.* at 9, 15-16.)

Appellant complains the Area Office failed to thoroughly consider the underlying protest by not conducting its own independent investigation into Appellant's allegations. (*Id.* at 10.) In particular, Appellant contends that the Area Office improperly placed the burden of proof on Appellant rather than shoulder the responsibility for determining the "actual facts" of the dispute. (*Id.* at 12.)

Appellant reiterates its view that Alphaport must rely on its subcontractors for experience with SMA services. (*Id.* at 13-15.) Appellant argues that Alphaport is incapable of performing the instant contract because SMASS III is 341 times larger than Alphaport's largest previous contract for engineering services. (*Id.* at 14.) Appellant likens Alphaport to the unproven concern in *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2007). (*Id.*) Further, Appellant posits, Alphaport could not have received a successful rating for the "Past Performance" evaluation factor if not for Millennium's past experience. (*Id.* at 16-17.)

Moreover, Appellant argues that Alphaport's hiring of a Millennium employee to serve as Program Manager further demonstrates unusual reliance on this subcontractor. (*Id.* at 18.) Citing *Size Appeal of National Sourcing, Inc.*, SBA No. SIZ-5305 (2011) and *Size Appeal of Video Masters, Inc.*, SBA No. SIZ-4984 (2008), Appellant contends that hiring of a subcontractor's employees to serve in key personnel positions, particularly managerial positions, is probative evidence of unusual reliance. (*Id.*) Appellant acknowledges that OHA decisions interpreting Executive Order 13,495 suggest that hiring of non-managerial personnel does not alone constitute a violation of the ostensible subcontractor rule, but Appellant argues that managerial hires may suggest unusual reliance when coupled with other evidence. (*Id.* at 19.)

On October 12, 2016, after reviewing the record under the terms of an OHA protective order, Appellant filed a supplement to its appeal. Appellant reiterates its contention that the Area Office failed to adequately investigate claims that only 2% of Alphaport's prior experience involved NAICS code 541330, and that Alphaport lacks the complex engineering experience required to perform the contract. (Supp. Appeal at 2-3.)

Appellant asserts that Alphaport's previous prime contracts are "only tangentially relate[d] to SMA technical services" and did not provide relevant experience for the instant contract. (*Id.* at 4.) With regard to the past performance examples cited in Alphaport's proposal, Appellant asserts that the first example is unrelated based on the NAICS code assigned and focused on developing training materials, and the second example is irrelevant as it did not meet the minimum $5 million threshold set in the RFP. (*Id.* at 4-5.) The third example, while relevant, is much smaller in size than SMASS III. (*Id.* at 5-6.) Appellant observes that Alphaport's proposal repeatedly referred to Alphaport and its subcontractors as a team, and "[c]ritically, the proposal is replete with references to 'Team Alphaport"D'. (*Id.* at 6-7.) In addition, Appellant alleges that Alphaport is unusually reliant on its subcontractors because Alphaport proposed to fill two of three key personnel positions with current Millennium employees, and because

Alphaport proposed to self-perform less than half of the engineering work required for the "Technical Disciplines" portion of the PWS and for the "Technical Disciplines" and "Technical Integration" sections combined. (*Id.* at 7-9.)

E. Alphaport's Response

On October 19, 2016, Alphaport responded to the appeal and supplemental appeal.

Alphaport argues that Appellant has failed to demonstrate clear error of law or fact in the size determination. Therefore, the appeal should be denied. (Response at 1.)

Alphaport contends the Area Office correctly concluded that the primary and vital requirements are overall management and technical integration. According to Alphaport, the primary and vital requirements are "associated with the principal purpose of the acquisition" but do not necessarily need to represent the largest part of procurement. (*Id.* at 6 (citing *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290 (2011) and *Size Appeal of Santa Fe Protective Services, Inc.*, SBA No. SIZ-5312 (2012)).) Alphaport acknowledges that "the RFP describes the primary purpose of the acquisition as providing 'mission assurance, engineering, and risk assessment in the SMA disciplines at [Kennedy Space Center] and at other NASA SMA supported sites.'" (*Id.*, quoting PWS at 2.) Nevertheless, Alphaport stresses, given the wide variety of SMASS III services, "the purpose of the contract cannot be met without the overall management and technical integration of all work." (*Id.*)

