

REDACTED DECISION FOR PUBLIC RELEASE

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

SIZE APPEAL OF:

Advanced Technology Logistics, Inc.

Appellant

Appealed from
Size Determination No. 3-2022-002

SBA No. SIZ-6159

Decided: June 10, 2022

APPEARANCES

Emily J. Chancey, Esq., and Nicholas P. Greer, Esq., Maynard Cooper & Gale P.C., Huntsville, Alabama, for Appellant.

Shomari B. Wade, Esq., Brett A. Castellat, Esq., Aaron M. Levin, Esq., and Christopher M. O'Brien, Esq., Greenberg Traurig, LLP, Washington, D.C., for Operations Services, Inc.

DECISION¹

I. Introduction and Jurisdiction

On October 26, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting – Area III (Area Office) issued Size Determination No. 3-2022-002, concluding that Advanced Technology Logistics, Inc. (Appellant) is not a small business for the subject procurement. The Area Office found that Appellant is affiliated with its subcontractor, SAWTST, LLC (SAWTST), under the “ostensible subcontractor” rule.² On appeal, Appellant maintains that the size determination is clearly erroneous, and requests that SBA’s Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

¹ This decision was originally issued under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

² The ostensible subcontractor rule previously was found at 13 C.F.R. § 121.103(h)(4), but effective November 16, 2020, SBA redesignated the rule as § 121.103(h)(2). *See* 85 Fed. Reg. 66,146 (Oct. 16, 2020). The text of the rule, however, remained unchanged.

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 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

On March 30, 2020, the Defense Logistics Agency (DLA) issued Request for Proposals (RFP) No. SP3300-20-R-5005 for “Labor and Logistics Support Services” at two DLA facilities near Norfolk, Virginia. (RFP at 10.) The Contracting Officer (CO) set aside the procurement entirely for participants in SBA’s 8(a) Business Development (BD) program, and assigned North American Industry Classification System (NAICS) code 493110, General Warehousing and Storage, with a corresponding size standard of \$30 million average annual receipts.³ (*Id.* at 48) The RFP contemplated the award of a single Indefinite-Delivery, Indefinite-Quantity (ID/IQ) contract with a five-year ordering period. (*Id.* at 10, 38.) Specific work would be defined in task orders issued after award of the base contract. (*Id.*)

The RFP’s Performance Work Statement (PWS)⁴ explained that the contractor will perform “warehousing and distribution operations and supply management” services at DLA Distribution Norfolk in Portsmouth, Virginia, and DLA Maritime Norfolk at the Norfolk Naval Shipyard. (PWS at 1-2.) The PWS stated:

The Contractor will be required to perform services both inside and outside areas to include open docks. The Contractor shall provide all management, personnel, supervision, materials, tools, equipment, transportation, and any other items and/or services not provided by the Government. The Government will not provide any direct supervision to the Contractor employees. The Contractor shall ensure contractor employees are cross-trained to move between the functional requirements of this PWS as workload dictates.

(*Id.* at 2.) The PWS identified the “Site Manager” and “Warehouse Specialist Supervisor” as Key Personnel. (*Id.* at 5-6.) Other anticipated labor categories included a Quality Control Manager; Warehouse Specialists; Business Systems Analysts; Supply Technicians; and General Clerks. (*Id.* at 6-7.)

³ Effective August 19, 2019, SBA increased the size standard for NAICS code 493110 from \$27.5 million to \$30 million. 84 Fed. Reg. 34,261, 34,274 (July 18, 2019).

⁴ DLA issued a conformed version of the PWS with Amendment 0013. Unless otherwise indicated, citations are to the conformed version.

To assist prospective offerors in preparing their proposals, the RFP included a table with estimated labor categories and labor hours at each of the two sites. (RFP at 68.) For the DLA Distribution Norfolk site, the RFP identified ten anticipated labor categories, with “Warehouse Specialist” comprising the bulk of the labor hours. (*Id.*) At the DLA Maritime Norfolk site, the RFP identified two anticipated labor categories, Supply Technician and General Clerk III. (*Id.*) The RFP stated that the table was provided “for informational purposes only”, and that offerors were free to develop their own mix of labor categories and labor hours, so long as the offeror’s proposal “address[es] any deviations from the estimated hours and labor categories”. (RFP at 68, 78; PWS at 6.)

A copy of an existing Collective Bargaining Agreement (CBA) was provided as an attachment to the RFP. (RFP at 47 and Attach. J.3.) The CBA was signed by representatives of SAWTST, LLC and ProLog, Inc. (jointly referred to as “the Company”), and the International Union of Operating Engineers Local 147 (“the Union”). (CBA at 6, 29.) The CBA governed the “wages, hours, and working conditions” on a predecessor DLA contract for similar work. (*Id.* at 6.) The CBA applied specifically to employees “providing logistical support at [Norfolk Naval Shipyard]” and “does not include employees of the Company at other locations or project sites.” (*Id.*) The CBA included a provision relating to employee seniority, and stipulated that seniority “shall be the determining factor in matters affecting reduction in force, promotion, demotion, recall, transfer and the filling of vacancies provided the senior employee has the ability to perform the job.” (*Id.* at 10.) In filling vacancies, the Company will first announce such vacancies internally so that “all interested employees may sign up requesting that they be considered for the job.” (*Id.* at 11.) The CBA was in effect from April 1, 2017 until March 31, 2020, but thereafter “shall automatically renew itself for successive periods of one (1) year each”. (*Id.* at 1, 28.) After the RFP was issued, Company and Union representatives agreed to an Addendum extending the CBA until March 31, 2021. According to the Addendum:

It is agreed that this extension will freeze all current wages and conditions of the [CBA] for the purpose of allowing good faith bargaining between the Local 147 Union and new Contractor(s) that may be awarded the new contract by the government for the DLA Distribution/Maritime contract

(CBA Addendum at 1.)

