United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Precision Lift, Inc.	SBA No. SIZ-4876
Appellant	Decided: December 17, 2007
Appealed from Size Determination No. 3-2008-2	

APPEARANCES

Marc Lamer, Esq., Kostos & Lamer, P.C., Philadelphia, Pennsylvania, for Appellant.

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

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

On October 24, 2007, the Small Business Administration (SBA) Office of Government Contracting, Area Office III (Area Office) issued Size Determination No. 3-2008-2 finding Precision Lift, Inc. (Appellant) ineligible for award under RFP No. W58RGZ-07-R-0266 (RFP or Solicitation) because it was not supplying an end item manufactured by a small domestic manufacturer and was thus other than small for the procurement. On November 2, 2007, Appellant filed the instant appeal.

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. Accordingly, this matter is properly before OHA for decision.

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. Findings of Fact

I find the following facts have been established by the preponderance of the evidence in the Record:

1. On January 24, 2007, the U.S. Army Aviation and Missile Command, Redstone Arsenal, Alabama (Army), issued RFP No. W58RGZ-07-R-0266 as a total small business set-aside. The RFP is for a Firm Fixed Price Indefinite Delivery/Indefinite Quantity contract for a base year and four option years for the acquisition of maintenance platforms for three primary aircraft (the AH-64 Apache, the UH-60 Blackhawk, and the CH-47 Chinook) in the Army's fleet.

2. 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. Because the Solicitation is for commercial products, the CO also incorporated by reference FAR 52.212-1, which provides, in pertinent part:

> The NAICS code and small business size standard for this acquisition appear in Block 10 of the solicitation cover sheet (SF 1449). However, the small business size standard for a concern which submits an offer in its own name, but which proposes to furnish an item which it did not itself manufacture, is 500 employees.

3. The Solicitation contains FAR 52.219-6, Notice of Total Small Business Set-Aside, which provides, in relevant part, "A small business concern submitting an offer in its own name shall furnish, in performing the contract, only end items manufactured or produced by small business concerns in the United States or its outlying areas…." Further, because the solicitation is a small business set-aside, 13 C.F.R. § 121.406(b)(1)(iii) provides that a concern qualifies as a non-manufacturer if it "will supply the end item of a small business manufacturer or processor made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(3) of this section."

4. The Solicitation contains DFARS 252.225-7001, which implements the Buy American Act (41 U.S.C. § 10(a) - (d)).

5. The Solicitation provided that contract award would be made to the lowest priced technically acceptable offeror (Solicitation, L-1, at 59). The Solicitation also required offerors to provide literature that showed its product meets the Government's requirements. In addition, the offerors were required to include technical literature prepared by a professional engineer concerning "test data and/or loads analysis" of the maintenance platforms. *Id*.

6. The Solicitation stated that initial proposals were due on February 26, 2007; Amendment 6 extended the deadline to March 26, 2007.

7. On February 28, 2007, Appellant submitted its initial proposal. Appellant's

proposal emphasized its experience in providing maintenance platforms for various federal entities and that its products were listed on the U.S. General Services Administration (GSA) schedule. Appellant also certified it was small business concern and attached its pricing quote.

8. On March 15, 2007, the CO informed Appellant that the Army found Appellant's proposal to be technically unacceptable and informed Appellant it had until March 26, 2007, to correct the following deficiencies:

a. Failure to provide test data or load analysis submitted by a professional engineer;

b. The proposal provided only dimensions and did not provide concise commercial technical literature or documentation that included product specifications;

c. Appellant did not document OSHA conformance;

d. The proposal did not substantiate product conformance, *i.e.*, there was no test, functionality, or capability data;

e. The proposal lacked data on setup and training at destinations;

f. The proposal did not explain if West Coast Weld Tech (WCWT) would be Appellant's subcontractor; and

g. The drawings provided did not identify if they were for the items being proposed.

9. On March 23, 2007, Appellant submitted information responsive to the CO's March 15, 2007 letter. Among other things, Appellant explained that WCWT would be its subcontractor and that they have been doing business together since 2001.[1] Appellant also provided several user guides pertaining to platforms for each helicopter type and a load analysis to the CO. *See* Contracting Officer Declaration (November 30, 2007). None of these technical volumes identify a place of manufacture.

