United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Fernandez Enterprises, LLC	SBA No. SIZ-4863
Appellant	Decided: August 28, 2007
Appealed from Size Determination No. 6-2007-067	

APPEARANCES

J. Hatcher Graham, P.C., Warner Robins, Georgia, for Appellant.

Thomas J. Spika, President, for Spika Welding & Manufacturing, Inc.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.,* and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. The Solicitation and Protest

On January 24, 2007, the U.S. Army Aviation and Missile Command, Redstone Arsenal, Alabama (Army), issued Solicitation No. W58RGZ-07-R-0266 (RFP) as a total small business set-aside. The RFP is for the acquisition of maintenance platforms for three primary aircrafts (the AH-64 Apache, the UH-60 Blackhawk, and the CH-47 Chinook) in the Army's fleet. The Contracting Officer (CO) designated North American Industry Classification System (NAICS)

code 336413, Other Aircraft Part and Auxiliary Equipment Manufacturing, as the applicable NAICS code for this procurement, with a corresponding 1,000 employee size standard. The CO also incorporated by reference FAR 52.212-1, which provides that the small business size standard for a concern that submits an offer in its own name, but which proposes to furnish an item that it did not itself manufacture, is 500 employees.[1] Offers originally were due on February 26, 2007, but Amendment 6 extended the deadline to March 26, 2007.

On May 15, 2007, the CO notified unsuccessful offerors that the apparent successful offeror was Fernandez Enterprises, LLC (Appellant). On May 22, 2007, Spika Welding & Manufacturing, Inc. (Spika) filed a size protest. Spika alleged that Appellant would supply platforms that were manufactured by West Coast Weld Tech, Inc. (WCWT or the Canada facility) in Canada (due to the fact that WCWT's Montana facility is too small to assemble the platforms), resulting in Appellant supplying an end item that does not meet the requirements of the Buy American Act[2].

On May 23, 2007, the CO forwarded the protest to the Small Business Administration (SBA) Office of Government Contracting – Area VI in San Francisco, California (Area Office). On May 24, 2007, the Area Office informed Appellant of the protest and requested it submit a response, completed SBA Form 355s (for Appellant and the end manufacturer), and certain other information.

On May 31, 2007, Appellant provided the requested information and responded to the protest, arguing that it should be dismissed because Spika did not challenge Appellant's size but merely its compliance with the Buy American Act.

B. The Size Determination

On June 8, 2007, the Area Office issued Size Determination No. 6-2007-067 (size determination), finding that Appellant is not a small business for the instant procurement because it is not supplying an end item manufactured by a small domestic manufacturer.

The Area Office began by analyzing Appellant's size, noting that Sally Fernandez is the President and majority member while WCWT is the minority member. The Area Office determined that Appellant and its affiliates were well below the 500 employee size standard for non-manufacturers. The Area Office then determined that WCWT (the Canadian company) and its affiliates, including West Coast West Tech International, Inc. (WCWT Int'l or the Montana facility), located in Montana, were well below the 1,000 employee size for manufacturers.

The Area Office then addressed Appellant's contention that Spika's protest should not be handled as a size status protest when it merely challenged Appellant's compliance with the Buy

[1] Additionally, the end item being supplied from the non-manufacturer must be from a small domestic end manufacturer in order for the supplier to qualify as a small business on the instant procurement. 13 C.F.R. § 121.406(b)(1)(iii).

[2] 41 U.S.C. § 10(a) - (d).

American Act, stating:

> In order for [Appellant] to qualify as a small business on the instant procurement, it must either be the manufacturer of the end item or supply the end item of a domestic small manufacturer; therefore, [Appellant's] decision to not manufacture the product itself but supply the product of another party falls under the size regulations at 13 CFR Part 121 and can be challenged as a size issue.
>
> The issue at hand is whether WCWT or WCWT Int'l is considered the manufacturer of the end item. WCWT is a Canadian firm and does not qualify as a domestic manufacturer as defined in 13 C.F.R. § 121.406(b)(1)(iii). If, however, WCWT Int'l is considered the manufacturer of the end item, then [Appellant] would qualify as a small business concern on the proposed contract.

Size Determination, at 5.