The RFP stated that DLA planned to award the contract to the offeror whose proposal represented the best value to the Government. (RFP at 76.) Proposals would be evaluated on five factors: (1) Performance Confidence Assessment; (2) Management Approach; (3) Staffing Approach; (4) Transition and Sustainment of Operations Approach; and (5) Cost/Price. (*Id.* at 76-77.) Collectively, the factors other than Cost/Price were “significantly more important than Cost/Price”. (*Id.* at 77.) For the “Performance Confidence Assessment” factor, the RFP did not limit the number of references an offeror could submit, but stated that DLA “recommends submission of a total of five (5) contracts encompassing the prime Offeror and/or any major subcontractors”. (*Id.* at 64-65.)

Initial proposals were due May 29, 2020, and final proposal revisions were submitted August 19, 2021. Appellant and Operations Services, Inc. (OSI) submitted timely offers.

B. Appellant’s Proposal

Appellant submitted its initial proposal on May 29, 2020. The proposal identified Appellant as the proposed prime contractor and SAWTST as Appellant’s sole proposed subcontractor. (Proposal, Vol. III, at 1-2.) SAWTST is the incumbent prime contractor. (*Id.*) Appellant and SAWTST together are referred to throughout the proposal as “Team ATL”, or in some instances, as “Team SAWTST”. (*Id.* at 2.)

The proposal stated that Appellant planned “to hire as many incumbent personnel as possible to ensure institutional knowledge remains on the contract.” (*Id.* at 3.) Appellant’s “goal is to attract, recruit, screen, interview, and hire/retain approximately 95% of the incumbent employees within 20 to 30 days of contract award.” (*Id.* at 85.) However, “[m]ost non-key personnel are hired on day one”, well in advance of this schedule. (*Id.* at 82.) Appellant’s HR department and recruiting staff also will “identify highly qualified candidates” for potential interview during the contract transition process, and thereafter will “maintain an active pool of qualified replacements for each labor category assigned to the contract to enable rapid replacement due to personnel loss.” (*Id.* at 3-4.) Future vacancies will be filled via the CBA or through other alternative approaches. (*Id.* at 78-79.) The proposal reiterated that “Team ATL’s response to meeting the [contract’s] staffing requirements is to hire as many incumbents as possible who meet our demanding character traits”. (*Id.* at 84.)

To manage the contract, Appellant proposed [Individual 1] as Site Manager; [Individual 2] as Warehouse Site Supervisor (1st Shift); [Individual 3] as Warehouse Site Supervisor (2nd Shift); and [Individual 4] as Corporate Program Manager. (*Id.* at 3, 59-60.) The Site Manager, [Individual 1], will have “complete authority to manage the contract and communicate[] directly with the Government to ensure the successful execution of the contract’s requirements.” (*Id.* at 60.) In addition, [Individual 1] “communicates with [Appellant’s] corporate staff to ensure all requirements are achieved.” (*Id.* at 44.) [Individual 1] previously was employed by SAWTST as Corporate Program Manager on the incumbent contract until October 2019, when he resigned to become an independent consultant. (*Id.* at 59-60 and Appx. A.) [Individuals 2 and 3] are current, long-time employees of SAWTST. (*Id.* at 60 and Appx. A.) The proposed Corporate Program Manager, [Individual 4], currently is employed by SAWTST as Corporate Program Manager on the incumbent contract. (*Id.* at 3; *see also* Vol. II, Appx. A at 6.) The proposal included “signed letters of intent for each key personnel who have committed to continue supporting this contract as a part of Team ATL.” (Proposal, Vol. III at 60 and Appx. A.)

The proposal included an Organizational Chart reflecting that the proposed Site Manager, [Individual 1], will be subordinate to Appellant’s CEO/President, Mr. Levi Robinson. (*Id.* at 67.) According to the chart, [Individual 2] and [Individual 3] will oversee the contract staff and will report directly to [Individual 1]. (*Id.*) The proposal stated that, during the transition period, Appellant’s CEO/President, Mr. Robinson, “[m]obilizes [On-Site Management Team], [and] [f]acilitates Kick-Off Meeting”. (*Id.* at 82.) The proposal did not

otherwise assign any role to Mr. Robinson in performance of the instant contract. The proposal indicated that the Corporate Program Manager will be responsible for “[c]ustomer [r]elationship [m]anagement” and “[m]anag[ing] [c]ontract [p]erformance”. (*Id.*) In addition, the Corporate Program Manager may temporarily serve as Site Manager in the event that the Site Manager “become[s] unavailable during a crisis”. (*Id.* at 93.)

