

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

SIZE APPEAL OF:

EarthCare Solutions, Inc.

Appellant

Appealed from
Size Determination Nos. 2-2010-77 & 79

SBA No. SIZ-5183

Decided: January 12, 2011

APPEARANCES

Daniel J. Donahue, Esq., Husch Blackwell LLP, Washington, D.C., for Appellant.

Christopher P. Coleson, VP Operations Officer, for New England Industrial Engineering, Inc.

Douglas C. Proxmire, Esq., and Elizabeth M. Gill, Esq., Patton Boggs LLP, for Guardian Environmental Services, Inc.

DECISION¹

HOLLEMAN, Administrative Judge:

I. Introduction & Jurisdiction

On October 29, 2010, the Small Business Administration's (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination Nos. 2-2010-77 & 79 finding EarthCare Solutions, Inc. (Appellant) other than small due to its affiliation with WRS Infrastructure & Environmental, Inc. (WRS). The Area Office determined Appellant's relationship with WRS violates the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)) for purposes of the procurement at issue. For the reasons discussed below, the appeal is denied, and the size determination is affirmed.

SBA's Office of Hearings and Appeals (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.

¹ This decision was finalized on January 12, 2011. Pursuant to 13 C.F.R. § 134.205, Appellant was given the opportunity to propose redactions to this decision before publication. Appellant did not request any redactions. Thus, OHA now publishes the Decision in its entirety.

Appellant filed the instant appeal within fifteen days of receiving the size determination. Thus, the appeal is timely, 13 C.F.R. § 134.304(a)(1), and this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protests

On April 15, 2009, the Contracting Officer (CO) for the U.S. Environmental Protection Agency (EPA) issued Solicitation No. PR-R2-08-10085 (RFP) seeking emergency rapid response services in New York and New Jersey. The RFP contemplated award of three indefinite delivery/indefinite quantity (ID/IQ) contracts: two to small businesses and one to a service-disabled veteran-owned small business concern (SDVO SBC). The CO designated North American Industry Classification System (NAICS) code 562910, Environmental Remediation Services, with a corresponding size standard of 500 employees.

On April 30, 2010, the CO notified unsuccessful offerors that Appellant was the apparently successful offeror for the SDVO SBC set-aside. On May 5, 2010, Guardian Environmental Services, Inc. filed a protest challenging Appellant's size. On May 6, 2010, New England Industrial Engineering, Inc. (NEIE) also filed a protest challenging Appellant's size. Both protestors alleged Appellant would be unduly reliant upon its subcontractor in performing the contract because Appellant lacks sufficient personnel and experience to perform.

B. Size Determination

On October 29, 2010, the Area Office issued its size determination finding Appellant other than small for this procurement based on its affiliation with its subcontractor, WRS. Based upon the information submitted by Appellant, the Area Office explained that WRS is one of three subcontractors Appellant will use for this procurement, each of which is located in the New York/New Jersey region. Appellant, which is incorporated in Virginia, acknowledged that WRS is the incumbent contractor and is no longer a small business, but asserted that it is not affiliated with WRS because it is an experienced environmental remediation firm. Appellant argued, *inter alia*, that it prepared the proposal, it would perform 51% of the contract, WRS would perform less than 10% of the contract, Appellant would hire over twenty people to perform the contract, and WRS provided no bonding or other financial assistance. The Area Office noted that Appellant itself is a small concern because it has only three employees.

The Area Office explained that the RFP requires rapid response cleanup services for hazardous substances and requires cleanup following events including but not limited to natural and man-made disasters, terrorist activities, and the use of weapons of mass destruction and nuclear, biological, and chemical weapons. The contractor is required to provide all necessary personnel and equipment to perform cleanup and restoration services within 6 to 48 hours after an event, depending upon the nature of the incident. The Area Office observed that the most important personnel position is the program manager, who must coordinate a response upon issuance of a task order. The solicitation listed a number of evaluation factors that, when combined, equaled the importance of price. The most highly valued evaluation factors (other

than price) were sample work plans and past performance.