The Area Office analyzed Appellant's Proposal and determined that the Canadian facility is the manufacturer of the helicopter maintenance platforms, not the Montana-based WCWT Int'l. The Area Office noted that while compliance with the Buy American Act was beyond its authority, it nonetheless found that Appellant would be purchasing more than 50% of the raw materials from American firms, which would be shipped to WCWT in Canada to create kits that WCWT Int'l would then assemble in the U.S. The Area Office compared WCWT and WCWT Int'l, finding that the Canadian facility (WCWT) has more than four times the number of employees and greater fixed assets than the American facility (WCWT Int'l). Further, Appellant's Proposal did not name WCWT Int'l. In addition, WCWT Int'l does not have sufficient personnel to produce the required quantities and SERCO NA (the proposed subcontractor for surge production) is a large business and would disqualify Appellant as a small business under the non-manufacturer rule. Accordingly, the Area Office found WCWT to be the manufacturer of the end item, not WCWT Int'l; therefore, since WCWT is located in Canada, the Area Office found Appellant other than small because it was not supplying the end item of a domestic manufacturer.

C. The Appeal

On June 21, 2007, Appellant filed the instant appeal. Appellant asserts that its Proposal demonstrates that the end item is being produced at its Montana facility. Appellant contends that it provided the Area Office "with hundreds of pages of documents indicating that the platforms…had been manufactured in the past in Montana and that the Appellant could meet the proposed delivery schedule with that facility." Appeal Petition, at 8.

Appellant then lists alleged errors of fact in the size determination. First, Appellant asserts that it has one employee, Sally Fernandez, but that it had binding commitments from management personnel should it have been awarded the contract. Appellant also disputes the Area Office's assertion that Appellant does not own or lease a manufacturing facility. Appellant asserts that its Proposal clearly states that it will be utilizing the Montana facility and that it was in the process of acquiring a production facility in Tucson, Arizona, to assist in meeting

production, if needed.

Appellant also asserts that the Area Office incorrectly assumed that the references in its Proposal to WCWT applied only to WCWT, Inc., the Canadian facility, when WCWT is composed of both the Montana and Canadian facility. Further, "[d]ocumentation, as well as statements by the owner of WCWT, established that raw metal, fabricated components, parts and sheets of metal were shipped to Montana to be formed into sliders, decks, legs and then fabricated into maintenance platforms." Appeal Petition, at 10. While the Canadian facility would perform warehousing, Appellant asserts that the Montana facility would perform "the majority of the effort in 10 of the 12 steps in the process and 71.4% of the materials received in the [sic] Montana are 'raw' materials requiring major fabrication." Appeal Petition, at 11. In addition, since late 2005, the Montana facility "has been the only producer of maintenance platforms for the U.S. market under the WCWT marque [sic]." Appeal Petition, at 10.

Appellant then asserts that its Montana facility does not reassemble disassembled platforms as contended by the Area Office. Instead, Appellant asserts that bulk raw materials are shipped to Canada for storage. Thereafter, the materials are shipped to the Montana facility to be cut and welded into assembled maintenance platforms, which are "then tested, disassembled, packaged and shipped to the customers [sic] site." Appeal Petition, at 13. In sum, Appellant contends that the Canadian facility stores bulk shipments of raw materials, which does not equate to being the end item manufacturer.

To explain the discrepancy in employee population and equipment, Appellant asserts that its Canadian facility has more employees and more complicated machinery because it performs work outside of building helicopter platforms. In contrast, the Montana facility was created solely to produce the platforms. Further, the Montana facility has faced layoffs due to a lack of orders for the platforms. In sum, the facilities do not perform the same function and therefore do not need to possess the same equipment.

Appellant denies that its Montana facility is assembling kits and states that its manufacturing process description, which was provided to the Area Office, details how raw materials are cut and welded to construct the platforms. Appellant maintains that the Montana facility transforms (via welding, cutting, fitting, and fabrication) stacks of aluminum tubing, metal rails, decking, and stair treads into working maintenance platforms, in accordance with 13 C.F.R. § 121.406(b)(2). Appellant asserts that whether the Canadian plant could perform the same process is irrelevant; "[t]he fact is that they do not and will not." Appeal Petition, at 17.