The proposal included tables outlining Appellant’s approach to staffing the contract, and providing a breakdown of labor between Appellant and SAWTST. (*Id.* at 62-66.) Appellant proposed “a reduced level of staffing, compared to the Government’s estimate”, and explained its rationale for these proposed changes. (*Id.* at 62-64.) The proposal indicated that, following an initial phase-in period, Appellant will contribute [XX] full-time equivalents (FTEs) annually, to include the Site Manager and one of the Warehouse Site Supervisors. (*Id.* at 65.) SAWTST will provide [XX] FTEs annually, including the second Warehouse Site Supervisor. (*Id.* at 66.)

For the “Performance Confidence Assessment” evaluation factor, Appellant described two projects previously performed by Appellant, and three projects previously performed by SAWTST. (Proposal, Vol. II.) The two prior examples for Appellant were for work that Appellant performed as a subcontractor on a logistics support services contract at Fort Benning, Georgia, and were valued at \$5,145,382 and \$2,529,410, respectively. (*Id.* at 3-5.) The three examples for SAWTST were for work SAWTST performed as a prime contractor, including the predecessor DLA contract, valued at \$37,618,086. (*Id.* at 5-11.)

C. Teaming Agreement

Appellant and SAWTST entered into a Teaming Agreement, dated February 28, 2020, for the purpose of competing for the instant procurement. (Teaming Agreement at 1.) The Teaming Agreement identified Appellant as the prime contractor and SAWTST as the subcontractor. (*Id.*)

A “Statement of Work” included with the Teaming Agreement provided, in part:

- a. SAWTST will receive not more than 49% of labor awarded each year. This agreed percentage will carry through the life of the contract and any subsequent extensions.
- b. The areas of responsibility are Labor & Logistics Support Services.
- c. SAWTST will support Prime Contractor as required.
- d. The leadership positions will be staffed by the prime, except for the management positions that SAWTST deems necessary to lead their efforts and manage SAWTST internal administrative company responsibilities.

(*Id.*, Exh. A.) Appellant will be responsible for furnishing “all project management, facilities, vehicles, equipment, tools, materials, and other items and services (except those identified as Government Furnished).” (*Id.*)

D. Protest

On September 17, 2021, the CO informed OSI that Appellant was the apparent awardee. On September 24, 2021, OSI filed a size protest challenging Appellant's size. OSI alleged that Appellant is affiliated with SAWTST, the incumbent prime contractor and Appellant's proposed subcontractor, in contravention of the ostensible subcontractor rule. (Protest at 2.) Because Appellant lacks relevant experience and is registered as performing work in "74 NAICS Codes across unrelated fields", OSI alleged that the "most critical and essential aspects of the contract work" likely will be performed by SAWTST. (*Id.* at 4.) OSI noted that SAWTST is the incumbent prime contractor, and that Appellant and SAWTST are co-located in "two small communities with no military presence". (*Id.* at 5.) According to OSI, Appellant will be unduly reliant upon SAWTST based on the four factors enumerated by OHA in *Size Appeal of DoverStaffing, Inc.*, SBA No. SIZ-5300 (2011) and its progeny. (*Id.* at 6.) OSI further alleged that Appellant may also be affiliated with other concerns, including Contract Administration Support Services, LLC (CASS), ATL2, LLC, and R&L Logistics Management, LLC, through common ownership and/or common management. (*Id.* at 5.)

E. Protest Response

The CO forwarded OSI's protest to the Area Office for review. On October 12, 2021, Appellant responded to the protest. Appellant denied that it is affiliated with SAWTST under the ostensible subcontractor rule. (Protest Response at 1.) Rather, in Appellant's view, three of the four *DoverStaffing* factors are not present. (*Id.* at 10.) Appellant acknowledged that it "does plan to hire the qualified incumbent personnel", and did not contend that was required to utilize such an approach by the CBA. (*Id.* at 3.) Nevertheless, Appellant maintained, the Area Office should not find Appellant unusually reliant upon SAWTST for personnel because "all former incumbent employees desiring employment under [Appellant's] prime contract must apply for employment and be interviewed by [Appellant]." (*Id.*) Appellant claimed that its proposal "made clear that the key personnel hired by [Appellant] from SAWTST would be subordinate to [Appellant's] executive leadership." (*Id.*) Appellant further asserted that it has additional relevant experience beyond the two examples cited in its proposal. (*Id.* at 4-10.) In support, Appellant pointed to contracts for "medical materiel management functions"; janitorial services; continuing education; and shuttle bus services. (*Id.*) Appellant did not specify the size of these contracts, either in dollar value or labor hours.

Appellant also denied affiliation with the other concerns identified in OSI's protest. CASS is wholly-owned by Ms. Jacquelin Tomlin, who holds no ownership or managerial interest in Appellant. (*Id.* at 11.) ATL2, LLC and R&L Logistics Management, LLC are joint ventures, not affiliates. (*Id.*)

Accompanying its response to the protest, Appellant submitted a copy of its proposal; the Teaming Agreement between Appellant and SAWTST; corporate and financial records; a sworn declaration from Ms. Tomlin; and a sworn declaration Mr. Robinson, Appellant's President and CEO. In his declaration, Mr. Robinson avers that Appellant will:

individually evaluat[e] and interview[] applicants from the incumbent contractor, SAWTST. [Appellant] will only hire incumbent personnel whose qualifications [Appellant] has satisfactorily evaluated and for whom it has a need.