The Area Office went on to list facts it gleaned from the information provided by Appellant and the protestors. Among many other observations, the Area Office noted: WRS is the incumbent contractor; the proposal indicates that WRS will act as a mentor to Appellant; WRS's current program manager will be the deputy program manager and will work closely with Appellant's proposed program manager; Appellant will manage the contract; the proposal refers to WRS as the "primary team member" and discusses WRS's experience and understanding of the contract requirements; each of the subcontractors will provide personnel and equipment in support of emergency response actions; and the teaming agreement between Appellant and WRS indicates 49% of the work will be awarded to WRS. The Area Office also determined from the proposal that Appellant is an experienced environmental remediation firm (having performed excavation and removal of contaminated soil, site restoration services, and sampling and analysis services), but Appellant lacks experience in providing emergency responses to hazardous materials incidents. WRS, on the other hand, has significant relevant experience in providing the type of emergency response cleanup services required by this procurement. Upon reviewing the solicitation requirements, the Area Office concluded the primary service required is the rapid deployment of a hazardous material response team to contain and remediate various types of environmental emergencies.

The Area Office then set forth the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), and concluded based upon that rule that Appellant is unusually reliant upon WRS. The Area Office explained that hiring subcontractors is permissible, and there is no prohibition on hiring the incumbent contractor. *See Size Appeal of Access Systems, Inc.*, SBA No. SIZ-4843 (2007); *Size Appeal of DLM&A, Inc.*, SBA No. SIZ-2028 (1984). Here, however, the Area Office again noted that the proposal emphasized WRS's experience with the contract and referred to WRS as a key team member. Furthermore, the Area Office concluded Appellant failed to demonstrate that it has performed contracts similar in scope to the one at issue, which is valued over \$20 million.² Nor did Appellant demonstrate any experience with rapid deployment of resources to hazardous materials incidents. Instead, it is WRS (and to a lesser extent the other subcontractors) who has the relevant expertise.

The Area Office also explained that whether a proposal specifically identifies a joint venture and whether the small prime contractor is performing over 50% of the work are not dispositive of the ostensible subcontractor issue. *See Size Appeal of ePerience, Inc.*, SBA No. SIZ-4668 (2004); *Size Appeal of SecTek, Inc.*, SBA No. SIZ-4558 (2003). Nevertheless, the Area Office relied upon the *Size Appeal of CWU, Inc.*, SBA No. SIZ-5118 (2010), for the proposition that when the incumbent contractor is the subcontractor and will perform 49% of the work, and when the prime contractor relies upon the subcontractor's experience and qualifications in its proposal, a finding of unusual reliance is warranted. Here, WRS will mentor Appellant, WRS is the other than small incumbent contractor, WRS's experience was frequently

² Appellant notes that the RFP provides only the minimum value of the contract, \$250,000, while the maximum value is to be determined. (RFP § B.5.)

cited in the proposal, the primary and vital requirements will be performed by subcontractors, Appellant has no specifically relevant experience, and WRS's current program manager will work closely with Appellant's proposed program manager. Based upon these facts, the Area Office concluded Appellant is unusually reliant upon WRS. Accordingly, because WRS is other than small, Appellant is also other than small for this procurement.

C. Appeal Petition

On November 12, 2010, Appellant filed the instant appeal.³ In a lengthy recitation of the facts at issue, Appellant indicates that it prepared the proposal, it pursued the contract and the subcontractors it hired, it has forty years of experience in environmental remediation contracting, its president has over twenty-five years of experience in the industry and over fifteen years experience in contract management, its president would be the program manager for the contract, its subcontractors are each capable of providing the emergency response services required by the RFP, its teaming agreement with WRS indicates the final portion of work to be awarded to WRS will be defined in a later subcontracting agreement, and it would manage the contract as indicated in the proposal and the accompanying proposed work plans.

Appellant argues it was clear error for the Area Office to determine Appellant is unusually reliant upon WRS. Appellant contends the Area Office failed to consider the entire RFP and failed to review all aspects of Appellant's relationship with WRS. Appellant's first allegation of error regards the Area Office's conclusion that the primary and vital contract requirement is the rapid deployment of a hazardous material response team. Instead, Appellant contends there are two primary and vital requirements: (1) rapid response teams to address environmental emergencies, and (2) containment and removal of hazardous materials from the sites. Appellant explains that while its subcontractors will provide the emergency response teams, it will perform the removal actions and manage the contract. Appellant alleges the removal work would constitute approximately 80% of a typical task order, so it was clear error not to determine the removal work is a primary and vital contract requirement. *See Size Appeal of Greenleaf Constr. Co.*, SBA No. SIZ-4765 (2006).

