

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

**REDACTED DECISION FOR PUBLIC RELEASE**

SIZE APPEAL OF:

Synergy Solutions, Inc.,

Appellant,

RE: TUVA, LLC

Appealed From  
Size Determination No. 2-2017-057

SBA No. SIZ-5843

Decided: July 19, 2017

APPEARANCES

Isaias “Cy” Alba, IV, Esq., Julia Di Vito, Esq., Marc B. Langston, Esq., PilieroMazza PLLC, Washington, D.C., for Synergy Solutions, Inc.

Amy O'Sullivan, Esq., Olivia Lynch, Esq., Crowell & Moring LLP, Washington, D.C., for TUVA, LLC

William Mayers, Esq., Office of General Counsel, Albuquerque, New Mexico, for the U.S. Department of Energy

DECISION<sup>1</sup>

I. Procedural History and Jurisdiction

On April 26, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2017-057, finding TUVA, LLC (TUVA), is an eligible small business for the procurement at issue.

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<sup>1</sup> I originally issued this Decision under a Protective Order and ordered the parties to file any requests for redactions. OHA received one timely request, which I considered in redacting this Decision for public release. This redacted Decision contains a corrected Decision Number.

Synergy Solutions, Inc. (Appellant) contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find that TUV A is not an eligible small business for the instant procurement. For the reasons discussed *infra*, I deny the appeal and affirm the size determination.

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 fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

## II. Background

### A. The Solicitation

On February 25, 2015, the U.S. Department of Energy (DOE), National Nuclear Security Administration (NNSA) issued Solicitation No. DE-SOL-0006736 (RFP) for support of the work of the NNSA Office of Personnel and Facility Clearances at Kirtland Air Force Base in Albuquerque, New Mexico. The Contracting Officer (CO) set the procurement aside for small businesses and designated it under North American Industry Classification System (NAICS) code 541690, with a corresponding \$15 million annual receipts size standard. TUV A submitted its initial offer on March 30, 2015, and its final proposal revisions on August 12, 2016.<sup>2</sup>

The Performance Based Work Statement (PBWS) requires the contractor to “provide expertise and perform all necessary services for the implementation of the DOE Personnel Security Program.” (PBWS at 3.) The work involves varied personnel security access authorization, adjudicative, and processing activities, as well as investigation and analysis work for some 8,200 clearance holders and 3,100 applicants per year. (*Id.* at 2.) Contractor work includes clearance processing; adjudication of investigative reports or other security related information; and complete security reviews for the HSPD-12, Human Reliability, Sensitive Compartmented Information, Facility Clearance /Foreign Ownership Control or Influence (FOCI), and the Facility Approval and Registration of Security Activities programs. (*Id.* at 3.)

NNSA instructed offerors to include “Corporate Experience” at Tab 3 of Volume II, Technical and Management Information. Specifically, they were to list “past or current contracts that are relevant (similar in nature, size in dollars, and complexity) to the scope of work that is to be performed by each team member.” (RFP, Amend. 7 § L.23, at 66-67.) Further,

Contracts listed shall include federal customers only. The experience cited must be within the last three years and in place for at least three months. . . . If [a] team member would like the Government to consider the Corporate Experience of an affiliated or predecessor company, the team member must explain how the affiliated or predecessor company's assets or resources will be brought to bear under the contract.

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<sup>2</sup> On May 1, 2016, NNSA issued Amendment 7 to revise Point of Contact information. Citations herein to the basic RFP follow Amendment 7 pagination.

(*Id.* at 67.) The Evaluation Criteria for “Corporate Experience” states:

The Government will evaluate and assess the relevancy, (similarity in nature, size in dollars, and complexity) and depth of the Offeror's (or team member's or subcontractor's) experience ... as it relates to performing the portions of the PBWS the Offeror (or team member or subcontractor) is proposed to perform. . . . The Government may consider the corporate experience of a predecessor or affiliated company of a team member as though the experience were the team member's if the Government determines that the assets or resources of the predecessor or affiliated company will be brought to bear in performance under this contract.

(RFP, Amend. 7 § M.2, at 78.)

The RFP's instructions regarding “Past Performance” state: “If the Offeror is a newly formed legal entity that has no past performance information, the Offeror shall submit past performance information relating to its team members.” (RFP, Amend. 7 § L.23, at 67.)

The Evaluation Criteria for Past Performance states:

The Government will evaluate the Offeror's (or team member's or subcontractor's) relevant information from [Past Performance], to determine the degree to which the past performance demonstrates the Offeror's (or team member's or subcontractor's) ability to successfully perform the portions of the PBWS the Offeror (or team member or subcontractor) is proposed to perform. . . . The Government may consider the past performance of a predecessor or affiliated company of a team member as though the past performance were the team member's if the Government determines that the assets or resources of the predecessor or affiliated company will be brought to bear in performance under this contract. Past performance information must be within the last three years and in place for at least three months in order to be evaluated.

(RFP, Amend. 7 § M.2, at 78.) The RFP lists the evaluation criteria in descending order of importance: (1) Technical Approach; (2) Staffing Plan and Program Manager Qualifications; (3) Corporate Experience; (4) Past Performance; and (5) Cost. (RFP, Amend. 7 § M.2, at 77.)

#### B. TUVA's Final Proposal Revisions (FPR or Proposal)

TUVA proposes itself as prime contractor, and two other concerns as subcontractors: SAVA Workforce Solutions, LLC (SAVA), and Inquiries, Inc. (Inquiries). TUVA will perform the contract using 55 Full Time Equivalent employees (FTEs), of whom TUVA will provide 24, SAVA 16, and Inquiries 15. (FPR, Vol. II, at L-7.) Some 85% of the proposed workforce will be hired from Appellant, the incumbent contractor. (*Id.* at 2-5.) For the Program Manager, the only Key Personnel, TUVA proposes [xxx], currently at the FBI, who will become a TUVA employee. (*Id.* at 2-11.) Of the [xxx] other proposed FTEs in the Program Management performance area, TUVA will provide [xxx], SAVA will provide [xxx], and Inquiries [xxx].