Alphaport contends that, even if the primary and vital requirements are SMA technical services, the Area Office did not err in concluding that Alphaport is compliant with the ostensible subcontractor rule. (*Id.* at 8.) Alphaport emphasizes that it will perform [more than 50]% of the labor hours associated with the "Technical Disciplines" portion of the PWS, as compared with [XX]% for Millennium and [XX]% for SAIC. (*Id.*) Although Millennium will perform three technical disciplines that Alphaport will not perform, subcontracting these discrete portions does not contravene the ostensible subcontractor rule. (*Id.* at 9.)

Alphaport asserts Appellant failed to show that the Area Office clearly erred in finding that Alphaport is not unusually reliant on its subcontractors. (*Id.* at 9, 13.) Alphaport argues that the percentage of contracts that a firm performs under a particular NAICS code is not an accurate measure of its experience or its ability to perform work. (*Id.* at 10.) According to Alphaport, the Area Office correctly recognized Alphaport's experience in the types of work called for by the RFP, including engineering services, and correctly determined that Alphaport was not reliant on Millennium's past performance but only providing information at the request of NASA. (*Id.* at 12-13.) Alphaport argues that the instant case is distinguishable from *Taylor Consulting* because Alphaport is not an unproven concern but rather has been in business since 2000 and has substantial income, including nearly $12 million in income from engineering services. (*Id.* at 11.) Alphaport also states that it is not unusually reliant on its subcontractors as Alphaport employs, supervises, and controls the key personnel hired from Millennium. (*Id.* at 15, citing *Size Appeal of Hanks-Brandan, LLC*, SBA No. SIZ-5692 (2015).) Further, aside from the two key personnel hired from Millennium, "Alphaport will not be hiring a single additional employee from Millennium or SAIC to perform the contract." (*Id.*)

Alphaport also contends the Area Office adequately addressed Appellant's protest, and that Appellant is barred from raising new arguments on appeal regarding the primary and vital requirements. (*Id.* at 7, 17.)

F. New Evidence

On September 26, 2016, Appellant moved to introduce as new evidence NASA's Source Selection Statement (SSS) for the SMASS III procurement, dated July 26, 2016. (Motion at 1.) Appellant asserts that "NASA issued the [SSS] on September 6, 2016", so Appellant could not have submitted the document to the Area Office during the size review. (*Id.* at 1-2.) Alphaport opposes the motion. In Alphaport's view, the SSS sheds no light on Alphaport's compliance with the ostensible subcontractor rule, and therefore is irrelevant. (Opp. at 2-3.)

III. Discussion

A. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not first presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g. Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal 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). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). OHA "will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review." *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

In this case, Appellant has not established good cause to admit the SSS. The stated purpose of the SSS is to summarize "[r]elevant portions" of NASA's evaluation findings, and to articulate the selection official's rationale for his award selection. (SSS at 1.) Thus, the SSS was not intended to analyze compliance with the ostensible subcontractor rule. Nor has Appellant persuasively shown how the SSS is pertinent to the issues presented here, such as determining the "primary and vital" contract requirements; assessing which firm(s) will be responsible for performing those requirements; and examining whether the prime contractor is unusually reliant upon its subcontractors. Accordingly, the SSS is EXCLUDED from the record and has not been considered for the purposes of this decision.

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if,

after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

The "ostensible subcontractor" rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or when the prime contractor is unusually reliant upon the subcontractor, the two firms are affiliated for purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). The rule is intended to "prevent other than small firms from forming relationships with small firms to evade SBA's size requirements." *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009). To ascertain whether the relationship between a prime contractor and a subcontractor violates the ostensible subcontractor rule, an area office must examine all aspects of the relationship, including the terms of the proposal and any agreements between the firms. *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). Ostensible subcontractor inquiries are "intensely fact-specific given that they are based upon the specific solicitation and specific proposal at issue." *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 12 (2010).