Finally, Appellant disputes the assertion that it cannot meet the delivery schedule with its Montana facility. Appellant asserts that whether or not the contractor can maintain production is for the contracting officer to decide, not the SBA. Regardless, Appellant maintains that its past performance establishes that it can meet the production requirements of the contract, even without acquiring additional facilities, in compliance with the domestic end manufacturer rule.

On June 28, 2007, Appellant moved to admit the exhibits offered with its appeal, including (1) a management personnel chart furnished to the Area Office; (2) a letter from Pacific Custom Brokers that was not supplied to the Area Office, allegedly supporting its claim

that the shipments were labeled kits solely for customs purposes; (3) a version of a document given to the Area Office with additional information provided in a different font, which allegedly explains the Montana facility's manufacturing processes; (4) an affidavit certifying the truth of the information supplied to the Area Office; and (5) the CO's request that Appellant certify that the platforms will be manufactured in the U.S., and Appellant's certification.

D. Protestor's Response

On June 26, 2007, Spika filed its Response to the appeal. Spika disputes Appellant's claim that it shipped eighty-five helicopter maintenance platforms out of its Montana facility during part of Fiscal Year 2006. Spika attached a matrix allegedly demonstrating the labor requirements in order to achieve such a shipment. Spika contends that the Montana facility's alleged four employee workforce would not have been able to produce eighty-five platforms. Spika also attached a statement by Ms. Temperton, a former manager of another company, who "was intimately knowledgeable of the operations" at the Montana facility.

E. Appellant's Motion to Strike

On June 28, 2007, Appellant moved to strike the documentation furnished by Spika in support of its Response. Appellant asserts that the evidence was not presented to the Area Office, in violation of 13 C.F.R. § 134.308(a), and consists of "undocumented assertions and speculations." *See Size Appeal of Virtual Media Integration*, SBA No. SIZ-4447 (2001). On July 3, 2007, Spika submitted a filing allegedly substantiating Ms. Temperton's qualifications to discuss the manufacturing processes at the Montana plant.

IV. Discussion

A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the Area Office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). This Office will disturb the Area Office's size determination only if the Administrative Judge, after reviewing the Record and pleadings, has a definite and firm conviction 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).

C. New Evidence

As a threshold matter, I EXCLUDE from consideration Spika's proffered new evidence. It is well-established that new evidence on appeal will not be considered unless the

Administrative Judge orders the submission of such evidence, or the proponent files a motion establishing good cause for submission of the evidence; neither event occurred here. 13 C.F.R. § 134.308(a)(1), (2).

Appellant moved for the admission of only one exhibit not previously supplied to the Area Office: a letter from Pacific Customs Brokers allegedly explaining why Appellant labeled its shipments as kits. Appellant offers this letter in response to findings made by the Area Office; it is relevant to the arguments on appeal and does not unduly enlarge the issues. Accordingly, I ADMIT Appellant's new evidence into the Record. *See Size Appeal of Leonardo Technologies, Inc*., SBA No. SIZ-4597 (2003). Appellant also moved for the admission of a document explaining the Montana facility's manufacturing processes, which, while provided to the Area Office, contains additional information in a separate font. I ADMIT this document into the Record as it does not unduly enlarge the issues on appeal. *Id*.

D. The Merits

A determination with respect to a concern's compliance with the Buy American Act is outside the scope of SBA's size regulations set forth in 13 C.F.R. Part 121. *See Size Appeal of W.H. Smith Hardware Company*, SBA No. SIZ-2603, at 3 (1987).

However, in order to qualify as a small business concern for a small business set-aside contract to provide manufactured products, an offeror must be either the manufacturer, or supply the end item of a domestic small manufacturer in compliance with the non-manufacturer rule. 13 C.F.R. § 121.406(a). For size purposes, there can be only one manufacturer of the end item. 13 C.F.R. § 121.406(b)(2). Here, it is clear that Appellant is supplying the platforms[3] and is well below the applicable size standard of 500 employees for a non-manufacturer pursuant to 13 C.F.R. § 121.406(b)(1)(i). Therefore, the issue is Appellant's compliance with the domestic manufacturer requirement of 13 C.F.R. § 121.406(b)(1)(iii), *i.e.*, whether Appellant is supplying an end item manufactured by WCWT, a Canadian company, or WCWT Int'l, a domestic company.