(*Id.* at L-7.) In the Processing performance area, [xxx] FTEs are planned; TUVA will provide [xxx], SAVA [xxx], and Inquiries [xxx]. (*Id.*) In the Adjudication performance area, [xxx] FTEs are planned, of which TUVA will provide [xxx], SAVA [xxx], and Inquiries [xxx]. (*Id.*) In the FOCI performance area, TUVA will provide all [xxx] planned FTEs. (*Id.*) Of the six team leads, TUVA will provide [xxx], and SAVA [xxx]. (*Id.*) TUVA will provide more higher-value personnel while SAVA will provide more clerks and administrative support, and TUVA will provide over 51% of the total labor cost. (FPR, Vol. III, at 5, 18, L-12.)

For Corporate Experience, TUVA listed two experiences for itself, three for SAVA, and two for Inquiries. (FPR, Vol. II, at Tab 3.) For itself, TUVA listed a 2010 (and ongoing) [Contract-1] on which its proposed subcontractor and sister company, SAVA, is the prime; and a 2014 (and ongoing) [Contract-2] on which TUVA is a subcontractor for [Company]. (*Id.* at 3-1 to 3-8.) For SAVA, TUVA listed three: [Contract-3]; [Contract-4], and [Contract-5]. (*Id.* at 3-8 to 3-15.) For Inquiries, TUVA listed [Contract-6]; and [Contract-7]. (*Id.* at 3-15 to 3-20.) TUVA related each of these seven experiences to particular areas of the PBWS. (*Id.* at 3-22 to 3-23.) TUVA also pointed out that its parent, Akima, provides shared services and support to it and to its sister companies in various areas. (*Id.* at 3-20 to 3-21.)

### C. The Award, Protests, and Area Office Proceedings

On September 30, 2016, the CO awarded the contract to TUVA. Appellant then filed a Government Accountability Office (GAO) protest<sup>3</sup> against TUVA, and NNSA took voluntary corrective action including reevaluation of proposals. On February 23, 2017, the CO notified Appellant that TUVA had been reselected for award.

On March 2, 2017, Appellant filed a size protest with the CO, asserting TUVA is ineligible for the procurement under the ostensible subcontractor rule because it “has very little experience performing prime contracts with the Federal Government” and, due to that inexperience “must have relied on a subcontractor, likely another subsidiary of Akima” to compete for the contract. (Protest at 3.) Appellant could not name the entity with which TUVA has teamed. (*Id.* at 4.) In support of its argument that TUVA lacks experience and thus is unusually reliant on its subcontractor, Appellant noted that TUVA has been awarded only one Federal contract under NAICS code 541690, that it has only one other Federal contract, and that TUVA received both of these contracts less than a month before the March 30, 2015, deadline for initial offers under the instant RFP. (*Id.* at 5, citing TUVA's listing on FPDS.gov.) Further, neither of these contracts is relevant for the instant RFP since neither has been in place for three months. (*Id.* at 5-6.) Appellant also noted TUVA had very little experience performing the required security clearance services, in contrast to its large sister companies which do have that experience and, thus, TUVA “is unduly relying on its subcontractor to perform.” (*Id.* at 6.) The CO forwarded the protest to the Area Office for a size determination.

On March 15, 2017, TUVA responded to the protest and submitted its completed SBA Form 355 and other required documents. The Form 355 contained the statement:

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<sup>3</sup> The GAO Bid Protest is No. B-413974. GAO denied Appellant's protest on June 15, 2017. *Synergy Solutions, Inc.*, B-413974.3, June 15, 2017.

Consistent with 13 C.F.R. § 121.103(b)(2)(ii)(C), once it was identified to assume responsibility for this procurement, TUVVA maintained control and had final decision-making authority over the proposal process. SAVA and Inquiries contributed information, including but not limited to corporate experience, past performance, staffing, and representations/certifications for their respective areas of responsibility and in a manner consistent with serving as a team member.

SBA Form 355, Attach. B at 2. TUVVA was established on September 18, 2013, and is a wholly-owned subsidiary of Akima, LLC (Akima), which is, in turn, a subsidiary of NANA Development Corporation, an Alaska Native Corporation (ANC). (Protest Response at 3.) TUVVA listed its 46 sister companies, including SAVA, a large concern and one of TUVVA's subcontractors on the instant RFP. TUVVA provided its 2013 Federal income tax return and financial statements for its fiscal years ending on September 30, 2014, 2015, and 2016.

TUVVA first asked the Area Office to dismiss the protest as nonspecific, referring to it as “speculative”. (Response to Protest at 4.) Substantively, TUVVA argued that the sole protest allegation, ostensible subcontractor, is meritless. In support, TUVVA pointed to its Proposal noting that it has the relevant experience, past performance, and qualifications for the contract; that it is responsible for the management of the contract and performance of its primary and vital requirements, that it will provide the sole key personnel and far more personnel than either subcontractor, amounting to over 51% of labor costs, that it dominates senior positions; that no member of its team is the incumbent, and that it may rely on its parent ANC and sister companies for contract experience and services without affiliation. (*Id.* at 5-12, citing various authorities.)

#### B. The Size Determination

On April 26, 2017, the Area Office issued the size determination, finding TUVVA is an eligible small business for this procurement. After describing the Akima family of companies, the Area Office discussed the RFP and the Proposal, and determined there was no ostensible subcontractor rule violation. (Size Determination at 3-9.)<sup>4</sup> Using the annual receipts formula for companies in business for less than three years, the Area Office determined that TUVVA, by itself, has annual receipts under \$15 million and is a small business. (*Id.* at 10-11.)