10. On April 6, 2007, Counsel for Appellant provided information to the CO that established Appellant had refused (on March 20, 2007) a February 20, 2007 offer from Fernandez Enterprises, LLC offering Appellant a substantial commission if Appellant would not submit an offer under the solicitation (Appellant's Protest Response, Exhibits O - Q).

11. On April 19, 2007, Appellant's President, Mr. John Tollenaere, sent a letter to WCWT stating that:

[1] WCWT, Inc. (located in Canada) established WCWT, Int'l (located in Montana) as a subsidiary to perform manufacturing when a competition required an end item to be manufactured in the U.S.

> [Appellant] appreciates receiving this Annual Update, expressing the letter of intent to maintain and expand on [WCWT's] commitment to manufacturing and production in Montana. As you know, [Appellant] continues to endeavor to secure U.S. contracts based on manufacturing being conducted in Montana, and relies on such assurances from the manufacturers it may use in this regard.
>
> It is our understanding that WCWT is committed to manufacturing aircraft fall protection maintenance platforms at its manufacturing facility in Great Falls, Montana. Consequently, and based on this assurance from WCWT, [Appellant], as part of its manufacturing source information, will inform U.S. Congressman Denny Rehberg of WCWT's commitment and the intent to increase the work force to 16 to facilitate the Congressionally funded U.S. contracts for such platforms.

12. On May 1, 2007, the CO sent a letter to Appellant that stated:

> The purpose of this letter is to confirm our phone conversation conducted on May 1, 2007 in which you were informed that your proposal was technically acceptable and of the following:
>
> a. Send a letter verifying that the end products will be manufactured in the U.S. since [Appellant] is teaming with [WCWT] which is a Canadian Company.
>
> You are hereby notified in accordance with FAR 15.307 that all discussions on the subjected [sic] RFP are concluded. Your final proposal revision is due no later than the close of business 07 May 2007 and must be received via email or fax. The Government intends to make award of this RFP without obtaining any further revisions.

13. On May 4, 2007, Appellant wrote to the CO and stated:

> [Appellant] verifies that any and all end-products that it will supply under a contract awarded to it arising from the above referenced proposal will be manufactured domestically, as required by the clause at DFAR 252.225-7001, Buy American Act and Balance of Payment Program, incorporated therein.

14. Final proposal revisions were due May 14, 2007. *See* CO Fax-Back Memo (November 5, 2007).

15. On May 14, 2007, Appellant submitted its final proposal revisions.

16. On July 1, 2007, WCWT's President, using a Great Falls, Montana address and referring to the Montana entity (WCWT, Int'l, as opposed to WCWT, Inc., the Canadian facility) wrote to Appellant and stated:

> West Coast Weld Tech International agrees to perform as the sole subcontractor

> and supplier of the West Coast Weld Tech designed phase maintenance platforms to [Appellant] in accordance with DFAR 252.225-7001…to provide AH-64, UH-60 and CH-47 maintenance platforms to the US Army….
>
> Additionally, while working as a subcontractor to [Appellant], in accordance with Solicitation No. W58RGZ-07-R-0266 for the potential five year buy of maintenance platforms, West Coast Weld Tech International agrees to comply with the attached statement of work.
>
> By receipt and acknowledgement of this letter, [Appellant] agrees to exclusively use the West Coast Weld Tech International phase maintenance platform designs for the identified Solicitation No. W58RGZ-07-R-0266 to the US Army Aviation and Missile Command.

17. On July 7, 2007, WCWT's President, again using the Great Falls, Montana address, referred to the instant solicitation and assured Appellant the Montana facility was open and outfitted in preparation of the orders. WCWT informed Appellant it:

a. Had the ability to expand;

b. Would have the necessary equipment in place to support the contract;

c. Had a skeletal crew in place and was ready to increase its manning; and

d. Had letters of commitment from its suppliers.

18. On August 1, 2007, the Defense Contract Management Agency (DCMA) conducted an onsite Preaward Survey at WCWT's Great Falls, Montana facility. DCMA found that "[t]he requested Evaluation Factors of Technical, Production and Quality Assurance capability were investigated and found to be Satisfactory" (Preaward Survey, at 1). Further, DCMA noted:

> The observations…regarding the suspicion of WCWT's intention to remain at its Great Falls, MT location for all manufacturing operations of the Maintenance Platforms and its intent to comply with the FAR 52.225-1 Buy American Act and DFARS 252.225-7001…are considered by the undersigned to be speculative in nature. There is no hard evidence of non-compliance or the intention on the part of WCWT not to fully comply with these FAR/DFARS provisions in performing under a purchase order for the Maintenance Stands from the Prime. Until such an event would occur, there are no grounds of proof under this preaward survey to warrant negative findings of violation of the…Buy American Act….

(Preaward Survey, at 2).

19. On September 27, 2007, the CO notified unsuccessful offerors that the apparent successful offeror was Appellant. On September 28, 2007, Spika Welding & Manufacturing,

Inc. (Spika) filed a size protest. Spika alleged that Appellant would supply platforms that were manufactured by WCWT at its Canadian facility, resulting in Appellant supplying an end item that was not manufactured by a small domestic manufacturer. Spika also noted that WCWT had "previously been ruled ineligible to receive this manufacturing contract" in *Size Appeal of Fernandez Enterprises, LLC*, SBA No. SIZ-4863 (2007) (*Fernandez*).

20. On October 1, 2007, the CO forwarded the protest to the Small Business Administration (SBA) Office of Government Contracting – Area III in Atlanta, Georgia (Area Office). On October 3, 2007, the Area Office informed Appellant of the protest and requested it submit a response, a completed SBA Form 355, a description of "the adequacy of WCWT operations in Montana toward the manufacture of the end product," and certain other information.

21. On October 9, 2007, Appellant provided the requested information and responded to the protest, noting that the *Fernandez* decision did "not represent binding precedent with respect to [Appellant]" (Protest Response, at 2). On October 19, 2007, Appellant responded to the Area Office's request for additional information. Appellant asserted that in August 2007, it presented its manufacturing plan to DCMA, addressing specifically how Appellant would satisfy the domestic production requirement at WCWT's Montana facility. Appellant noted that while it was aware that the platforms must be manufactured domestically, it was "unaware of any requirement that the same specific products are <u>being</u> manufactured at the time of offer submission or at the time of certification (otherwise, a newly-formed firm could never qualify)" (Protest Response, at 2 (emphasis in original)). Appellant asserted that it certified in May 2007 that it would be supplying domestic platforms. Appellant also noted that while WCWT's Montana facility had been dormant, it has been "ramping up production capabilities since April of [2007]" (Protest Response, at 1).

B. <u>The Size Determination</u>

On October 24, 2007, the Area Office issued Size Determination No. 3-2008-2 (size determination) finding Appellant ineligible for the instant procurement because it was not supplying an end item manufactured by a domestic manufacturer.

The Area Office began by addressing compliance with the size standard, noting that the number of employees at Appellant, WCWT, Inc. (Canadian facility) and WCWT, Int'l (Montana facility) was well under the 500 employee size standard for non-manufacturers.

The Area Office then noted a "problematic" Preaward Survey at WCWT's Montana facility. Specifically, the site visit was delayed by three weeks and the building was unoccupied, with limited material and product available (one complete maintenance stand and subassemblies). However, the Area Office noted the Preaward Survey indicated that WCWT's Montana facility was technically capable of performance in the event of award.

Appellant certified as a small business concern on May 14, 2007; accordingly, the Area Office determined Appellant's compliance with the domestic manufacturing rule as of that date. The Area Office referenced Appellant's protest response, which stated that it did not believe the

manufacturing facility had to be manufacturing at the time of offer, but rather that the machinery had to be in place at the critical times. The Area Office found this response implied "that the platforms have not previously been manufactured at the Montana facility and also explains why most of the documentation submitted for this size determination was dated with revisions, expansions and proposed hiring in Montana after May 2007" (Size Determination, at 4).

Next, the Area Office noted a discrepancy between the production manual logo supplied by the CO (WCWT's Canadian facility logo, and warranty by the Canadian plant) and the manual supplied by Appellant (Montana business address). The Area Office then reviewed shipping invoices prior to May 2007 that indicated platforms were shipped "disassembled" to the Montana facility. The Area Office also reviewed the Manufacturing Equipment List and concluded that more welding machines were located at the Canadian facility while more labor was performed in Montana.

The Area Office then stated that absent a technical volume to review:

> 13 C.F.R. § 121.103(a)(5) states in determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation. While affiliation is not an issue in this matter, the totality of the circumstances rule allows SBA to look at all factors to determine whether or not a particular small business requirement is met.

(Size Determination, at 5). While the Area Office stated that the Montana facility intends to expand, as of May 2007, the Area Office found that it was not equipped to produce the platforms. Accordingly, the Area Office found Appellant ineligible for the instant procurement because it was not supplying an end item manufactured by a small, domestic manufacturer.

C. The Appeal

On November 2, 2007, Appellant filed the instant appeal. Appellant argues that the Area Office erroneously concluded that no manufacturing could take place at WCWT's Montana facility based on the fact that as of May 2007, no manufacturing was taking place in Montana. Appellant asserts that SBA's regulations do not require manufacturing to be taking place at the time of offer; instead 13 C.F.R. § 121.406(b)(1)(iii) provides that a concern qualifies as a non-manufacturer if it "will supply the end item of a small business manufacturer or processor made in the United States…." (Appeal Petition, at 7).

Appellant then contends the Area Office unreasonably found there was a risk that manufacturing could be accomplished outside the U.S. Appellant argues that the Area Office's "assertion" is in direct contravention to the DCMA Preaward Survey's conclusion that WCWT's Montana facility was capable of manufacturing the platforms in the event of award. Appellant contends the Area Office disregarded: (1) Appellant's representations to the Army in response to the request that Appellant verify that the platforms would be manufactured domestically (at the risk of an 18 U.S.C. § 1001 false statement violation); (2) Appellant's representations to the SBA in Appellant's President's Declaration, under penalty of perjury, that the manufacturing would be

domestic; (3) the DCMA Preaward Survey; and (4) the terms of Appellant's potential contract.

Appellant also disputes the Area Office's reference to a WCWT production manual allegedly supplied to the CO with Appellant's original proposal. Appellant contends that it never supplied a production manual to the CO with its original proposal[2]. Even after the CO requested additional information, Appellant maintains it did not supply a complete production manual. Rather, it supplied a compilation of production information to the DCMA that addressed its: (1) quality system; (2) material handling; and (3) Montana production processes, all of which showed its Montana address. Appellant presumes that the production manual referred to by the Area Office was actually supplied by Fernandez Enterprises. Finally, Appellant argues that the Area Office's reliance on the fact that WCWT's Canadian facility has more machinery is misguided. Appellant contends that WCWT's Canadian facility will always have more machinery than the Montana facility as it produces many items aside from platforms. Accordingly, Appellant argues that any comparison of the machinery at WCWT's facilities is irrelevant.

D. Protestor Response

On November 13, 2007, Spika filed its Response. Spika alleges Appellant's initial proposal does not specify that WCWT's Montana facility will be manufacturing the platforms. Spika asserts that only after OHA's decision in *Fernandez* did Appellant make a point of clarifying that production would be at the Montana facility. Specifically, Spika alleges that the "ruling of ineligibility of Fernandez Enterprises teaming with [WCWT] provided an excellent blueprint for [Appellant] to follow in an attempt to navigate through the pitfalls of this contract" (Response, at 2). Spika asserts that it is irrelevant whether WCWT could produce the platforms in Montana. Spika argues that Appellant's initial proposal lists the Canadian facility as the manufacturer and renders Appellant ineligible for award.

E. Subsequent Filings

On November 16, 2007, Spika submitted a filing (and attached its GAO letter) alleging that Appellant had purchased platforms from WCWT's Canadian facility "in fulfillment of a Federal DOD purchase," contradicting Appellant's alleged statement that it had used WCWT's Montana facility on all small business set-asides since 2005.

On November 19, 2007, Appellant filed a Reply stating that the contract at issue was a GSA Federal Supply Schedule (FSS) contract that included the Trade Agreements Act clause, allowing Appellant to supply Canadian products, and further was not a small business set-aside contract.

On November 28, 2007, I ordered the CO to submit a declaration addressing whose production manual was supplied to the Area Office. On November 30, 2007, the CO filed a Declaration stating that she did not forward anything specifically titled "production manual" to the Area Office. However, the CO did forward various technical documents received from

[2] On November 16, 2007, Appellant filed a Declaration by John Tolleneare, Appellant's President, asserting that Appellant did not supply a production manual with its offer.

Appellant as part of its proposal, including: (1) Appellant's test data/load analysis report entitled "Rotorcraft Maintenance Platform Linear Finite Element Analysis Document," containing WCWT's Canadian address; and (2) WCWT's user guides for each of the requested maintenance platforms.

On December 4, 2007, I ordered Appellant to submit a filing addressing whether WCWT's Montana facility's lease had been renewed and, if so, Appellant was to provide proof of the renewal.

On December 6, 2007, Appellant submitted a copy of WCWT's lease renewal, dated November 15, 2007, securing the Montana facility for an additional two year period (until November 15, 2009). Appellant also responded to the CO's November 30th filing. Appellant acknowledges that some of the documents supplied to the CO contain WCWT's Canadian address, but notes that these documents addressed the platforms' design and not the platforms' production. Moreover, Appellant states:

> [It] knows of no regulation that would required [sic] a foreign company that established an American production facility to reprint its original design data or manuals (or for that matter its warranty literature) to reflect the address of the American manufacturing facility, instead of its corporate headquarters. Moreover, that would most certainly make little sense to do simply for the purpose of offer submission (i.e., prior to award of an actual contract for the manufacture of items in the American facility).

(December 6, 2007 Response, at 3).

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. I will disturb the Area Office's size determination only if, after reviewing the Record and pleadings, I have 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. Preliminary Matters

As a threshold matter, I EXCLUDE Spika's November 16, 2007 filing as irrelevant because I do not find it to be probative of any issue before me in this appeal. FRE 402; 13 C.F.R. § 134.223. More specifically, Spika's filing contains allegations about Appellant's

performance under a GSA Delivery Order that was not a small business set-aside and thus has no relevance to this appeal.

I also EXCLUDE from the Record that part of Appellant's December 6, 2007 Response to my December 4, 2007 Order (including any documents or explanation) that goes beyond the issue of the lease.[3] I do find that WCWT has the continued right to occupy the facility in Great Falls, Montana until 2009.

D. The Merits

1. Introduction

This appeal presents unique facts as it intersects with a previous OHA decision, *Fernandez*, involving the same solicitation and subcontractor (WCWT) at issue here. *See Size Appeal of Fernandez Enterprises, LLC*, SBA No. SIZ-4863 (2007). OHA's decision was based largely on Fernandez's proposal and documents Fernandez submitted with its proposal. *Fernandez*, at 7. Based upon these documents, Judge Holleman found the Area Office did not make a clear error of law or fact in determining Fernandez to be other than small because it was supplying an end item (manufactured by WCWT) that Fernandez's proposal showed would be manufactured in Canada.

The facts before me in this appeal are distinguishable. The CO informed Appellant that its initial proposal was technically unacceptable because, essentially, Appellant furnished almost no information with its proposal (Fact 8). Prior to submitting its final proposal revisions, Appellant provided significant amounts of technical information to the CO, none of which identified Canada as a point of manufacture (Fact 9). In addition, Appellant provided ample correspondence that established an unequivocal understanding and commitment by Appellant and WCWT to manufacture the platforms in the United States (Facts 11 - 13). Thereafter, the DCMA performed a Preaward Survey (a task DCMA has great experience performing) and concluded there was no proof WCWT intended to manufacture the platforms anywhere else than Great Falls, Montana (Fact 18).

I also note the size determination contains a discussion of the totality of the circumstances rule, which is only applicable to questions of affiliation. This is necessarily erroneous since affiliation is not at issue here. Here, it is clear that Appellant is supplying the platforms 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). Further, it is established that WCWT, Appellant's manufacturer, is a small business manufacturer. Therefore, the only issue is Appellant's compliance with the domestic manufacturer requirement of 13 C.F.R. § 121.406(b)(1)(iii)[4], *i.e.*, whether Appellant will be supplying an end item manufactured by WCWT, Inc., a Canadian company, or WCWT, Int'l, a domestic company.

[3] I note the Linear Finite Element Analysis proffered by Appellant is part of the Record.

[4] However, 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).

2. Applicable Regulation

Pursuant to 13 C.F.R. § 121.406, to be a qualified small business concern and sell manufactured goods to the United States under a small business set-aside procurement, an offeror must either:

> (1) Be the manufacturer of the end item being procured (and the end item must be manufactured or produced in the United States); or
> (2) Comply with the requirements of paragraph (b), (c) or (d) of this section as a nonmanufacturer, a kit assembler or a supplier under Simplified Acquisition Procedures.
> (b) Nonmanufacturers. (1) A concern may qualify for a requirement to provide manufactured products as a nonmanufacturer if it:
> (i) Does not exceed 500 employees;
> (ii) Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied; and
> (iii) Will supply the end item of a small business manufacturer or processor made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(3) of this section.

3. Analysis of the Area Office Findings

The Area Office determined WCWT was going to manufacture the platforms in Canada and not Montana based upon the following:

1. Appellant's production manual provided to the CO with Appellant's original proposal that showed a WCWT Canadian Logo and warranties by WCWT, Inc. (the Canadian facility);

2. A history of disassembled platforms being shipped from WCWT Canada to WCWT Montana;

3. More employees in the Canadian plant than the Montana plant;

4. "Not much welding was occurring in the Montana location prior to 2007";

5. DCMA's Preaward Survey that does not indicate platforms are currently being manufactured in Montana, but does indicate an expansion is planned; and

6. A discussion of the totality of the circumstances, without an explanation of what it had to do with the ultimate determination.

The Area Office's reasoning is materially deficient. First, as discussed above, a totality of the circumstances analysis is inapplicable to this case because this case does not involve issues of affiliation. Second, contrary to the Area Office's claim, the Record does not contain Appellant's Production Manual that was allegedly supplied with its initial proposal. Rather, the

Record only contains User Guides (for the various maintenance platforms) and engineering reports/analyses, which Appellant provided to the CO on March 23, 2007, prior to final proposal revisions (Fact 9).

Neither the User Guides nor the engineering reports/analyses identify a manufacturing location. Instead, as may be expected with user guides, these User Guides address assembly and operation issues and not the production of the platforms. Accordingly, the fact that WCWT, Inc. (the Canadian facility) is captioned on the User Guides is irrelevant because Appellant was merely supplying design data that had not changed since its GSA FSS contract. The Record makes it far more likely that all the WCWT, Inc. reference indicates is that WCWT has not edited these documents because the maintenance platform designs have not changed since its GSA contract and thus the instructions to the users on how to assemble, move, or use the platforms need not change. Therefore, to the extent the *Fernandez* decision may be read to reach a different understanding, I decline to follow it.

The User Guides contain warranty references to WCWT, Inc. (the Canadian facility) and not WCWT, Int'l (the Montana facility). I do not find these references indicative of Appellant's intent to manufacture the platforms in Canada. Rather the references merely indicate that WCWT offers a warranty, not where the platforms will be manufactured. Moreover, WCWT's warranty language in the User Guides is irrelevant, for Appellant as the prime contractor is ultimately responsible for the warranty required by the contract[5]. Plainly, WCWT as Appellant's subcontractor is not in privity with the Army and has no contractual obligation to the Army to honor the warranty. Hence, under facts of this appeal, I do not find the warranties stated in the User Guides to be relevant to the place of manufacture.

The Area Office's remaining findings are superficial and irrelevant. Specifically, it is irrelevant that there may be more employees in the Canadian plant or that the Montana plant is not currently manufacturing the platforms. This is only logical, for WCWT's Montana plant has less employees and less equipment than the Canadian plant because it is a newer and smaller operation. Further, SBA's regulations do not require manufacturing to be taking place at the time of offer; instead 13 C.F.R. § 121.406(b)(1)(iii) provides that a concern qualifies as a non-manufacturer if it "will supply the end item of a small business manufacturer or processor made in the United States…." (emphasis added). Thus, objective evidence of the intent of Appellant and WCWT concerning what they "will" do must be demonstrated on or before Appellant's final proposal revisions (*See infra*, Part 4). Any other holding would necessarily exclude new companies or companies expanding or changing their operations

The Area Office committed a clear error when it relied on its suspicions and disregarded: (1) Appellant's representations to the Army in response to the request that Appellant verify that the platforms would be manufactured domestically (at the risk of an 18 U.S.C. § 1001 false statement violation); (2) Appellant's representations to the SBA in its President's Declaration under penalty of perjury that the manufacturing would be domestic; and (3) the DCMA Preaward Survey. Absent objective and unambiguous proof to the contrary, the Area Office must accept this evidence, especially since its substance is that Appellant and WCWT intend to comply with

[5] Solicitation, H-1, at 37.

the contract terms and supply domestic end products.

The Area Office also ignored DCMA's critical finding relevant to 13 C.F.R. § 121.406(b)(1)(iii). While relying on the minor finding by DCMA that not much manufacturing had been going on in Montana, the Area Office ignored the DCMA's specific finding that:

> There is no hard evidence of non-compliance or the intention on the part of WCWT not to fully comply with these FAR/DFARS provisions in performing under a purchase order for the Maintenance Stands from the Prime. Until such an event would occur, there are no grounds of proof under this Preaward survey to warrant negative findings of violation of the…Buy American Act….

(Fact 18).

Since the Area Office relied upon part of the DCMA's Preaward Survey in the size determination, the Area Office must discuss and weigh the entire DCMA report. The Area Office was bound to discuss why it gave weight to one finding yet ignored DCMA's ultimate conclusion that WCWT could manufacture the platforms in Montana. In making this statement, I take notice that DCMA's expertise is in conducting preaward surveys. Therefore, since DCMA concluded there was no proof that WCWT would not manufacture the platforms in Montana, the Area Office was either bound to accept DCMA's conclusions or required to discuss why it was disregarding them. Instead, the Area Office did neither. This is clear error.

In sum, I find the Record does not support the Area Office's finding that manufacture of the maintenance platforms will not occur in the United States. Instead, the Record shows:

1. WCWT leased and equipped a facility to manufacture the platforms;

2. WCWT had made arrangements to increase its manufacturing capacity in Montana; and

3. WCWT intended to manufacture the platforms in Montana.

(Facts 9, 11 - 13, 16 - 18) From my examination of the size determination, I find the Area Office gave no weight to these facts or failed to consider them, which is clearly erroneous.

4. Appellant's Representations

Before the close of proposals (let alone the *Fernandez* decision), Appellant unequivocally manifested its intent and understanding that WCWT would manufacture the helicopter maintenance platforms in Montana (Facts 9, 11 - 13). Further, both Appellant and WCWT understood WCWT had to manufacture the helicopter maintenance platforms in the United States and Appellant verified its intent to provide the platforms as domestic end products to the CO (Fact 13).

Accordingly, I find the Record supports Appellant's representations that it will manufacture the helicopter maintenance platforms in Montana. In making this finding, I note it is outside the scope of my review to guarantee the platforms will be manufactured in Montana. Instead, it is the CO's responsibility to ensure the Army receives the required domestic end products; if not, it is the CO's responsibility to bring this matter to the attention of those responsible for investigating fraud.

V. Conclusion

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

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

_____

THOMAS B. PENDER
Administrative Judge