(First Robinson Decl. ¶ 4.) Mr. Robinson did not claim that he or other senior executives of Appellant would be personally involved with overseeing or managing the instant contract. Nor did Mr. Robinson assert that Appellant was obliged to hire incumbent personnel by the RFP or under the terms of the CBA.

F. Size Determination

On October 26, 2021, the Area Office issued Size Determination No. 3-2022-002, concluding that Appellant is not small for the instant procurement. The Area Office found that Appellant is affiliated with SAWTST under the ostensible subcontractor rule, and that the combined receipts of Appellant and SAWTST exceed the size standard. (Size Determination at 13.)

The Area Office explained, first, that Appellant is 100%-owned by Mr. Robinson, who also serves as Appellant’s CEO and President. (*Id.* at 4.) Mr. Robinson has the power to control Appellant through his ownership interest. (*Id.* at 4-5.) Mr. Robinson holds no ownership or managerial interest in any other concerns. (*Id.*) CASS is wholly-owned by Ms. Tomlin, but she is not an “owner, officer, or director” of Appellant, and thus has no ability to “control or manage [Appellant].” (*Id.* at 5.) The Area Office found that Appellant is not affiliated with ATL2, LLC or R&L Logistics Management, LLC, as these are joint ventures rather than stand-alone businesses. (*Id.*)

Turning to the ostensible subcontractor rule, the Area Office found that Appellant and its subcontractor, SAWTST, are affiliated in contravention of 13 C.F.R. § 121.103(h)(2). (*Id.* at 10.) The first step in an ostensible subcontractor analysis is to assess whether the prime contractor will self-perform the “primary and vital” requirements of the contract. (*Id.* at 6.) Here, both Appellant and SAWTST will perform the primary and vital contract requirements, which the Area Office found to be “warehousing, distribution operations and supply management”. (*Id.* at 7.) Appellant, though, will perform the majority (51%) of this work, and therefore satisfies this requirement. (*Id.*)

Next, the Area Office considered whether Appellant will be unusually reliant upon SAWTST to perform the contract, based on the “four key factors” that OHA has found to be strongly indicative of unusual reliance:

- (1) the proposed subcontractor is the incumbent that is ineligible to compete for the procurement;
- (2) the prime contractor intends to hire the large majority of its workforce from the subcontractor;
- (3) the prime contractor’s proposed management were previously [employed] with the subcontractor on the incumbent contract; and
- (4) the prime contractor lacks relevant experience and must rely on

its subcontractor to win the contract.

(*Id.*, citing *Size Appeal of Charitar Realty*, SBA No. SIZ-5806, at 13 (2017).) Applying this test, the Area Office found that the first factor is met because SAWTST is the incumbent contractor and was ineligible to compete for the instant procurement because SAWTST is no longer a participant in the 8(a) BD program. (*Id.* at 8.) The second factor is met because Appellant “states in its proposal that it will hire as many staff as possible from SAWTST”. (*Id.* at 9.) Further, Appellant did not clearly propose any of its own personnel for the contract. (*Id.*) The third factor is met because Appellant’s proposed managerial staff are current SAWTST employees on the predecessor contract, or in the case of [Individual 1], the proposed Site Manager, a former SAWTST employee on the predecessor contract. (*Id.*) Appellant did not propose any key employees who are not current or former employees of SAWTST. (*Id.*) Further, although Appellant maintained that its managerial staff are subordinate to its CEO, Mr. Robinson, his only duties described in the proposal “are to mobilize the Onsite Management Team and facilitate the kickoff meeting during the transition period.” (*Id.* at 8-9.) The fourth factor also is met because, while Appellant does appear to have some relevant experience, it has not previously performed a contract comparable in scale to the instant procurement. (*Id.* at 9-10.)

The Area Office concluded that Appellant will be unusually reliant on SAWTST to perform the contract. (*Id.* at 10.) The facts in this case are highly analogous to *Charitar*, where the prime contractor was heavily reliant upon its subcontractor, proposed to subcontract a large portion of the work, and would contribute very little to performance of the contract. (*Id.*)

Finally, the Area Office computed Appellant’s size, based on Appellant’s own receipts, its proportionate share of joint venture receipts, and the receipts of SAWTST, the ostensible subcontractor. (*Id.* at 12-13.) The combined receipts exceed the \$30 million size standard, so Appellant is not a small business for this procurement. (*Id.* at 13.)

G. Appeal

On November 10, 2021, Appellant filed the instant appeal. Appellant contends that the Area Office clearly erred in finding that Appellant will be unusually reliant upon SAWTST to perform the contract. Therefore, the size determination should be reversed or remanded.

Appellant highlights, first, that the Area Office determined that Appellant will self-perform a majority of the primary and vital contract requirements. (Appeal at 6-7.) The sole issue presented in this case, then, is whether Appellant will be unusually reliant upon SAWTST, based on the “four key factors” stemming from OHA’s *DoverStaffing* line of cases. (*Id.* at 7.)

Appellant does not dispute that the first factor is present, as SAWTST is the incumbent contractor and is ineligible for the instant procurement. (*Id.*) The first factor alone, though, is insufficient to establish a violation of the ostensible subcontractor rule. (*Id.*, citing *Size Appeal of Elevator Serv., Inc.*, SBA No. SIZ-5949, at 9 (2018).) Appellant contends that the remaining three factors are not met.

With regard to the second factor, Appellant acknowledges that it will hire the large majority of its workforce from SAWTST. (*Id.* at 8.) However, OHA has held that “hiring the incumbent workforce alone is not problematic so long as the personnel to be hired from incumbent are reviewed individually rather than a unilateral transfer of employees or hiring *en masse*.” (*Id.*, quoting *Size Appeal of NorthWind-CDM Smith Advantage JV, LLC*, SBA No. SIZ-6053, at 27 (2020).) Appellant’s proposal stated that Appellant will “hire as many incumbent personnel as possible to ensure institutional knowledge remains on the contract.” (*Id.*, quoting Proposal, Vol. III, at 3.) Candidates, though, will be individually evaluated, not transferred *en masse*. (*Id.* at 9, citing First Robinson Decl. ¶ 4.) The proposal also contemplated that Appellant may hire additional qualified candidates from the local community. (*Id.* at 10, citing Proposal, Vol. III, at 59.) Appellant analogizes the instant case to *Size Appeal of Montech, Inc.*, SBA No. SIZ-6100, at 18 (2021), where OHA found that the second factor was not met because personnel hired from the subcontractor “represent only a portion of the total workforce that [the prime contractor] would need to hire to fulfill this contract”. (*Id.* at 10.)

The Area Office also erred in its analysis of the second factor by overlooking that the award was subject to a CBA. (*Id.*) The CBA, attached to the RFP, was part of the record before the Area Office and “requires the contractor to make staffing decisions based on seniority.” (*Id.*) In *Montech*, OHA found that where “a contractor must make staffing decisions in accordance with an existing [CBA]”, then “more extensive reliance upon [the subcontractor’s] workforce would not have been improper.” (*Id.* at 10-11, quoting *Montech*, SBA No. SIZ-6100, at 18.)

Appellant argues that the Area Office misapplied the third factor of the unusual reliance test. (*Id.* at 11.) Appellant concedes that its three proposed key personnel, as well as its proposed Corporate Program Manager, are current or former employees of SAWTST. (*Id.*) However, OHA case law instructs that key personnel may be hired from the incumbent as long as they “remain under the supervision and control of the prime contractor”. (*Id.* at 11-12.)

Here, the organizational chart provided in Appellant’s proposal reflects that Mr. Robinson and Appellant’s corporate staff will have “oversight over the Site Manager and Corporate Program Manager (former incumbent personnel)” and thus, the key personnel hired from SAWTST will be “subordinate” to Appellant’s executive leadership. (*Id.* at 12.) The presence of an organizational chart renders any finding under the third factor “questionable”. (*Id.*, citing *Montech*, SBA No. SIZ-6100, at 19.) Moreover, the Area Office failed to inform Appellant that it had concerns about Appellant’s proposed organizational structure. (*Id.* at 12-13.) Had the Area Office done so, Appellant could have explained that Mr. Robinson will “have control over the contract and oversee [Appellant’s] key personnel, [and] that he will also serve as the Corporate Program Manager following the transition period.” (*Id.* at 12-13, citing Second Robinson Decl. ¶ 4.)

Finally, Appellant asserts that the Area Office ignored that Appellant brings significant experience that is relevant to each task identified in the PWS. (*Id.* at 12-13.) In its proposal, Appellant provided five past performance examples: two subcontracts performed by Appellant and three prime contracts performed by SAWTST. (*Id.* at 13.) DLA considered that both of

Appellant's references were "relevant" whereas one of SAWTST's references was deemed irrelevant. (*Id.*)

Furthermore, the Area Office should have considered the additional examples of past performance that Appellant submitted in response to the size protest. (*Id.* at 14, citing *Size Appeal of Telesis Corp.*, SBA No. SIZ-6113, at 17-18 (2021).) The Area Office itself recognized that Appellant does have relevant experience in "managing warehousing, distribution, transportation, and project management", and the Area Office thus need not have proceeded with any additional analysis. (*Id.* at 14-15, citing *Size Appeal of Innovate Int'l Intelligence & Integration, LLC*, SBA No. SIZ-5882, at 7 (2018).) Accordingly, the Area Office should have found that the fourth factor was not satisfied. (*Id.*)

Lastly, the fact that Appellant also will subcontract 49% of the contract to SAWTST is not dispositive, because three of the four unusual reliance factors are not present. (*Id.* at 15, citing *Montech*, SBA No. SIZ-6100, at 20.)