In assessing whether TUVVA is affiliated with SAVA and Inquiries under the ostensible subcontractor rule, the Area Office first determined that the primary purpose of the contract is to provide personnel security program support to NNSA. (*Id.* at 7.) This includes functions such as completing background investigations, adjudicating clearance determinations, processing

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<sup>4</sup> The Area Office discussed whether the recent regulatory revision exempting entities “similarly situated” to an offeror from characterization as an ostensible contractor, is applicable, and determined that it is not. (Size Determination at 5-6.) This determination was correct because NNSA issued the instant solicitation prior to that rule's effective date. *See Size Appeal of GASL, Inc.*, SBA No. SIZ-4191 (1996). Therefore, I will not consider the parties' arguments on whether TUVVA's subcontractors are “similarly situated” entities.

clearance requests, and registering security clearances. The only Key Personnel is the Program Manager, so management of the provided security personnel appears to be a primary and vital part of the contract. (*Id.*)

As for staffing, the Area Office found the sole Key Personnel, the proposed Program Manager, will be a TUVA employee and is not currently employed by either subcontractor. (*Id.* 7-8.) Also, while TUVA will hire 85% of its workforce from the incumbent, that incumbent is not a proposed subcontractor, and so the hire is not indicative of unusual reliance on a subcontractor. (*Id.*, citing *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716 (2016).) Further, TUVA will employ 24 of 55 personnel, including [xxx] of the six team leaders, supporting the finding of no unusual reliance on SAVA or Inquiries either for personnel or expertise. (*Id.* at 8.) There is, however, no clear division by function between the TUVA and its subcontractors as each will provide Personnel Security Specialists and Program Analysts.

Regarding past performance, the Area Office noted that OHA has held that an offeror may rely upon its experience as a subcontractor without a finding of unusual reliance, because the ostensible subcontractor rule is not designed to penalize the offeror being awarded its first prime contract for not having prime contractor experience. (*Id.* at 8-9, citing *Size Appeal of Alphaport, Inc.*, SBA No. SIZ-5799 (2016).) “[T]here is nothing in the solicitation that indicates that the corporate experience has to be as a prime contractor, only that the customer has to be federal.” (*Id.* at 8.) Further, the RFP specifically states the Government will evaluate the relevancy and depth of each team member’s experience as it relates to the portion of the contract it will perform. (*Id.* at 9, citing RFP at 79.) Moreover, TUVA, as an ANC subsidiary, may rely on its sister companies’ past performance without risking a finding of affiliation. (*Id.* at 9, citing *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383 (2012).)

The Area Office noted that the CO had informed it that, between TUVA and Inquiries, there was enough highly-rated past performance that the rating of “Very Good” would not have been different without SAVA’s involvement. (*Id.* at 9.) Thus, the Area Office concluded that TUVA was not unusually reliant upon SAVA for experience even though TUVA had used its team members’ past performance to support its Proposal. (*Id.*) Accordingly, the Area Office concluded that TUVA was not affiliated with its subcontractors under the ostensible subcontractor rule and, thus, is an eligible small business for this procurement.

### C. The Appeal Petition

On May 12, 2017, Appellant filed the instant appeal. Appellant contends the Area Office clearly erred in finding no affiliation between TUVA and its subcontractors under the ostensible subcontractor rule and, thus, erred in concluding TUVA is an eligible small business for the instant contract. Appellant asserts that the Area Office erred in identifying the RFP’s primary and vital requirements, and failed to examine all aspects of TUVA’s relationship with its subcontractors. Further, TUVA lacks any experience relevant to the contract, and relies on its subcontractors both the qualify for and to perform the contract.

First, Appellant maintains the Area Office incorrectly identified the primary and vital contract requirements, and thus could not properly determine who would perform the primary

and vital requirements. (Appeal at 5, 6-9.) Specifically, the Area Office erroneously found, in addition to providing personnel security program support to NNSA, that “management of the provided security personnel also appears to be a primary and vital part of the contract.” (Appeal at 7, quoting Size Determination at 7.) Appellant contends the mere fact that a requirement is a substantial part of the contract does not make it primary and vital. (Appeal at 7, citing *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466 (2013).) The important distinction is what the procuring agency actually seeks to acquire, not what the contractor must do or provide to deliver those goods and services. (Appeal at 7, citing *Size Appeal of Hamilton Alliance, Inc.*, SBA No. SIZ-5698 (2015).)

Here, Appellant asserts, while Program Management is a substantial aspect of the contract, the offeror's Technical Approach related to the PBWS requirements is of higher importance than its Staffing Plan and Program Manager Qualifications. (Appeal at 8, citing RFP at 72, RFP Amend. 7.) The PBWS requires the contractor to provide expertise and perform all necessary services for the implementation of the DOE Personnel Security Program. (*Id.* at 8, citing PBWS at 3.) Thus, the Area Office should have concluded that the primary purpose of this contract is to support the personnel security program for the NNSA's clearance population, and that the contractor must have the expertise to perform it. (Appeal at 8-9.)

Second, Appellant maintains the Area Office failed to examine all aspects of the relationship between TUVA and its subcontractors, including who drafted the Proposal and whether there are teaming agreements. (*Id.* at 9.) The Area Office did not analyze whether TUVA has the expertise required by the PBWS, but instead considered the proposed Program Manager “as a substitute for its own expertise and experience.” (*Id.*) Appellant also asserts TUVA's staffing plan is “wholly reliant” on procuring personnel from the incumbent, and the Area Office failed to analyze to what extent TUVA will rely on its subcontractors “in the event” TUVA does not acquire the incumbent personnel or has attrition. (*Id.* at 9-10.) Appellant also asserts, “[i]t is possible” the subcontractors will provide personnel, while TUVA provides none. Analyzing the Staffing Plan does not explain how TUVA could draft a proposal or perform “without any apparent experience or expertise” in the primary and vital areas. (*Id.* at 10-11.)

Appellant asserts the Area Office erred when, instead of analyzing all aspects of TUVA's relationships with subcontractors, it concluded that because TUVA will hire incumbent personnel and will perform the same tasks as the subcontractors, TUVA will perform the primary and vital requirements of the contract. (*Id.*, citing Size Determination at 8.) The Area Office ignored TUVA's heavy reliance on its subcontractors' experience to qualify for and perform the contract in violation of the ostensible subcontractor rule, an error requiring reversal by OHA. (Appeal at 11.)

The Area Office committed another reversible error by failing to evaluate whether TUVA independently qualifies for the contract, including analyzing whether TUVA's own past performance was relevant. (Appeal at 12-13.) Instead, the Area Office found it unnecessary for corporate experience to be as a prime contractor, “only that the customer has to be federal.” (Appeal at 13, citing Size Determination at 8.) Appellant contends, “This statement is belied by the RFP itself, as the only way a project could be for a “federal customer” is if it were a prime contract with the Federal government.” (Appeal at 13, citing RFP Amend. 7 at 67.)