C. Analysis

Having reviewed the record and the arguments of the parties, I agree with Appellant that the Area Office clearly erred in concluding that the primary and vital requirements of the SMASS III procurement are "the overall management and the technical integration of all work". Section II.C, *supra*. The Area Office apparently reasoned that management and technical integration are of particular significance here because "[t]he most technically experienced engineering firm in the world could not win this contract unless it could provide the management and technical integration required." *Id.* As Appellant emphasizes, though, it is settled law that "the primary and vital requirements are those associated with the principal purpose of the acquisition." *Size Appeal of Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312, at 10 (2012). *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 17 (2011). Further, because the primary and vital requirements stem from the contract's principal purpose, the primary and vital requirements typically are those which account for the bulk of the effort, or of the contract dollar value. *Size Appeal of Social Solutions Int'l, Inc.*, SBA No. SIZ-5741, at 12 (2016).

In the instant case, the RFP specifically stated that the primary purpose of the SMASS III procurement is to obtain mission assurance, engineering, and risk assessment services in the SMA disciplines. Section II.A, *supra*. Such work, detailed within the "Technical Disciplines" portions of the PWS, constitutes the vast majority of contract labor as well as contract dollar value. According to the LOE estimates that accompanied the RFP, for example, "Technical Disciplines" work represents more than 95% of total labor hours during the base year of contract performance, and a similarly large proportion during each subsequent option year. *Id.* Both Appellant's protest and Alphaport's response to the protest characterized technical SMA services as the primary and vital contract requirements, and neither firm attempted to argue that the primary and vital requirements should be limited to management or technical integration. *Id.* The fact that the CO assigned the procurement the NAICS code for engineering services — instead of, for example, a NAICS code pertaining to management consulting — also suggests that

NASA considered the technical SMA services to be the principal purpose of this procurement. *See* 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). Accordingly, Appellant has persuasively shown that management and technical integration are not the primary and vital requirements of the SMASS III procurement. I rather find that the primary and vital requirements are the technical SMA services, which comprise the vast majority of the work.

Notwithstanding the error in identifying the primary and vital requirements, though, Appellant has not established reversible error in the size determination, because the record reflects that Alphaport, the prime contractor, will manage the contract and perform the bulk of the primary and vital requirements. OHA has long recognized that, when a prime contractor and its subcontractors are performing the same types of work, "the firm that will perform the majority of the total contract must be deemed to be performing the "primary and vital' contract requirements." *See Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279 (2011); *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 6-7 (2011); *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155, at 8-9 (2010). Here, according to Alphaport's proposal, Alphaport and its subcontractors will all perform work under the "Technical Disciplines" portions of the PWS, but Alphaport is responsible for [more than 50]% of such services, whereas Millennium and SAIC will perform [XX]% and [XX]%, respectively. Section II.B, *supra*. Furthermore, within "Technical Disciplines", Alphaport will perform the majority of work in the two largest disciplines, "Quality Engineering and Assurance" and "Safety and Reliability Engineering and Assurance", which collectively represent [XX]% of the total services required under "Technical Disciplines". *Id.* While Appellant highlights that Millennium is solely responsible for particular portions of the work under "Technical Disciplines", the Area Office found that these aspects together "account for less than 10% of the total contract labor". Section II.C, *supra*. It therefore was not improper for Alphaport to delegate these discrete functions to Millennium, given that Alphaport still will perform the majority of the primary and vital requirements. *E.g., Size Appeal of BCS, Inc.*, SBA No. SIZ-5654, at 13 (2015) (finding no violation of the ostensible subcontractor rule because the engineering services subcontracted, although "important", were "only a part of the overall planning, analysis and evaluation services" to be provided by the contractor).

Because I agree with the Area Office that Alphaport will perform the majority of the "primary and vital" requirements and will manage the contract, the remaining issue is whether Alphaport is unusually reliant upon its subcontractors. Appellant emphasizes that, although all three proposed key personnel will be Alphaport employees, Alphaport will hire two of those personnel, the Program Manager and the Business Analyst, from Millennium. OHA has recognized on numerous occasions, though, that "when key personnel, even if hired from the subcontractor, remain under the supervision and control of the prime contractor, there is no violation of the ostensible subcontractor rule." *Size Appeal of NVE, Inc.*, SBA No. SIZ-5638, at 10 (2015); *see also Size Appeal of GiaCare and MedTrust JV, LLC*, SBA No. SIZ-5690, at 12 (2015); *Size Appeal of Maywood Closure Co., LLC & TPMC-EnergySolutions Envt'l. Servs. 2009, LLC*, SBA No. SIZ-5499, at 9 (2013); *Size Appeal of J.W. Mills, Mgmt., LLC*, SBA No. SIZ-5416, at 8 (2012). Here, Alphaport's proposal made clear, and the Area Office confirmed, that the Program Manager and the Business Analyst will be Alphaport employees and will report

to, and be supervised by, Alphaport's executive officers. Sections II.B and II.C, *supra*. Further, aside from these two employees, Alphaport will not hire additional staff from either subcontractor to perform the contract. *Id.* Appellant therefore has not established that Alphaport will be dependent upon its subcontractors for contract management, or for its workforce generally.

Appellant also argues that Alphaport is reliant upon its subcontractors because Alphaport lacks the experience necessary to win or perform the contract. In this regard, Appellant notes that OHA has held that "[w]hen a prime contractor relies almost totally upon the experience of other firms to establish its relevant experience, that is probative evidence it is unusually reliant upon its subcontractor to perform the contract in question." *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300, at 10-11 (2011).

I find no merit to Appellant's argument. Unlike the situation in *DoverStaffing*, the record here does not establish that Alphaport relied entirely on its subcontractors' experience to win the contract. Whereas the concern in *DoverStaffing* was unproven, Alphaport is a far more established entity, and Alphaport's proposal indicated that Alphaport has experience in each category of work required by the PWS, including several technical disciplines. Section II.B, *supra*. Further, although Alphaport submitted three past performance references for itself and three for Millennium, the RFP instructed offerors to submit up to three references for the prime contractor, and up to three for each major subcontractor. Section II.A, *supra*. Accordingly, given that Alphaport complied with solicitation instructions, the fact that Alphaport submitted an equal number of references for itself and Millennium does not suggest unusual reliance. *Size Appeal of Bering Straits Logistics Servs., LLC*, SBA No. SIZ-5277, at 8 (2011).

Moreover, even if OHA were to agree that Alphaport did rely heavily upon its subcontractors' past performance, OHA's case decisions subsequent to *DoverStaffing* have recognized that past performance is "only one among other factors in the ostensible subcontractor analysis." *Size Appeal of Logistics & Tech. Servs., Inc.*, SBA No. SIZ-5482, at 8 (2013). Indeed, OHA has reversed a finding that the ostensible subcontractor rule was violated — even after concluding that the challenged firm "relied almost entirely on [the alleged ostensible subcontractor] for its past performance for this contract" — when no other strong indicia of affiliation were present. *Id.* Here, as discussed above, Alphaport will manage the contract and perform the majority of the primary and vital requirements. Alphaport is not an unproven concern; neither subcontractor is the incumbent on the predecessor SMASS II contract; and Alphaport will not hire its workforce from Millennium and SAIC. Even the fact that Alphaport will distribute work among two subcontractors reduces the likelihood that Alphaport will be reliant upon any one of them, as OHA has explained that "[w]here there are a number of subcontractors, but with no one subcontractor having a majority of the work, control over the management of the contract can lead to finding of no violation of the ostensible subcontractor rule even where the challenged concern is not performing the majority of the work." *Size Appeal of Paragon TEC, Inc.*, SBA No. SIZ-5290, at 13 (2011). In sum, the record does not support the conclusion that Alphaport will be unusually reliant upon its subcontractors to perform this contract.

Appellant also complains that Alphaport's proposal referred to Alphaport and its subcontractors collectively as "Team Alphaport". OHA has long held, however, that such language is largely meaningless in determining compliance with the ostensible subcontractor rule. *E.g., Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436, at 16 (2013).

Last, contrary to Appellant's suggestions, I find that the Area Office sufficiently addressed Appellant's protest allegations, acknowledged relevant evidence, and identified evidence relied upon to allow OHA to conduct a proper review of the size determination. Although the Area Office ultimately rejected several of Appellant's protest allegations, the Area Office did not simply ignore these contentions, but instead determined to them to be meritless based on more specific credible evidence and OHA case precedent. Section II.C, *supra*.

IV. Conclusion

Appellant has not demonstrated that the size determination contains clear error of fact or law. Accordingly, 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