In order to be considered a manufacturer, a concern must, with its own facilities, perform the primary activity of transforming substances into the manufactured end item, so that it possesses characteristics it did not have before. 13 C.F.R. § 121.406(b)(2). A firm that performs only "minimal operations" upon the end item does not qualify as a manufacturer. *Id*. Such activities include merely unpacking, modifying, on-site assembly, installing, and integrating components, nearly all of which are produced by a single manufacturer. *See Size Appeal of American Systems Corporation*, SBA No. SIZ-4022 (1995). In evaluating whether operations are minimal, the SBA will consider: (1) the proportion of total value in the end item added by the efforts of the concern; (2) the importance of the elements added by the concern to the function of the end item, regardless of relative value; and (3) the concern's technical capabilities, facilities and equipment, production or assembly line processes, labeling of products, and product

[3] Our caselaw holds that a firm is not the manufacturer of an item produced by an affiliate, if the actual manufacturing is performed by the affiliate. *Size Appeal of Comark Government and Education Sales, Inc*., SBA No. SIZ-4666 (2004).

warranties. 13 C.F.R. § 121.406(b)(2)(i).

In response to the protest, Appellant submitted an email to the Area Office, which purported to discuss the amount of manufacturing performed by WCWT Int'l (Appellant's Exhibit 3). However, these mere assertions, unsupported by documentation in the Proposal or other information submitted by Appellant, are entitled to much less weight than the Proposal itself.

The best source to evaluate Appellant's manufacturing operations is Appellant's own description of how it proposed to perform the contract: Appellant's Proposal. The Proposal was prepared without reference to the issue of which WCWT entity would be performing the work, as that was not an issue at the time of Proposal preparation. Accordingly, the Proposal, upon which the Army based its award, is more probative evidence of Appellant's manufacturing operations than Exhibit 3.

The Proposal discusses at length WCWT's role in contract performance. The Proposal emphasizes WCWT's development of a unique maintenance platform design, and refers to WCWT's manufacturing techniques and practices. Proposal, at 20, 23. The Proposal stresses that Appellant and WCWT are a team, repeatedly referring to the platforms as FE [Fernandez Enterprises]/WCWT maintenance platforms. Proposal, at 20, 22-23. Appellant's Proposal also emphasizes the past performance history of WCWT by stating that "[t]he Fernandez Enterprises team has a six year history in the design, production and delivery of aircraft maintenance platform systems for the AH-64, UH-60, and CH-47 helicopters," and "WCWT has focused on the aerospace, industrial/commercial and manufacturing business lines since 1991." Proposal, at 2, 47. This performance history references the Canadian facility because the Montana facility has only been in existence since 2003, and, according to Appellant, only began manufacturing platforms in late 2005. Appeal Petition, at 2.

Most tellingly, the Proposal states, "Each platform is *fully assembled* on our shop floor before packaging for shipment. This allows us to examine all aspects of workmanship to recheck the *entire platform* to ensure that all parts are included and the *finished product* meets the purchase order specifications." Proposal, at 38 (emphases added). The Proposal thus makes clear that the manufacturing of the platforms takes place entirely at WCWT's facility, with no mention of the manufacturing taking place anywhere but in Canada. The Proposal then states that the platforms are dismantled, cleaned, and then re-assembled at the procuring agency's site. While the platforms are assembled at the site of the procuring agency, OHA's precedent clearly establishes that a firm which performs the on-site assembly of an item is not the manufacturer. *Size Appeal of Nordic Sensor Technologies, Inc*., SBA No. SIZ-4373 (1999); *Size Appeal of American Systems Corporation*, SBA No. SBA-4022 (1995). Therefore, WCWT Int'l is not considered the end item manufacturer even if it performs the on-site assembly.[4]

In its appeal, Appellant contends that the references in its Proposal to WCWT manufacturing the platforms refer to both the Canadian and Montana facility because WCWT is

[4] In Exhibit 3, Appellant alleges that WCWT Int'l performs the on-site assembly; however, the Proposal does not specify WCWT Int'l's role in on-site assembly.

"composed of WCWT, Inc. and WCWT, Int'l." Appeal Petition, at 10. Further, while the Canadian facility previously manufactured these platforms, "the Montana company and facility were formed and acquired specifically to provide a domestic manufacturer for contracts such as the present one and, since late 2005, has been the only producer of maintenance platforms for the U.S. market under the WCWT marque [sic]." *Id.*

However, Appellant's Proposal fails to identify the role of the Montana facility in the manufacturing or fabrication process. There is a reference to the Montana facility in the Proposal's introduction, which simply states that WCWT established a U.S. manufacturing operation in Great Falls, Montana. This passing reference does not make clear that there is a separate U.S. corporate entity serving as the primary manufacturer. The Proposal does not delineate the Montana facility's role or the elements the Montana facility adds to the function of the maintenance platforms. Further, if the Montana facility has been the only producer of maintenance platforms in the U.S. market under the WCWT marquee since 2005, why is this past performance not mentioned in the Proposal? Appellant's argument on appeal appears to be a *post hoc* rationalization.

While the Proposal provides great detail about the assembly process, it does not address the role of the Canadian facility versus the Montana facility in this assembly process. Indeed, the Proposal's Technical Volume has a picture of the Canadian facility alongside a description of the fabrication process. Proposal, at 36. The Proposal also asserts that WCWT installs electrical equipment in accordance with the Canadian electric code, which would be irrelevant if WCWT Int'l were performing the work. Proposal, at 24. Further, the Program Management section of the Proposal provides, "With over 45,000 square feet of fabrication space, WCWT can deliver orders in as short as two and half weeks to eight weeks depending on the platform." Proposal, at 41. This is an obvious reference to the Canadian facility as the Montana facility only has approximately 9,000 square feet.[5] In addition, the Proposal describes SERCO North America's facility, an approximately 6,000 employee concern to be used for surge production, but does not describe the Montana facility where Appellant now alleges the majority of the manufacturing will occur. Appellant's assertion that the Canadian facility is mainly providing warehousing of raw materials is also unsupported in the Proposal.

Therefore, all of the Proposal's experience, technical capability, and design references must be to WCWT alone, and not to WCWT Int'l. According to the Proposal, WCWT is the manufacturer of the platforms, and there is no mention of WCWT Int'l's experience or technical capabilities. Appellant only discussed WCWT Int'l after the protestor raised the issue of whether the platforms were manufactured by a U.S. firm.

In evaluating the Montana facility's product warranties pursuant to 13 C.F.R. § 121.406(b)(2)(i)(C), I note that Appellant's Proposal provides:

[5] While my analysis is focusing on Appellant's Proposal, I note that Appellant provided the Area Office with photographs of the Montana facility. My review of these photographs, however, shows a building that is largely empty, and only partially filled with equipment. The facility seems to lack both equipment and raw materials, and does not appear to be the facility that is the primary manufacturer of the platforms in question here.

> West Coast Weld Tech Inc. [Canadian facility] warrants to its original purchaser that the Helicopter Maintenance Platform is free from defect in material and workmanship at the time shipped by West Coast Weld Tech Inc. [Canadian facility]. Within the warranty period listed below, West Coast Weld Tech Inc. [Canadian facility] will replace or repair any warranted parts or components that fail due to such defects in material or workmanship.

Proposal, Section 10, at 1. Thus, this important guarantee of the quality of WCWT's work is made by WCWT, without reference to WCWT Int'l.

In sum, a review of Appellant's Proposal leads inescapably to the conclusion that WCWT is the manufacturer/assembler of the platforms in question.

I find that the Record establishes that WCWT, the Canadian facility, is the manufacturer of the platforms in violation of 13 C.F.R. § 121.406(b)(1)(iii). The Proposal clearly establishes that WCWT is performing this work. The references in the Proposal are to WCWT's experience, skill, and compliance with Canadian codes. There is no mention of WCWT Int'l's experience or technical capabilities. The appeal attempts a *post hoc* emphasis on WCWT Int'l's role, but the evidence does not establish that WCWT Int'l plays a major role in the manufacturing of these platforms.

Appellant failed to establish there was any clear error by the Area Office, based upon the Record before the Area Office. Accordingly, I affirm the Area Office determination and deny the appeal.

V. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

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

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CHRISTOPHER HOLLEMAN
Administrative Judge