Appellant also argues the Area Office erred in stating an ANC cannot violate the ostensible subcontractor rule by subcontracting to a sister company, arguing that, while ANCs are exempt from some affiliation grounds, affiliation “may be found for other reasons.” (*Id.* at 14, citing 13 C.F.R. § 121.103(b)(2).) Further, the fact the RFP permits offerors to rely on the corporate experience of affiliated or predecessor concerns has no bearing on the ostensible subcontractor issue. (Appeal at 14, citing RFP Amend. 7, at 66-7.) Indeed, if TUVA relied on SAVA's experience as an affiliated company, then it has conceded affiliation with SAVA. (Appeal at 14 & n.4.) Appellant further argues that the OHA decisions the Area Office relied on are inapposite, because they hold an ANC does not violate the ostensible subcontractor rule for relying on the experience of sister companies that will not serve as subcontractors, while here TUVA proposes to subcontract to a sister company and also relies on that sister company's past performance. (*Id.* at 15, citing *Size Appeal of Roundhouse PNB, LLC*, SBA No. SIZ-5383 (2012); *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5098 (2009).) Moreover, Appellant argues, permitting an ANC to subcontract with a sister company whose experience it also relies on would cause 13 C.F.R. § 121.103(b)(2) to be meaningless. (*Id.*) Appellant also asserts the Area Office failed to analyze whether TUVA is unusually reliant on Inquiries, the other subcontractor. (*Id.* at 16.)

As relief, Appellant requests OHA to conclude the Area Office clearly erred in finding TUVA an eligible small business, and to reverse or remand the size determination.

#### D. The Supplemental Appeal

On May 26, 2017, after reviewing the Area Office file under the terms of an OHA protective order, Appellant moved to file a Supplemental Appeal and a Supplement to the record on appeal, and filed both proposed documents. The Supplement is the NNSA's “Integrated Project Team Corrective Action Final Evaluation Report” (Evaluation Report), that Appellant had obtained under GAO's protective order, with an accompanying release from GAO for use in this size appeal.

Appellant argues that the Area Office file “confirms” that the Area Office did not fully examine all aspects of the relationship between TUVA and its subcontractors, including previous contracting between them and the role the subcontractors had “in pursuing this contract.” (Suppl. Appeal at 1-2.) Appellant asserts that “a proper examination of TUVA's proposal would have revealed that TUVA was completely reliant on its subcontractors for relevant experience.” (*Id.* at 2.) The Area Office also failed to investigate the size status of Inquiries. (*Id.*)

Appellant asserts that TUVA failed to fully respond to the Area Office's initial request for documents and information following the size protest, when the Area Office requested information on past relationships with the subcontractors and copies of all agreements with them, as well as for information on TUVA's own past experiences. (*Id.* at 5, quoting Area Office letter of March 6, 2017.) In response, TUVA stated it had no prior relationship with Inquiries before this RFP, and provided no other information and no agreement. (Suppl. Appeal at 5.) TUVA stated that it had been a subcontractor to SAVA and that it and SAVA are sister companies, but did not provide copies of any agreements with SAVA or any specific information on their

contractual relationships. (*Id.*) TUVA also did not state whether there were common officers or directors between itself and its subcontractors, or whether it receives any other assistance from SAVA. (Suppl. Appeal at 5-6.) Appellant argues the Area Office should have drawn an adverse inference against TUVA, because of its incomplete response. (*Id.*)

Next, Appellant argues the Area Office also failed to ask TUVA for further information after receiving an incomplete response to the protest. Appellant points to a statement in TUVA's response: "once it was identified to assume responsibility for this procurement" as proving TUVA did not pursue the contract, but was identified by its subcontractors (or some other entity) to serve as the prime contractor. (*Id.* at 6, quoting Form 355 Attach. B at 2.) Thus, Appellant asserts, TUVA brings nothing to the table but its size status. (Suppl. Appeal at 6.) Appellant further argues that, because TUVA did not provide the Area Office with own past experiences, and its sole experience identified in its Proposal is not relevant, the Area Office either should have deemed TUVA's response incomplete or confirmed that TUVA has no experience performing the required work. (*Id.* at 7.)

Appellant further asserts both the Area Office and TUVA misrepresented the corporate experience references contained in the Proposal. (*Id.* at 7-8.) The Area Office stated TUVA provided two experience references for itself, but Appellant maintains TUVA supplied only one for itself "and attempted to pass off one of SAVA's experience references as its own." (*Id.* at 2.) Further, TUVA told the Area Office that it was the prime contractor on [Contract-2] while its Proposal states TUVA was a subcontractor to [Company]. (*Id.* at 9, citing FPR, Vol. II, at 3-1 to 3-8; Response to Protest at 11.) Appellant points out the difference between being the prime and being a subcontractor is significant because the RFP requires the experience to be for a "federal customer"; that is, only experience as a prime contractor is relevant. (Suppl. Appeal at 8-9.) Appellant maintains the Area Office needed to know how much of TUVA's experience is its own in order to determine whether TUVA is unusually reliant on its subcontractors. (*Id.* at 8-9, citing *Size Appeal of Earthcare Solutions, Inc.*, SBA No. SIZ-5183 (2011).)

The Area Office also failed to analyze whether TUVA's one experience reference ([Contract-2]) was relevant as required by the RFP, because, in Appellant's view, if the Area Office had done that analysis it would have found [Contract-2] not relevant. (*Id.* at 8-10.) Appellant points out that [Company] is not a federal customer, the contract was much smaller than the one here, and it was for human resources and administrative management services, which are not similar to personnel security services here. (*Id.*) Thus, Appellant argues, because TUVA has no relevant experience, it must be unusually reliant on its subcontractor's experience, and the Area Office's conclusion to the contrary was error. (Suppl. Appeal at 11.)

The Area Office also should have examined whether TUVA alone could have qualified for the contract, rather than TUVA and Inquiries together. (*Id.*) Referring to the Evaluation Report, Appellant asserts that, without its subcontractors' experience, TUVA's Proposal "would have dramatically different ratings for two of the four non-price evaluation factors." (*Id.* at 12.)