Appellant next contends it was error to find that Appellant is unusually reliant upon WRS when it has three subcontractors that will all perform the rapid response work required by the RFP. Appellant explains the work will be performed from the geographically distributed offices of all three subcontractors, and the fact that three subcontractors will perform this portion of work does not support the conclusion that Appellant is unusually reliant upon one of them. *See Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151 (2010). Appellant also argues that simply because WRS will act as a mentor to Appellant does not mean the firms are engaged in a joint venture or that WRS will control the contract. It only means WRS will share its knowledge

³ On November 12, 2010, Appellant also submitted a Motion to Supplement the Record seeking to admit a letter from Appellant to the Area Office dated May 20, 2010. I have reviewed the letter, which does not appear in the Area Office file. Because the letter relates to NEIE's Freedom of Information Act request (which also does not appear in the Area Office file), it is irrelevant to this appeal. Accordingly, Appellant's motion is DENIED, and I will not consider the letter in my decision.

of the instant contract with Appellant. Similarly, Appellant contends the fact that Appellant's proposed program manager will work closely with WRS's current program manager does not indicate that WRS will control the procurement but again demonstrates only that WRS will share its knowledge with Appellant. Appellant argues that, rather than reading the solicitation and the proposal as a whole, the Area Office improperly relied upon one phrase out of a two-inch technical proposal (which indicates Appellant's program manager will work "under the direct tutelage" of WRS's program manager) to conclude Appellant's key personnel assignments constitute evidence of undue reliance.

Finally, Appellant asserts the proposal's references to WRS's experience are not indicative of unusual reliance because the Area Office ignored the proposal's geographic distribution of work among all three subcontractors. The proposal listed the experience of Appellant and all three subcontractors, and Appellant believed WRS's (and the other subcontractors') experience would help persuade the EPA to award the contract to Appellant rather than a competitor. Appellant contends the fact that the proposal stresses WRS's experience does not support a finding of unusual reliance in this case because Appellant will be performing the type of environmental remediation services with which it has extensive experience. Further, because the rapid response services will be provided by all three subcontractors, the Area Office cannot say that Appellant is unusually reliant upon WRS. Appellant requests that OHA reverse the size determination on these grounds.

D. NEIE's Opposition

On November 23, 2010, NEIE filed its response to the appeal petition. NEIE asserts Appellant's assignment of errors constitute mere disagreement with the Area Office's findings. First, NEIE challenges Appellant's assertions that its own removal work would represent a higher dollar value than WRS's work for each task order and that WRS would likely perform less than 10% of a typical task order. NEIE alleges Section H.44 of the RFP requires that the prime contractor subcontract all transportation and disposal services. Thus, NEIE argues Appellant may not perform the removal work it proposes to perform itself, and Appellant's argument reflects a lack of understanding of the procurement at issue and of emergency rapid response services contracting in general. NEIE also notes Appellant has no employees qualified to act as the transportation and disposal specialist.

NEIE next emphasizes that WRS senior staff will be heavily involved with management of the contract work. WRS will act as a mentor to Appellant, and the current WRS program manager will work closely with Appellant's proposed program manager. The proposal refers to the "partnership" between the firms, and the EPA will call WRS's office in Pennsylvania when it needs emergency response services. NEIE argues this clearly indicates undue reliance because it gives WRS complete control over the contract. NEIE also emphasizes that Appellant's proposal "continually and exhaustively stresses the importance of" WRS's past experience, particularly as the incumbent on this contract. NEIE argues this too evinces Appellant's unusual reliance upon WRS because, according to NEIE, Appellant would be unable to perform the contract without WRS. *See Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071 (2009).

NEIE then engages in a lengthy comparison of this case to *Size Appeal of ePerience, Inc.*, SBA No. SIZ-4668 (2004). Similar to that case, NEIE argues: Appellant's proposal presents Appellant and WRS, the incumbent contractor, as a team; WRS had substantial input in preparation of the proposal; the proposal indicates that Appellant will rely upon WRS's in-depth knowledge of the procurement; Appellant will rely upon WRS for a significant number of employees; and Appellant will receive continuing training from WRS. Appellant goes on to further examine the relationship between Appellant and WRS, concluding, among other things, that: WRS is the company dedicating the offices, personnel, and resources to manage the contract; WRS, not Appellant, has the requisite background to perform the contract; WRS will perform the majority of the contract due to Appellant's misunderstanding of the requirements; and WRS will perform the most complex and costly contract functions. NEIE also vehemently disputes Appellant's assertions that it chased the contract, that it pursued WRS as a subcontractor, or that it prepared the proposal without substantial assistance from WRS. Appellant concludes the only thing Appellant brings to the contract is its SDVO SBC status.