Accompanying the appeal, Appellant moved to introduce new evidence not previously provided to the Area Office. Specifically, Appellant seeks to admit a Second Declaration from Mr. Robinson and Appellant's Post-Award Debriefing. (Motion at 1.) In his Second Declaration, Mr. Robinson asserts that he will serve as the Corporate Program Manager following the transition period. (Second Robinson Decl. ¶ 4.) Appellant argues that "good cause" exists to admit the declaration because the Area Office concluded that the "Corporate Program Manager will manage contract performance which will be the majority of the management work performed under the contract", but that Mr. Robinson "would not have a major role" in contract performance. (Motion at 2.) Had the Area Office alerted Appellant of its concerns regarding Mr. Robinson's role, Appellant could have explained that he "will have ultimate responsibility for contract performance and will serve as the Corporate Program Manager following the transition period." (*Id.*)

Appellant argues that the Debriefing also should be admitted because it shows that DLA concluded that Appellant's prior experience was "relevant". (*Id.*) The Debriefing thus contradicts the Area Office's finding that Appellant lacks sufficient relevant experience to perform the contract. (*Id.* at 2-3.)

H. OSI's Response

On November 29, 2021, OSI responded to the appeal. OSI argues, as a preliminary matter, that OHA should exclude new evidence that was not submitted to the Area Office during the size review. (Response at 6 and 9-10, n.4-5.) Appellant has not shown "good cause" to introduce the new evidence, as is required by 13 C.F.R. § 134.308. In particular, OHA should reject Mr. Robinson's Second Declaration, as this statement is inconsistent with "the proposal [Appellant] submitted to DLA which makes no mention of Mr. Robinson serving as [Corporate Program Manager]." (Opp. at 4.) OHA case law instructs that post-proposal information that conflicts with the proposal must be disregarded. OSI maintains that the Debriefing is "irrelevant" to the instant size appeal because DLA's determination of relevance for past performance purposes does not necessarily mirror SBA's analysis of unusual reliance. (*Id.* at

6.) Further, Appellant could have submitted the Debriefing to the Area Office in response to the protest. (*Id.*) As such, OSI urges, OHA should not admit these new pieces of evidence as “they do not clarify the central issues on appeal and only obscure the record before OHA.” (*Id.* at 8.)

Turning to the merits of the appeal, OSI argues that the Area Office correctly found that Appellant violated the ostensible subcontractor rule based on the *DoverStaffing* line of cases. (Response at 6.) The appeal fails to show clear error in the size determination. (*Id.* at 7.) OSI argues, first, that the Area Office did not err in finding that Appellant planned to hire the large majority of its workforce from SAWTST. (*Id.* at 7.) Despite Appellant’s claims that it will not hire subcontractor personnel “*en masse*”, Appellant’s proposal stated that Appellant’s “goal is to attract, recruit, screen, interview, **and hire/retain approximately 95% of the incumbent employees** within 20 to 30 days of contract award.” (*Id.* at 7, quoting Proposal, Vol. III at 85 (emphasis added by OSI).) The proposal further stated that Appellant’s key personnel will be “hired within one (1) day of contract award”, and that “[m]ost non-key personnel are hired on day one as well”. (*Id.*, quoting Proposal, Vol. III at 82.) Accordingly, the notion that Appellant will interview and assess incumbent employees individually, and hire only those for whom the firm has a need, is not consistent with Appellant’s proposal. (*Id.* at 8.) OSI observes that Appellant “has not identified a single employee that it intends to hire, or position that it intends to fill, with non-incumbent personnel.” (*Id.*)

OSI also disputes Appellant’s claim, raised for the first time on appeal, that the CBA somehow impacts Appellant’s hiring decisions. (*Id.* at 9.) Appellant’s argument amounts to “a tacit admission that [Appellant] planned to engage in wholesale hiring of incumbent employees”. (*Id.*) Moreover, nothing in the CBA or in the RFP requires that a successor prime contractor must hire incumbent Union personnel. (*Id.*) Indeed, in its proposal, Appellant itself characterized the CBA as merely one of three alternatives for filling vacancies during performance. (*Id.*, citing Proposal, Vol. III at 78.)

Next, OSI asserts that the Area Office did not err in concluding that Appellant’s proposed managerial staff previously were employed by SAWTST. (*Id.*) Appellant does not dispute that all of its key personnel, as well as [Individual 4], are current or former SAWTST employees on the incumbent contract, but on appeal Appellant seeks to rebut the Area Office’s determination with “an inadmissible, *post-hoc* declaration that is inconsistent with its own proposal.” (*Id.*) OHA should reject Mr. Robinson’s Second Declaration, and should find no merit to Appellant’s claims that Mr. Robinson will actively manage the contract based on Appellant’s organizational chart. (*Id.* at 10.) According to OSI, Appellant’s proposal made clear that managerial staff “would only occasionally report **issues** to [Mr. Robinson], who would mainly serve to mobilize the team and facilitate kick-off events **during the transition period.**” (*Id.* at 10 (emphasis OSI’s).) Mr. Robinson thus will have no specific control over, or involvement with, the instant procurement. (*Id.* at 11-12.)

Unlike the situation presented in *Montech*, Appellant proposed a Corporate Program Manager, [Individual 4], another employee of SAWTST who currently manages the incumbent contract, to be “the ultimate key manager responsible for contract performance.” (*Id.* at 11.) The Area Office thus correctly found that Mr. Robinson will have no major role in the instant procurement. Although Mr. Robinson states in his Second Declaration that he will be Corporate

Program Manager, this assertion is contradicted by Appellant’s proposal, and should be given no weight. (*Id.* at 12.)

Finally, OSI argues that the Area Office correctly determined that Appellant lacks relevant experience and relied upon its more experienced subcontractor, SAWTST, to win the award. (*Id.* at 13.) Although DLA found Appellant’s two prior references to be similar in nature to the instant procurement, DLA did not find them to be of comparable size or magnitude. (*Id.* at 14.) Further, DLA considered other past performance as reflected in the Contractor Performance Assessment Reporting System, and discovered no other relevant past performance for Appellant. (*Id.* at 14-15.) Thus, while DLA did not specifically comment on the additional past performance described in Appellant’s response to the protest, it nevertheless is clear that DLA considered such contracts irrelevant. The Area Office properly concluded that Appellant does not have “experience in contracts of a similar magnitude” and that Appellant relied upon SAWTST to win the contract. (*Id.* at 16.)

III. Discussion

A. Standard of Review

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

The “ostensible subcontractor” rule provides that when a subcontractor is 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)(2). The rule essentially asks “whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor.” *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 7 (2010). 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).

B. Analysis

I find no merit to this appeal. The sole question presented in this case is whether Appellant will be unusually reliant upon SAWTST to perform the contract, in contravention of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(2). In a line of cases stemming from *Size Appeal of Dover Staffing, Inc.*, SBA No. SIZ-5300 (2011), OHA has identified “four key factors” that are suggestive of unusual reliance: (1) the proposed subcontractor is the incumbent contractor and is ineligible to compete for the procurement; (2) the prime contractor plans to

hire the large majority of its workforce from the subcontractor; (3) the prime contractor's proposed management previously served with the subcontractor on the incumbent contract; and (4) the prime contractor lacks relevant experience and must rely upon its more experienced subcontractor to win the contract. *Size Appeal of Equity Mortgage Solutions, LLC*, SBA No. SIZ-5867, at 18 (2017); *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850, at 15 (2017); *Size Appeal of Charitar Realty*, SBA No. SIZ-5806, at 13 (2017); *Size Appeal of Modus Operandi, Inc.*, SBA No. SIZ-5716, at 12 (2016); *Size Appeal of Prof'l Sec. Corp.*, SBA No. SIZ-5548, at 8 (2014); *Size Appeal of Wichita Tribal Enters., LLC*, SBA No. SIZ-5390, at 9 (2012). When these factors are present, violation of the ostensible subcontractor rule is more likely to be found if the proposed subcontractor will perform 40% or more of the contract. *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5785, at 10 (2016).

Here, the Area Office concluded that all four factors are present, and Appellant has not persuasively refuted the Area Office's determination. The Area Office found that the first factor is met because SAWTST is the incumbent contractor and would have been ineligible to compete for the instant procurement. Section II.F, *supra*. The second factor is met because Appellant plans to hire its workforce *en masse* from SAWTST. *Id.* Further, Appellant did not clearly propose any of its own personnel for the contract. *Id.* The third factor is met because all of Appellant's proposed managerial staff are current, or former, SAWTST employees on the predecessor contract. *Id.* In addition, although Appellant asserted that its managerial staff will be subordinate to its CEO, Mr. Robinson, his only duties described in the proposal "are to mobilize the Onsite Management Team and facilitate the kickoff meeting during the transition period." *Id.* The fourth factor is met because three of the five examples of past performance cited in Appellant's proposal were for SAWTST, and Appellant failed to show that Appellant itself has previously performed any contract comparable in scale to the instant procurement. *Id.* Lastly, the Area Office observed that Appellant also proposed to subcontract nearly half the contract (49%) to SAWTST. *Id.*

On appeal, Appellant does not dispute that the first factor is met, as the proposed subcontractor, SAWTST, is also the incumbent prime contractor, and having graduated from the 8(a) BD program, SAWTST would not have been eligible to submit a proposal in its own name for the instant procurement. Section II.G, *supra*. Appellant highlights, however, that the first factor alone is not sufficient to find violation of the ostensible subcontractor rule. *E.g.*, *Size Appeal of InGenesis, Inc.*, SBA No. SIZ-5436, at 16 (2013).

Appellant argues that the Area Office incorrectly determined that the second factor is met, because Appellant will not hire its workforce *en masse* from SAWTST. Section II.G, *supra*. Instead, Appellant maintains, Appellant will interview and evaluate candidates individually. *Id.* This line of argument, though, is contradicted by Appellant's proposal, which stated that Appellant will "hire as many incumbent personnel as possible" and that "[m]ost non-key personnel are hired on day one". Section II.B, *supra*. The proposal reiterated that Appellant intends to "hire/retain approximately 95% of the incumbent employees within 20 to 30 days of contract award." *Id.* Further, as the Area Office noted, the proposal contained no indication that Appellant would contribute any of its own personnel to this contract. *Id.* Based on Appellant's proposal, then, the Area Office did not err in concluding that Appellant will hire its workforce *en masse* from SAWTST.

Appellant also argues, alternatively, that Appellant may have been required to hire the incumbent workforce pursuant to a Collective Bargaining Agreement (CBA) provided as an attachment to the RFP. Section II.G, *supra*. Therefore, Appellant reasons, heavy reliance on the incumbent contractor may be excused, as Appellant may have had a limited pool of eligible employees that could be utilized, similar to the situation described in *Size Appeal of Montech, Inc.*, SBA No. SIZ-6100 (2021). *Id.* As OSI observes in its response to the appeal, however, the CBA here pertains specifically to the incumbent contract, and there is no language in the CBA to suggest that this agreement also would be binding on a successor prime contractor. Section II.A, *supra*. The RFP likewise did not require that the contractor must fill vacancies pursuant to the CBA. *Id.* On the contrary, the RFP expressly permitted that offerors were free to develop their own mix of labor categories and labor hours. *Id.* Appellant's own proposal similarly characterized the CBA as merely one of several options for staffing the contract. Section II.B, *supra*. The facts in this case thus fundamentally differ from those in *Montech*.

Turning to the third factor, the Area Office correctly recognized that all of Appellant's proposed key personnel are current or former employees of SAWTST on the incumbent contract. Specifically, both of the proposed Warehouse Site Supervisors, [Individuals 2 and 3], were SAWTST employees at the time of proposal submission. Sections II.B and II.F, *supra*. The proposed Site Manager, [Individual 1], was an independent contractor but previously served as SAWTST's Corporate Program Manager on the incumbent contract. *Id.* In addition, Appellant's proposed Corporate Program Manager, [Individual 4], held this same role as an employee of SAWTST at the time of proposal submission. *Id.*

Appellant does not dispute that it proposed to hire its managerial personnel from SAWTST. In Appellant's view, however, the issue is immaterial because these personnel will be supervised and controlled by Appellant's CEO and President, Mr. Robinson. Appellant points in particular to the "Team ATL Organizational Chart" included in the proposal, reflecting that [Individual 1] and [Individual 4] will be subordinate to Mr. Robinson. Section II.B, *supra*. Appellant also seeks to introduce a supplemental declaration from Mr. Robinson, attesting that he personally will serve as Corporate Program Manager following the transition period. Section II.G, *supra*.

I agree with OSI that Mr. Robinson's supplemental declaration is not admissible. OHA generally does not accept new evidence that could have been, but was not, presented to the Area Office during the size review. *E.g.*, *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). Further, although OHA has, in rare circumstances, admitted new evidence that merely clarifies an issue in a proposal, it is well-settled that "documents created in response to a protest may not be used to contradict an offeror's proposal." *Size Appeal of PacArctic, LLC*, SBA No. SIZ-6105, at 19 (2021) (quoting *Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815, at 10 (2017)); *Size Appeal of Camp Noble, Inc.*, SBA No. SIZ-5644, at 5 (2015). Here, Mr. Robinson's supplemental declaration cannot be reconciled with Appellant's proposal, because the proposal identified [Individual 4] as Corporate Program Manager and further indicated that Mr. Robinson will have virtually no involvement in this procurement. Section II.B, *supra*. Good cause therefore does not exist to admit the supplemental declaration, and Appellant's motion to introduce the supplemental declaration is DENIED.

Appellant’s claim that managerial staff hired from SAWTST will be under Mr. Robinson’s supervision and control is unpersuasive based on Appellant’s proposal. In contrast to the Site Manager, who will have “complete authority to manage the contract and communicate[] directly with the Government to ensure the successful execution of the contract’s requirements”, and the Corporate Program Manager, who is responsible for “[c]ustomer [r]elationship [m]anagement” and “[m]anag[ing] [c]ontract [p]erformance”, the proposal contemplated only a very minor role for Mr. Robinson. Section II.B, *supra*. Specifically, according to the proposal, Mr. Robinson “[m]obilizes [On-Site Management Team], [and] [f]acilitates Kick-Off Meeting”. *Id.* Accordingly, Appellant’s proposal simply does not support the conclusion that Mr. Robinson will supervise and control the managerial staff. Rather, the instant case appears highly analogous to *DoverStaffing*, where OHA rejected the argument that the challenged firm’s President would control the project because “the proposal does not assign a major role to the [challenged firm’s] President beyond interface with the [procuring agency], and it is the Project Manager who will be providing oversight over the project.” *DoverStaffing*, SBA No. SIZ-5300, at 8.

Lastly, Appellant has not demonstrated that the Area Office erred in finding the fourth unusual reliance factor to be met. The Area Office noted that, in its proposal, Appellant provided two examples of work previously performed by Appellant as a subcontractor, and three examples of work previously performed by SAWTST as a prime contractor, including the incumbent contract. Sections II.B and II.F, *supra*. Moreover, although Appellant apparently does have some prior experience that is qualitatively similar to the instant procurement, Appellant did not show that it had performed such services on a scale even remotely comparable to the instant procurement. *E.g.*, *Charitar*, SBA No. SIZ-5806, at 13 (fourth factor was met where the challenged firm “adduced no evidence that it has ever performed a contract” of similar size). On appeal, Appellant contends that the Area Office should have given greater weight to the additional examples of past performance that Appellant submitted in response to the size protest. Appellant, though, did not disclose the dollar values, or levels of effort, for these additional examples, and several of the additional examples appear to have scant, if any, resemblance to the work called for by the instant procurement. Section II.E, *supra*. As such, Appellant has not persuasively explained how a more detailed consideration of the additional examples might have altered the Area Office’s decision.

IV. Conclusion

Appellant has not shown clear error in the size determination. The appeal therefore is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

Kenneth Hyde

 KENNETH M. HYDE
 Administrative Judge