### E. TUVA's Response to the Appeal and Supplemental Appeal

On June 16, 2017, TUVA filed its Response to the Appeal and Supplemental Appeal. With its Response, TUVA also moved to supplement the record on appeal. TUVA seeks to submit a copy of the GAO's decision denying Appellant's protest, *Synergy Solutions, Inc.*, B-413974.3, June 15, 2017; and three completed Past Performance Questionnaires (PPQs).

TUVA asserts, first, that Appellant improperly attempts to add, for the first time on appeal, the issue whether Inquiries is an ostensible subcontractor. (TUVA Response at 5-10.)

TUVA further asserts the Area Office accurately determined the RFP's primary and vital requirements. TUVA contends Appellant's argument, that the Area Office erred in also identifying management as a primary and vital requirement, relies on an inapposite OHA decision. The RFP in *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466 (2013) contained no discussion of the contractor managing or designing a program. Here, in contrast, the RFP required offerors to submit material on management, and thus *Shoreline* was inapposite to this case. (*Id.* at 10-13.)

TUVA asserts Appellant's argument that "expertise" is a primary and vital requirement is meritless. "Expertise" is not a requirement, that is, a task the awardee will perform. (*Id.* at 12-13.) Further, Appellant's protest maintained the only primary and vital requirement is clearance processing and adjudication, so Appellant is raising this issue for the first time on appeal. (*Id.*)

TUVA maintains the Area Office correctly determined that it will perform the primary and vital requirements. The Area Office analysis supports a determination that TUVA will provide personnel security support to NNSA (background checks, clearance determinations, clearance requests and registering security clearances). (*Id.*) TUVA will provide more personnel than any other team member (24, compared to 16 for SAVA and 15 for Inquiries). SAVA and Inquiries provide more personnel than TUVA only for certain low level clerical positions. (*Id.* at 14.) TUVA will provide the most personnel in the skilled positions such as Program Analyst, who will perform the functions required by the RFP. (*Id.* at 14-15.)

As for Appellant's argument that the Area Office failed to analyze all aspects of TUVA's relationships with its subcontractors, TUVA asserts that there is no aspect other than whom TUVA has proposed to work, and its Proposal speaks as to which entity will perform the RFP's primary and vital requirements. Further, Appellant fails to submit anything that questions the calculations in TUVA's Proposal as relied upon by the Area Office. (*Id.* at 15.)

TUVA maintains the Area Office's determination that TUVA will perform the primary and vital requirements is consistent with OHA's holding that where there are a number of subcontractors, but no one subcontractor has a majority of the work, the challenged concern's control over management of the contract can lead to a finding of no violation of the ostensible contractor rule. (*Id.* at 16, citing *Size Appeal of J.R. Conkey & Assoc.* SBA No. SIZ-5326 (2012).)

TUVA also argues Appellant's assertion that when a prime contractor relies totally on the experience of other firms to establish its experience, that is probative of unusual reliance, is meritless here. Who will perform is dictated by proposed staffing, not whose past performance is relied upon. Further, analysis of a concern's experience and competency to perform a contract are matters of responsibility, which are beyond the jurisdiction of the size determination process. The Area Office was not required to determine whether TUVA had the capability to perform the contract alone. (*Id.* at 16-17, citing *Size Appeal of Alphaport, Inc.*, SBA No. SIZ-5799 (2016).)

TUVA maintains Appellant's arguments attempt to reraise bid protest challenges or challenges to the RFP that GAO has already ruled untimely or rejected. (*Id.* at 18.) TUVA further maintains its alleged lack of experience as a prime contractor is irrelevant, and already rejected by GAO. TUVA provided Corporate Experience and Past Performance references for itself as well as its subcontractors. TUVA maintains its lack of experience as a prime contractor is irrelevant. The purpose of the ostensible subcontractor rule is not to penalize a contractor for not having prime experience at the time of its first award, but to prevent a prime from obtaining a small business set aside when it is unusually reliant upon a large subcontractor for performance. (*Id.* at 18-19, citing *Size Appeal of Alphaport Inc.*, SBA No. SIZ-5799 (2016).) Any analysis regarding a concern's experience and ability to perform are matters of responsibility, which belong to the CO, and are beyond the jurisdiction of the size determination process. (*Id.* at 19-20, citing *Size Appeal of TCE, Inc.*, SBA No. SIZ-5003 (2008).)

TUVA asserts its Proposal included Corporate Experience and Past Performance references for itself and its proposed subcontractors, SAVA, a sister entity, and Inquiries, an unrelated entity. Appellant objects to TUVA's relying on sister entity contracts as its own references, but TUVA argues this is permitted by the express terms of the RFP and GAO and OHA precedent. Further, contrary to Appellant's assertion, TUVA clearly identified itself as subcontractor to its sister entity, [Company], on its submission of [Contract-2]. The two firms performed relying on the shared services from their ANC parent, and thus it was an appropriate reference to submit. (*Id.* at 20-21.)

TUVA points out the RFP permits an offeror to rely upon the experience of predecessor or affiliated entities or team members. (*Id.* at 22, citing RFP at 67, 79, Amendment 7 at 78.) GAO and OHA precedent permit such reliance. (*Id.* at 22-23, citing *AMI-ACEPEX, Joint Venture*, B-401560, Sept. 30 2009, 2009 CPD ¶ 197, *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383 (2012).) Further, the Small Business Act contains a blanket exemption from affiliation for ANC sister entities, unless the Administrator determines they have obtained or are likely to obtain a substantial unfair competitive advantage. (*Id.* at 23, citing 15 U.S.C. § 636(j)(10)(J)(ii)(II).)

TUVA maintains Appellant's attack on the relevance of its experience is a bid protest challenge and is not properly within the scope of the size determination. TUVA asserts it unclear how NNSA's evaluation of TUVA's past performance and experience, now upheld by GAO, is appropriate to consider in a size determination. (*Id.* at 25-26.) GAO rejected or dismissed as untimely Appellant's allegations NNSA improperly attributed corporate experience or past performance to TUVA. (*Id.* at 26.) Appellant's argument is based on its interpretation of the RFP as permitting only experience as a prime contractor to the Federal Government. Appellant

maintains the RFP, and GAO and OHA precedent permit NNSA to rely on its [Contract-2] contract reference, and GAO has now upheld this. (*Id.* at 26-27.) As the Size Determination concluded, there is nothing in the RFP which requires the experience be as a prime contractor, only that it be Federal. (*Id.* at 27, citing Size Determination at 8, RFP Amendment 7 at 67.)