III. Discussion

A. Standard of Review

The standard of review for this appeal is whether the Area Office based the size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office made a patent error of fact or law based on the record before it. Consequently, I may not disturb the Area Office's size determination unless I have a definite and firm conviction that the Area Office made key findings of law or fact that are mistaken. *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

B. Analysis

The regulation governing ostensible subcontractor relationships provides that a prime contractor is affiliated with its subcontractor on a particular procurement if the prime contractor is unusually reliant upon the subcontractor or if the subcontractor would perform the primary and vital requirements of the contract. 13 C.F.R. § 121.103(h)(4). To determine whether firms have violated the ostensible subcontractor rule, all aspects of the relationship between the firms must be considered. *Id.* Appellant's proposal is dated May 15, 2009, so Appellant's size is determined as of that date. 13 C.F.R. § 121.404(a). Thus, any events occurring after that date are irrelevant. *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138, at 6 (2010). Additionally, an ostensible subcontractor analysis is extremely fact-specific and is undertaken on the basis of the solicitation and the proposal at issue. *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 14 (2010). The Area Office must base its ostensible contractor determination solely on the relationship between the parties at that time, which is best evidenced by Appellant's proposal (and anything submitted therewith, including teaming agreements). Any assertions not in accord with the proposal and teaming agreements are, therefore, irrelevant.

The Area Office reviewed the RFP and Appellant's proposal and found Appellant's relationship with WRS violates the ostensible subcontractor rule. The Area Office determined

the primary and vital contract requirement is the rapid deployment of a hazardous material response team to contain and remediate various types of environmental emergencies. The Area Office concluded that Appellant would be unusually reliant upon WRS to perform the contract in part because WRS is the incumbent and has the requisite experience to perform emergency rapid response services, whereas Appellant has no such experience.

Appellant contends the Area Office failed to properly identify the primary and vital contract tasks because the removal of hazardous material, which Appellant proposes to perform, is also vital to the contract. Appellant also asserts it is not unusually reliant upon WRS because it has extensive experience in removal and remediation, and it has three subcontractors to perform the emergency rapid response services. On the contrary, NEIE contends WRS, the incumbent experienced contractor, will perform more work than Appellant, and the level of WRS's involvement indicates WRS will be able to control the procurement.⁴

The Performance Work Statement (PWS) from the RFP provides: "The purpose of this contract is to provide fast responsive environmental cleanup services for hazardous substances/wastes/contaminants/materials and petroleum products/oil . . . in the states of New York and New Jersey." (PWS § I.C.) The contractor is responsible for providing personnel, labor, materials, and equipment required to respond to and prevent environmental damage from natural and manmade disasters, any release of oil or hazardous substances into the environment, and the threat of fire or explosion from terrorist acts, weapons of mass destruction, and nuclear, biological, or chemical incidents. (PWS § I.E.) The contractor must maintain emergency response capabilities to respond to industrial chemical incidents involving materials associated with terrorist activities, including biological warfare agents, radiological materials, chemical warfare agents, and other industrial chemicals that may be used as weapons. (PWS § II.C.) The contractor is also responsible for clean-up operations for responses to the release of oil and other hazardous substances, containment and countermeasures, mitigation and disposal of pollutants, environmental restoration, and analytical activities. (PWS §§ II.D.-H.)

According to the RFP, all evaluation factors combined were approximately equal to price. The evaluation factors other than price were: management approach, cost control, past performance, program manager, response managers, availability of response personnel, and sample work plans. Sample work plans and past performance were the factors most heavily weighted (other than price). (RFP § M.)

Appellant explains in its proposal that it will provide rapid response services through three subcontractors, including WRS. Appellant further explains that it will manage the contract and provide containment, removal, and disposal services. Appellant's proposal describes the role of each member of the "EarthCare Solutions Team." (Technical Proposal § A.) The proposal explains that Appellant's proposed program manager will coordinate resources for each task order using the same procedures WRS currently uses to allocate resources. Appellant will

⁴ Regarding NEIE's contention that Appellant may not perform the removal work pursuant to the terms of the RFP, that issue is one of responsibility and lies within the CO's purview. It is not relevant to the issue OHA must decide—whether Appellant is unusually reliant upon WRS—and will not be considered here.

use WRS's established call center to receive task orders, and Appellant's program manager will work from office space at WRS's Pennsylvania location. Upon receipt of a task order, the program manager will appoint a response manager, who will be dedicated to the specific clean-up action, communicate with the on-scene coordinator, and develop a work plan. Response resources will be mobilized from one of three locations, each of which is a location of one of Appellant's subcontractors.