TUVA characterizes as meritless Appellant's arguments the Area Office failed to consider all aspects of the relationships between TUVA and its subcontractors. As to expertise, TUVA maintains this issue was not raised in the protest, and may not be addressed on appeal. Further, the RFP states the contractor shall provide expertise and perform services, it does not require the contractor itself have the expertise. Finally, the Area Office did address TUVA's expertise, in considering its Program Manager and hiring of the incumbent workforce. (*Id.* at 30-31.)

TUVA characterizes Appellant's complaint, that the Area Office failed to analyze the extent TUVA may have to rely on its subcontractors for personnel, as an absurd hypothetical. TUVA's Proposal discusses at length its steps for hiring personnel. (*Id.* at 32-33.)

TUVA characterizes the Area Office's not obtaining teaming agreements for the subcontractors as harmless error. (*Id.* at 35-36, citing *Size Appeal of OSG, Inc.*, SBA No. SIZ-5718 (2016).) Appellant says a more thorough examination of the agreements may have illuminated how TUVA planned on fulfilling staffing needs for the contract, but Appellant does not explain how. TUVA's Proposal makes clear how staffing needs will be met, and a possible small gap in the record is not reversible error. Further, because Inquiries was not an alleged ostensible subcontractor, there was no requirement for TUVA to produce a teaming agreement. (*Id.* at 37-38.)

TUVA argues Appellant's contention the Area Office should have drawn an adverse inference against it for failing to state whether there were common officers and directors between it and its subcontractors, and the specifics of its contractual relationships with SAVA is meritless. Common ownership and common management cannot be grounds for finding affiliation between sister ANC firms. (*Id.* at 38-39.)

TUVA points out that its sworn statement establishes that it drafted its Proposal. (*Id.* at 40.)<sup>5</sup> Finally, TUVA notes Appellant's argument the Area Office erred in failing to recognize TUVA provided no information regarding its experience performing the required services, other than those in its Proposal. Appellant failed to establish how this recognition would alter the outcome of the case. Appellant offers no authority to support its contention this was error, and ignore the fact that the RFP limited the number of references an offeror could provide. TUVA thus asserts this argument is meritless. (*Id.* at 42-43.)

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<sup>5</sup> TUVA further argues its language is consistent with the ANC regulation. However, Appellant cites to recent revision of the regulation, not applicable here because it became effective after NNSA issued the solicitation.

### III. Discussion<sup>6</sup>

#### A. Standard of Review and New Evidence

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).

Appellant and TUVA both seek to submit new evidence on appeal. OHA generally will not consider evidence not previously presented to the Area Office. 13 C.F.R. § 134.308(a). OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously 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).

Appellant seeks to submit NNSA's Evaluation Report. TUVA seeks to submit the GAO decision *Synergy Solutions, Inc.*, B-413974.3, June 15, 2017, and three completed PPQs. None of this material was submitted to the Area Office and thus none of it was the basis of the Area Office's determination. Therefore, because it cannot be the basis for a finding of clear error by the Area Office, I EXCLUDE all of the proffered new evidence.

#### B. Analysis

Appellant does not challenge the Area Office's conclusion that TUVA, by itself, is small under the \$15 million annual receipts size standard. The only issue on appeal, therefore, is whether TUVA is affiliated with SAVA pursuant to the ostensible subcontractor rule. The rules governing size determinations provide:

An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant. All aspects of the relationship between the prime and subcontractor are considered, including, but not limited to, the terms of the proposal (such as contract management, technical responsibilities, and the percentage of subcontracted work), agreements between the prime and subcontractor (such as bonding assistance or the teaming agreement), and whether the subcontractor is

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<sup>6</sup> On May 17, 2017, NNSA moved to dismiss the appeal. On June 7, 2017, following a brief stay, I denied that Motion to Dismiss and set the close of record as June 16, 2017.

the incumbent contractor and is ineligible to submit a proposal because it exceeds the applicable size standard for that solicitation.

13 C.F.R. § 121.103(h)(4) (2015).<sup>7</sup>

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 “primary and vital” requirements are those associated with the principal purpose of the acquisition. *Size Appeal of Santa Fe Protective Services, Inc.*, SBA No. SIZ-5312, at 10 (2012); *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 17 (2011). Not all the requirements identified in a solicitation can be primary and vital, and the mere fact that a requirement is a substantial part of the solicitation does not make it primary and vital. *Id.* 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). The purpose of the rule is to “prevent other than small firms from forming relationships with small firms to evade SBA's size requirements.” *Size Appeal of Fischer Bus. Solutions, LLC*, SBA No. SIZ-5075, at 4 (2009).

The Area Office found the contract's primary and vital requirements are to provide personnel security program support to NNSA, and also to manage the contract, since the only Key Personnel is the Program Manager. Size Determination at 7. On this point, Appellant makes two arguments. First, Appellant argues that management is not a primary and vital requirement of the contract, relying on *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466 (2013). Appeal at 5, 6-9. Second, Appellant argues that “expertise” is a primary and vital function of the contract, which the contractor must not merely provide, but also possess itself prior to submitting its offer. Appeal at 8-9. Appellant maintains, because the Area Office incorrectly identified the primary and vital contract requirements, that it could not properly determine who would perform them. Appeal at 6-7. TUVA responds that the Area Office did correctly determine the primary and vital requirements, noting the RFP required offerors to submit material on proposed management, and arguing that *Shoreline* is inapposite. Response at 10-13. TUVA also points out that “expertise” cannot be a primary and vital requirement because it is not a task the awardee will perform. Further, Appellant raises this issue for the first time on appeal. *Id.* at 12-13.

I disagree with Appellant and find the Area Office analysis supports a determination that TUVA will provide the primary and vital requirement of personnel security support to NNSA (personnel security access authorization, adjudicative, and processing activities, investigation and analysis work). TUVA will provide more total personnel than any other team member (24, compared to 16 for SAVA and 15 for Inquiries), as well as more team leads ([xxx], compared to [xxx] for SAVA). SAVA and Inquiries provide more personnel than TUVA only for certain low level clerical and processor positions. TUVA will provide the most personnel in the skilled

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<sup>7</sup> SBA revised the ostensible subcontractor rule effective June 30, 2016. 81 Fed. Reg. 34243, 34258 (May 31, 2016). The instant solicitation was issued on February 25, 2015, so the size determination regulations in effect on that date apply to this case. *E.g.*, *Size Appeal of Aerosage, LLC*, SBA No. SIZ-5820 (2017).

positions such as Program Analyst, who will perform the functions required by the RFP. OHA's decision in *Size Appeal of Shoreline Services, Inc.*, SBA No. SIZ-5466 (2013) is unavailing to Appellant because, as TUVA points out, the RFP there did not require offerors to submit information on management. *Shoreline* at 3, 10-11. Here, on the contrary, offerors had to provide quite detailed information on how it would manage the program, and to name and provide information on the Program Manager, who is the only key personnel. Further, the "Program Management" performance area consists of over 20% of the proposed personnel. Thus, even if the Area Office's inclusion of management as a primary and vital requirement was error, TUVA so dominates the proposed staffing in both personnel security support and management that any such error is inconsequential. Further, Appellant has failed to show how it has been harmed by that inclusion, and thus any error is harmless.

Appellant correctly points out that the RFP states, "The contractor shall provide expertise and perform all necessary services for the implementation of the DOE Personnel Security Program." PBWS at 3. Clearly, what NNSA seeks to acquire here is support in running its personnel security program, investigating and clearing its personnel. The contractor must provide expertise, as well as diligence, and timeliness, as part of its performance of the required tasks of the contract. "Expertise" describes the manner in which the contractor will perform its tasks; it is not the task itself. Even if it were, TUVA accurately notes the PBWS requires the contractor only to provide expertise, not that it must possess expertise itself. I find the Area Office was correct not to include "expertise" among the RFP's primary and vital requirements.

In addition to determining what are the primary and vital requirements of a procurement, and who will perform them, SBA must examine all aspects of the relationship between the prime contractor and its subcontractor, including the terms of the proposal and any agreements, to determine whether the ostensible subcontractor rule has been violated. *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). OHA has identified four key factors in determining whether a concern is unusually reliant upon its ostensible subcontractor: (1) whether the proposed subcontractor is the incumbent; (2) whether the prime planned to hire a large majority of the workforce from the subcontractor; (3) whether the prime's proposed management worked for the proposed subcontractor on the incumbent contract; and (4) whether the prime contractor lacks relevant experience, and is obliged to rely on its more experienced subcontractor to win the contract. *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5726 (2016).

Here, TUVA proposes to hire a large portion of its workforce (85%) from the incumbent contractor. In this case, however, that concern is not one of TUVA's proposed subcontractors; rather, the incumbent is Appellant itself. The fact that neither of TUVA's subcontractors is the incumbent, is a factor the regulation specifically mentions, and which weighs in TUVA's favor here. The RFP designates only one Key Personnel position, the Program Manager, and TUVA proposes to fill this position with an individual who currently works for the FBI, is not an employee or former employee of either proposed subcontractor, and who will become one of TUVA's own employees. OHA's precedent further supports TUVA's Proposal. In *Size Appeal of Alphaport, Inc.*, SBA No. SIZ-5799 (2016), OHA held there was no ostensible subcontractor violation where the awardee had proposed to hire the incumbent workforce from a firm other than its proposed subcontractors. This fact pattern is present here. Also, in *Size Appeal of J.R.*

*Conkey & Assoc., Inc.*, SBA No. SIZ-5326 (2012), OHA concluded that where multiple subcontractors are proposed, but no one subcontractor has a majority of the work, control over management of the contract may lead to a finding that the ostensible subcontractor rule is not violated, even where the prime contractor will not perform the majority of the work. Here, the prime will perform over half of the work and will control management (both in the Program Management staffing area and through the Program Manager), so TUVAs Proposal meets the standard set forth in *Conkey*, and unquestionably passes three of the four factors laid out in *Modus Operandi*.

Appellant's arguments hang heavily on the fourth *Modus Operandi* factor, where Appellant alleges that TUVAs lack of experience means it must rely on its subcontractors to win the contract. Specifically, Appellant argues that TUVAs is unusually reliant upon its subcontractors for its Corporate Experience and Past Performance. With this Proposal, TUVAs submitted two Corporate Experience and Past Performance contracts for itself, three for SAVA, and two for Inquires. For itself, TUVAs submitted [Contract-1] performed by SAVA and [Contract-2] on which TUVAs performed as subcontractor for its sister company [Company]. FPR, Vol. II, at 3-1 *et. seq.* For SAVA, TUVAs listed [Contract-3], [Contract-4], and a completed [Contract-5] all performed by SAVA. For Inquiries, TUVAs listed two administrative support contracts. TUVAs also noted its parent, Akima, provides it with support. *Id.*

Appellant asserts that [Contract-2] is not relevant because TUVAs was not the prime but a subcontractor and, therefore, the contract was not for a "federal customer" as required by the RFP. Suppl. Appeal at 8-9. Further, Appellant asserts, [Contract-2] was much smaller and was for different work than the instant contract, and TUVAs also had misrepresented to the Area Office that it was the prime on it. *Id.* at 8-10. Appellant also points to [Contract-1] and asserts that TUVAs "attempted to pass off one of SAVA's experience references as its own." *Id.* at 2. In sum, Appellant argues, because TUVAs lacked the necessary expertise for the instant contract, it is unusually reliant on its subcontractors, and the Area Office's conclusion to the contrary was error. *Id.* at 10-11. Appellant also faults the Area Office for not having examined whether TUVAs, by itself, could have qualified for the contract, because, without its subcontractors, TUVAs's Proposal "would have dramatically different ratings for two of the four non-price evaluation factors." *Id.* at 11-12.

In response, TUVAs argued that Appellant's allegations relating to TUVAs's experience and competency to perform are meritless and, besides, are beyond the jurisdiction of the size determination process because they pertain to matters of responsibility. Response at 16-18. TUVAs asserts the RFP does not require only prime contractor experience; further, the RFP permits an offeror to rely on affiliated entities and team members for experience, and the Small Business Act exempts sister entities under an ANC, such as SAVA and [Company], from affiliation. *Id.* at 22-23.