The proposal indicates Appellant is responsible for assigning personnel, equipment, and resources to task orders, ensuring health and safety, quality assurance, and regulatory compliance, providing planned and emergency response services, and monitoring the status of all team resources. WRS is responsible for mentoring Appellant's program manager and other team members, providing personnel, equipment, and resources to support task orders as directed by Appellant, and supplementing Appellant's provision of planned and emergency response services. The other subcontractors will supplement the provision of personnel and equipment in support of planned and emergency response actions. The proposal emphasizes that Appellant is the single point of contact with the EPA for task order performance. Equipment is to be provided from one of the team response centers, *i.e.*, one of the three subcontractor locations.

Regarding past performance, Appellant lists six contracts it performed between 2007 and the present. The most recent contract called for transportation and disposal of non-hazardous waste to an off-site landfill, the second called for transportation and disposal to an off-site landfill, the third and fourth contracts each called for the excavation and removal of contaminated soil from a former landfill, the fifth called for soil excavation from a former capacitor manufacturing site, and the last contract called for the excavation, filling, grading, and construction of an earthen cap for an exposed landfill. Ten contracts were listed for WRS's past performance. Of these, nine contracts (including the precursor contract to the instant procurement) were for the provision of emergency and rapid response remediation services involving hazardous materials. There are also seven contracts listed for Appellant's second subcontractor, most of which deal with demolition and environmental remediation, but none of which involve emergency and rapid response remediation services involving hazardous materials. There are no contracts listed for Appellant's third subcontractor.

Attachment A to the teaming agreement executed between Appellant and WRS is an "Anticipated Statement of Work" and provides that Appellant "shall award WRS Infrastructure & Environment, Inc. 49% of the work made available" by the EPA. WRS agrees to provide "[a]ll forms of emergency response actions and non-time-critical responses involving a broad range of remedial activities and technologies (e.g., containment, countermeasures, removals, demolition, decontamination, etc.)." WRS also agrees to provide responses to natural disasters and terrorist incidents. The Teaming Agreement between Appellant and its second subcontractor also includes an anticipated statement of work, which requires that the subcontractor provide the same services WRS is required to provide. However, this anticipated statement of work does not include a guaranteed percentage of work to be provided to the subcontractor. There is no formal teaming agreement between Appellant and its third subcontractor. Rather, the proposal includes only a letter dated May 13, 2009, and signed by the subcontractor's strategic relations manager indicating the subcontractor "can provide the requisite equipment and labor as necessary."

With regard to personnel, the proposed program manager is Appellant's president and owner. The proposed deputy program manager/response manager is a WRS employee. The other proposed response managers include seven employees of WRS, six employees of Appellant's second subcontractor, three employees of Appellant's third subcontractor, and two employees of firms that are not "EarthCare Solutions Team" members.

Based upon the RFP and Appellant's proposal, I find the Area Office committed no error in determining the primary and vital contract requirement is the rapid deployment of a hazardous material response team or in concluding Appellant would be unusually reliant upon WRS in performing the contract. Contrary to Appellant's assertions, the Area Office properly examined all aspects of Appellant's relationship with WRS, including those specifically enumerated in the regulation: the terms of the proposal, agreements between the prime contractor and subcontractor, and whether the subcontractor is the other than small incumbent contractor. 13 C.F.R. § 121.103(h)(4).

With regard to the primary and vital requirements of the contract, Appellant describes the work required by the RFP as "response actions—getting to a site to address the immediate situation—and removal actions—containment, removal, and disposal of hazardous materials to remediate the site." (Appeal Petition 7.) The Area Office determined the primary and vital contract requirement is "the rapid deployment of hazardous material teams." (Size Determination 7, 9.) It is clear from reading the RFP that rapid deployment of a hazardous material response team is the primary service being acquired. The focus of the RFP is responding to the release of hazardous materials into the environment as a result of disasters and terrorist acts, and the contractor must be able to deal with biological warfare agents, radiological materials, and chemical warfare agents, among other substances, at a moment's notice. These are clearly the types of incidents and materials that would require a rapid response on an emergency basis.

The contractor is also responsible for clean-up operations, containment and countermeasures, mitigation and disposal of pollutants, environmental restoration, and analytical activities. These are undoubtedly important contract activities, but they are secondary to the rapid response team deployment. Appellant's president alleges in his declaration that removal services will constitute 80% of any task order issued under the contract, but that is not evident from the solicitation. The solicitation itself stresses the emergency response services. As noted above, it is the solicitation and the proposal that must direct the ostensible subcontractor analysis, not self-serving assertions made thereafter. As the Area Office points out, the rapid response teams will be deployed from the locations of all three subcontractors. Thus, I find no error in the Area Office's conclusion that Appellant will not perform the primary and vital contract requirement.

The Area Office also concluded Appellant is unusually reliant upon WRS. Appellant relies upon *Size Appeal of Colamette Construction Co.*, SBA No. SIZ-5151 (2010), to contend that because all three subcontractors are responsible for performing a primary and vital contract task, it is clear error to conclude that Appellant is unusually reliant upon one of them. There, OHA found: "the fact that Appellant will rely upon multiple subcontractors to perform 70% of the contract cannot establish that Appellant would be unusually reliant upon [one subcontractor]

specifically.” *Id.* at 6. What Appellant fails to mention, however, is that in *Colamette Construction*, the subcontractor at issue would have performed only 3% of the total contract value, and OHA found the record lacked other sufficient evidence to uphold a finding of a violation of the ostensible subcontractor rule. Here, according to the teaming agreement between Appellant and WRS, Appellant “shall award” 49% of the contract work to WRS. Appellant attempts to argue on appeal that the final portion of work to be awarded to WRS will be defined in a later subcontracting agreement, but the plain language of the agreement clearly provides that WRS will perform 49% of the work under the contract. In contrast, there is no specific percentage of work allocated to the other two subcontractors.

Furthermore, there is other evidence in the record that is indicative of an ostensible subcontractor relationship between Appellant and WRS. First and foremost, WRS is the incumbent contractor and can no longer submit a proposal on its own because it exceeds the size standard applicable to the procurement. As the Area Office noted, this factor is not dispositive and does not require finding an ostensible subcontractor relationship. *See Size Appeal of Access Systems, Inc.*, SBA No. SIZ-4843, at 15 (2007). Nevertheless, combined with other factors, it constitutes evidence that Appellant, the small prime contractor, will be unusually reliant upon WRS, its large subcontractor. *CWU, Inc.*, SBA No. SIZ-5118, at 13.

Additionally, Appellant proposes to coordinate resources for each task order using the same procedures WRS currently uses to allocate resources. Appellant’s program manager will work from WRS’s Pennsylvania location, will work closely with WRS’s current program manager, and will use WRS’s established call center to receive task orders. The same cannot be said of Appellant’s relationship with its other subcontractors.

It is also clear from Appellant’s proposal that Appellant relied heavily upon WRS’s experience to establish the team’s relevant past performance. Only the contracts listed for WRS’s past performance involved emergency and rapid response remediation services involving hazardous materials. Appellant’s own contracts involved mostly transportation and disposal of non-hazardous materials and soil excavation, and the contracts performed by Appellant’s other subcontractor involved demolition and environmental remediation. Thus, without WRS’s experience, the team would have no experience with emergency and rapid response remediation services involving hazardous materials, the primary and vital contract task. Additionally, WRS will provide more key personnel than Appellant or either of its other subcontractors.

Based upon all these factors, I find the Area Office correctly determined that Appellant is unusually reliant upon WRS. Although Appellant continually emphasizes that all three subcontractors would provide emergency and rapid response services, what is important is that Appellant will not provide those services, which constitute the primary contract requirements. Moreover, Appellant’s relationship with WRS is clearly more extensive than its relationship with its other subcontractors. Appellant will use WRS’s procedures and facilities to conduct its contract management and other contract responsibilities, WRS will perform 49% of the work according to information contained in Appellant’s proposal, WRS is the incumbent contractor, and WRS is the only team member with experience in providing the emergency and rapid response services required by the contract. Accordingly, WRS is Appellant’s ostensible subcontractor, and Appellant is other than small for this procurement.

IV. Conclusion

Appellant did not meet its burden of proving that the Area Office committed clear errors of law based upon the record before it. Accordingly, this 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(b).

CHRISTOPHER HOLLEMAN
Administrative Judge