I find Appellant's arguments wholly without merit. First, although the RFP requires Corporate Experience to include "federal customers only," there is no requirement that that experience must be as a prime contractor. *See* RFP, Amend. 7 § L.23, at 66. Appellant has not pointed out any part of the RFP that makes such a requirement. The RFP's instructions do provide special instructions for an offeror that may be "a newly formed legal entity that has no

past performance information,” *id.* at 67, but none of those instructions prohibit the use of subcontracting experiences. The ultimate customer was [Agency], a Federal agency, and I cannot say that the Area Office's decision to consider this as appropriate experience was clear error. Second, the RFP specifically permits past performance information relating to team members, on condition that the Proposal explain “how the affiliated . . . company's assets or resources will be brought to bear under the contract.” RFP, Amend. 7 § L.23, at 66-67. TUVA's Proposal cross-references each team member's past performance to specific areas of the PBWS, and mentions the support of its parent company, Akima. *See* Proposal at 3-22 to 3-23; 3-20 to 3-21. The relevancy of the experiences proposed (similarity in nature, size in dollars, and complexity) to the instant contract is for the NNSA to determine as part of its evaluation process. RFP, Amend. 7 § M.2, at 78.

Third, Appellant's other contentions, such as that [Contract-2] was much smaller and was for different work than the instant contract, and its various assertions suggesting that TUVA is not capable of performing are in the nature of a responsibility determination, and as such are the province of the CO, not the Area Office. *Size Appeal of Spiral Solutions and Technologies, Inc.*, SBA No. SIZ-5279 (2011) (“[T]he determination of what capabilities are necessary to perform a contract, or whether the awardee has such capabilities, are matters of contractor responsibility.”); *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228 (2011) (“A broad inquiry into a firm's ‘capabilities,’ however, is the nature of a responsibility determination, and therefore is the province of the CO, not the Area Office.”) Appellant's contentions go to TUVA's ability to perform the contract, and cannot be a basis for a finding of affiliation under the ostensible subcontractor rule. *Size Appeal of Loyal Source Government Services, LLC*, SBA No. SIZ-5662 (2015). Likewise, Appellant is incorrect in faulting the Area Office for not having examined whether TUVA, by itself, could have qualified for the contract.

Finally, it is important to note that TUVA is ultimately owned by an ANC, and SAVA is one of its sister companies. The regulation governing ANCs provides that business concerns owned and controlled by ANCs are not considered affiliates of those entities, nor are they affiliated with other concerns owned and controlled by those entities because of common ownership, common management or the performance of common administrative services. 13 C.F.R. § 121.103(b)(2)(ii). Further, OHA has held in the past that in alleging that a firm owned by an ANC has relied upon its sister company's employees and experience to obtain a contract, the real allegation is that the firm should be considered affiliated with that sister company because of common ownership and management, and this is not permitted by the regulation. *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5098 (2009). While this case is different from *Alutiiq* in that SAVA is a subcontractor here, the principle remains the same, which is that TUVA and SAVA are part of an ANC family of companies, and TUVA's reliance upon SAVA's experience is an aspect of their common ownership and common management. Under SBA's size regulations, they are not considered affiliates. Accordingly, I find that TUVA's reliance upon SAVA for past performance and corporate experience is not unusual reliance under the ostensible subcontractor rule.

Appellant also makes several other arguments, which I now consider. First, the Area Office should have obtained the teaming agreements between TUVA and its subcontractors, and so it should have, as the regulation requires an ostensible subcontractor analysis to consider all

factors in the relationship between the concerns. Suppl. Appeal at 5-7. However, I am persuaded by TUVA's argument that this omission was harmless error, because TUVA's Proposal, contained in the record, lays out what tasks TUVA and its subcontractors will perform, how personnel will be recruited, and who will manage the contract. Thus the gap in the record caused by missing teaming agreements is harmless error. *Size Appeal of OSG, Inc.*, SBA No. SIZ-5728 (2016).

Second, Appellant argues that TUVA may be reliant upon its subcontractors for more personnel than the Proposal calls for, and poses a scenario where none of the incumbent personnel signs on with TUVA. Appeal at 9-10. This scenario is mere speculation. An ostensible subcontractor analysis must be based upon the solicitation and offeror's Proposal, and not on unrealistic scenarios concocted by a protestor. *See Size Appeal of Four Winds Services, Inc.*, SBA No. SIZ-5260 (2011).

Third, Appellant seizes upon a phrase in TUVA's SBA Form 355, "once it was identified to assume responsibility for this procurement" as evidence that TUVA did not itself pursue the contract, but was identified by its subcontractors to serve as the prime. Thus, in Appellant's view, TUVA brings nothing to the table but its size status. Suppl. Appeal at 9-10. TUVA responds that its submission was a sworn statement, that it prepared its Proposal, and that any allegation by Appellant to the contrary is unfounded speculation. Response at 39-40. Further, the phrase "once it was identified" refers to the action of its parent company, Akima, in identifying this procurement opportunity for TUVA, and this action is consistent with common management within an ANC's family of companies. *Id.* I find that the Area Office was correct to rely on TUVA's sworn statements. *See Size Appeal of Vazquez Commercial Contracting, LLC*, SBA No. SIZ-5803 (2017).

In sum, TUVA's Proposal meets the tests applying the ostensible subcontractor rule laid out in *Conkey* and *Modus Operandi*. Here, there are two subcontractors, neither of which have a majority of the work, and the prime, TUVA, which has the largest portion of the work and also control over management of the contract. Further, neither proposed subcontractor is the incumbent, TUVA does not propose to hire its workforce from its proposed subcontractors, and its proposed management did not previously serve with either subcontractor. Appellant's argument hangs almost entirely on the fourth factor of *Modus Operandi*, alleging TUVA lacks relevant experience, and relies on its more experienced subcontractor. First, in an analysis which relies on a number of factors, to find only one factor pointing towards finding of unusual reliance would not support such a finding. And further, here TUVA was relying upon its own experience and that of a sister ANC company, which is permitted under the regulation and OHA precedent.

Accordingly, I conclude Appellant has failed to establish clear error in the size determination, and therefore I must deny the appeal and affirm the size determination.

IV. Conclusion

Appellant has failed to demonstrate that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge