

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

SIZE APPEAL OF:

Space Concepts, LLC

Appellant

RE: Spacesaver Intermountain, LLC

Appealed from

Size Determination No. 6-2010-135

SBA No. SIZ-5169

Decided: November 30, 2010

ORDER REMANDING CASE

I. Introduction & Jurisdiction

On September 23, 2010, the U.S. Small Business Administration's (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2010-135 finding Spacesaver Intermountain, LLC (Spacesaver IM) to be a manufacturer of the item being procured by the solicitation at issue. For the reasons discussed below, this matter is remanded to the Area Office for further investigation.

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

II. Background

A. Solicitation and Protest

On July 28, 2010, the Contracting Officer (CO) for the U.S. Department of the Interior, U.S. Geological Survey issued Request for Quotations No. 10WRQQ0268 (RFQ) seeking mobile storage shelving units. The RFQ was a total small business set-aside, and the CO designated North American Industry Classification System (NAICS) code 337214, Office Furniture (Except Wood) Manufacturing, with a corresponding size standard of 500 employees.

On August 24, 2010, the CO notified unsuccessful offerors, including Space Concepts, LLC (Appellant) that Spacesaver IM was the apparent successful offeror. On August

30, 2010, Appellant filed a protest challenging Appellant's eligibility for the solicitation. Specifically, Appellant argued that Spacesaver IM is a representative of Spacesaver Corporation, a large business and the actual manufacturer of the products being acquired.

#### B. Size Determination

On September 23, 2010, the Area Office issued its size determination finding Spacesaver IM to be eligible for the subject solicitation. The Area Office first determined that Spacesaver IM is affiliated with Henriksen-Butler Design Group, LLC (HBDG) based upon common management and ownership. 13 C.F.R. § 121.102(e). The Area Office next considered Spacesaver IM's compliance with the regulation governing the provision of manufactured products under small business set aside contracts. 13 C.F.R. § 121.406.

The Area Office quoted the applicable regulations, which provide that to be eligible for the subject solicitation, Spacesaver IM must be either the manufacturer of the end product (as defined at 13 C.F.R. § 121.406(b)(2)) or must comply with the nonmanufacturer rule (set forth at 13 C.F.R. § 121.406(b)(1)). 13 C.F.R. § 121.406(a). The Area Office then examined Spacesaver IM's responses to the three factors to be considered under the definition of manufacturer: (1) the proportion of value Spacesaver IM adds to the end product, (2) the importance of the elements added by Spacesaver IM, and (3) Spacesaver IM's technical capabilities. Spacesaver IM explained that it adds 58% of the total value of the end product, assembles over 5,400 components into the end product, and has the capability to assemble different parts from different suppliers within its own facilities. Based upon these responses, the Area Office concluded Spacesaver IM is the manufacturer of the end item being procured. Finally, the Area Office determined the aggregate employees of Spacesaver IM and its affiliate, HBDG, do not exceed 500. Thus, Spacesaver IM is eligible for this procurement.

#### C. Appeal Petition

On October 6, 2010, Appellant filed the instant appeal. On October 26, 2010, Appellant filed a supplemental appeal petition. Appellant contends Spacesaver IM is not the manufacturer of the end item being procured. Instead, Appellant claims Spacesaver IM is merely an assembler of components used to build mobile storage systems. Appellant explains it, like Spacesaver IM, is an industry dealer that represents a specific manufacturer of mobile storage systems. According to Appellant, Spacesaver IM represents Spacesaver Corporation.

Appellant asserts that Spacesaver Corporation is a large manufacturer of mobile storage units with a GSA contract. Appellant explains Spacesaver Corporation manufactures products and distributes them through area contractors such as Spacesaver IM. According to Appellant, the contractors are responsible for sales and installation, but Spacesaver Corporation provides the warranty and is responsible for product liability issues arising from its manufactured components.

Appellant disputes Spacesaver IM's assertion that it supplies 58% of the value of the end product. Appellant claims Spacesaver IM merely *assembles* components supplied by Spacesaver Corporation, and the value Spacesaver IM adds represents no more than 12-15% of the total cost

of the end item. Appellant includes photographs of various mobile storage unit components to demonstrate the installation service Appellant contends Spacesaver IM provides. In sum, Appellant argues Spacesaver IM is an assembler (just like Appellant), but is not a manufacturer, and contends the size determination is in error. On this basis, Appellant requests that OHA reverse the size determination.

#### D. Spacesaver IM's Response

On October 27, 2010, Spacesaver IM filed its response to the appeal.<sup>1</sup> On November 8, 2010, Spacesaver IM filed its supplemental response. Spacesaver IM emphasizes that it is a separate and distinct entity from Spacesaver Corporation. Spacesaver IM asserts that it did not use any part of Spacesaver Corporation's GSA contract as part of its bid for the instant procurement. Spacesaver IM contends it meets the requirements of the nonmanufacturer rule "as far as it pertains to [this procurement] under FAR 19.102 and FAR 52.219-27(c)(2)." (Response 2.) Spacesaver IM highlights that under those sections, there can only be one manufacturer of the end item being procured and the manufacturer can be the concern that transforms miscellaneous components into the end product. Spacesaver IM explains that it is utilizing seven different suppliers for this procurement and reiterates that it adds 58% of the value of the end item, assembles over 5,400 parts to complete the end product, and does so within its own facilities.

Spacesaver IM next disputes a number of Appellant's contentions. Spacesaver IM asserts it provides all warranties for and is responsible for all liability issues arising from the end product. Most importantly, Spacesaver IM indicates that the components for this solicitation are not being supplied exclusively by Spacesaver Corporation nor is Spacesaver IM using Spacesaver Corporation's GSA contract as part of its bid on this project. Spacesaver also contends the photographs provided by Appellant are not representative of the units or components required by this procurement. Spacesaver argues much of the information contained in the appeal petition is irrelevant to the instant procurement. Spacesaver IM concludes it is the manufacturer of the end item being acquired under this contract and contends the size determination should be affirmed.

#### E. Appellant's Reply

On November 10, 2010, Appellant filed a reply to Spacesaver IM's response. A reply to a response is not permitted unless the Judge directs otherwise. 13 C.F.R. § 134.309(d). Appellant did not request leave to file a supplemental pleading, and the reply contains no new information relevant to this appeal. Accordingly, Appellant's response is EXCLUDED from the record, and I will not consider it in deciding this matter.

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<sup>1</sup> On October 27, 2010, Spacesaver IM also filed a Motion to Dismiss for Lack of Service. On October 29, 2010, I held a teleconference with the parties and thereafter issued an Order denying the Motion to Dismiss.

### 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. 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

Although Spacesaver IM seems to think the nonmanufacturer rule is set forth at FAR § 19.102(f)(1), the rule by which it must abide is in fact found at 13 C.F.R. § 121.406. That rule provides that to be eligible for a small business set-aside contract for the acquisition of manufactured goods, a firm must either (1) be the manufacturer of the end item being produced or (2) comply with the so-called nonmanufacturer rule.<sup>2</sup> 13 C.F.R. § 121.406(a). The Area Office determined that Spacesaver IM is the manufacturer of the end item being procured by the solicitation at issue. The applicable regulation offers the following guidance when determining whether a concern is considered a manufacturer:

For size purposes, there can be only one manufacturer of the end item being acquired. The manufacturer is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. The end item must possess characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed. The end item may be finished and ready for utilization or consumption, or it may be semifinished as a raw material to be used in further manufacturing. Firms which perform only minimal operations upon the item being procured do not qualify as manufacturers of the end item. Firms that add substances, parts, or components to an existing end item to modify its performance will not be considered the end item manufacturer where those identical modifications can be performed by and are available from the manufacturer of the existing end item:

(i) SBA will evaluate the following factors in determining whether a concern is the manufacturer of the end item:

(A) The proportion of total value in the end item added by the efforts of the concern, excluding costs of overhead, testing, quality control, and profit;

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<sup>2</sup> Alternatively, the firm could comply with rules concerning kit assemblers or simplified acquisition procedures, but those rules are not at issue here.

(B) The importance of the elements added by the concern to the function of the end item, regardless of their relative value; and

(C) The concern's technical capabilities; plant, facilities and equipment; production or assembly line processes; packaging and boxing operations; labeling of products; and product warranties.

13 C.F.R. § 121.406(b)(2)(i).

In answer to the Area Office's questions with regard to the factors set forth in the regulation, Spacesaver IM explained that it adds 58% of the total value of the end product, assembles over 5,400 components into the end product, and has the capability to assemble different parts from different suppliers within its own facilities. Accordingly, the Area Office concluded Spacesaver IM is the manufacturer of the end item being procured by this RFQ.

In most cases before OHA involving a nonmanufacturer question, the decision rests heavily upon the challenged firm's proposal to determine whether the concern is manufacturing the end item being acquired. *See, e.g., Size Appeal of Fernandez Enters., LLC*, SBA No. SIZ-4863 (2007) ("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."). There is no proposal in the record here (presumably because the solicitation was an RFQ conducted under simplified acquisition procedures). Therefore, it was particularly important for the Area Office to investigate the work that Spacesaver IM would perform under the contract. Unfortunately, however, the Area Office performed no analysis whatsoever to reach its conclusion that Appellant is a manufacturer. Instead, it merely accepted Spacesaver IM's self-serving and conclusory assertions.

First, there is no explanation in the record as to how Spacesaver IM adds 58% of the value of the end item being procured. Spacesaver IM emphasizes that FAR § 19.102(f)(1) provides that the manufacturer of a product can be the concern that "transforms . . . miscellaneous parts or components into the end product." However, the record includes no calculations upon which to judge Spacesaver IM's assertion that it adds 58% of the total value of the end product, nor does it include any specific description of how Spacesaver IM "transforms miscellaneous parts or components into the end product." Spacesaver merely declares that its bill of materials consists of approximately 125 line items from seven suppliers and that it will assemble over 5,400 parts to assemble the end product. It appears the Area Office accepted these assertions without thought or question. Spacesaver IM did submit its bill of materials, but failed to offer any explanation of how this list of components compels the conclusion that the company adds 58% of the value of the end product.

Second, Spacesaver IM asserts it provides an important element of the end item because without the 5,400 components being assembled, there would be no functional end item. Again, it appears the Area Office accepted this statement without any analysis. There is no discussion in the size determination regarding what elements or services Spacesaver IM actually performs and how those elements and services are important to the function of the end item. The record

simply does not reflect the level of assembly that is required to transform the 5,400 components into the end item. The only evidence in the record related to this question is again Spacesaver IM's bill of materials. Even with this information, though, it is impossible for someone not experienced in this field to determine the amount of work required to assemble the components. It is difficult to believe that, without any explanation the Area Office thoroughly understood the process of assembling anti tip rails, anchors, LPLF panels, various types of carriages, etc. into mobile shelving units. Additionally, although Spacesaver IM continually emphasizes the total number of components, at least 644 of the components on the list are screws. Without any explanation, there is no way to discern the complexity of the assembly Spacesaver IM is performing.

Third, with regard to Spacesaver IM's technical capabilities, the firm asserts it has the personnel, facilities, and equipment necessary to assemble the components. However, there is no explanation in the record of the type or magnitude of facilities or equipment that would be needed to complete this assembly work. Again, the Area Office simply accepted Spacesaver IM's statements without any examination.

Furthermore, the Area Office did not have the complete solicitation. The statement of work and the diagrams of the shelving units to be produced under the contract are not in the record. Thus, the Area Office did not know precisely what was the end item being procured, nor, as discussed above, did the Area Office examine the extent of the work Spacesaver IM will perform in relation to this procurement. Yet, without this crucial information, the Area Office concluded that Spacesaver IM is a manufacturer of the end item. I find it the Area Office's lack of analysis constitutes clear error.

On remand, the Area Office must make further factual investigation into the operations of Spacesaver IM in relation to this procurement. The Area Office must request a more detailed explanation of how Spacesaver IM meets the definition of manufacturer found at 13 C.F.R. §121.406(b)(2). Specifically, the Area Office must request clarification as to how Spacesaver IM is adding 58% of the end item's total value and verify any information provided. To that end, the Area Office should obtain a complete breakdown of Spacesaver IM's quote, including price information for all of the components and services to be provided. The Area Office must determine how much work Spacesaver will put into assembling the 5,400 components to be used and whether such assembly could be performed by Spacesaver's suppliers or could be performed by the procuring agency. The Area Office must inquire as to the type of facilities and equipment necessary to complete this assembly (*e.g.*, What specific equipment will be used to complete this operation? Does this type of work require some particular technical expertise? What portion of the assembly is completed at the firm's facilities vs. in vehicles or on site?). The critical question here is whether Spacesaver IM will perform enough work to be considered a manufacturer or whether it will perform "only minimal operations upon the item being procured." 13 C.F.R. § 121.406(b)(2); *see also Size Appeal of Virtual Media Integration*, SBA No. SIZ-4447 (2001); *compare Size Appeal of Nordic Sensor Technologies, Inc.*, SBA No. SIZ-4373 (1999), *with Size Appeal of Am. Sys. Corp.*, SBA No. SIZ-4022 (1995).

Additionally, the Area Office should investigate Spacesaver IM's relationship with Spacesaver Corporation in relation to this procurement. Specifically, what components is

Spacesaver IM acquiring from Spacesaver Corporation and at what cost? What portion of the manufacturing is being completed by Spacesaver Corporation? Could Spacesaver IM perform the work required under this RFQ without Spacesaver Corporation? The Area Office must obtain and thoroughly analyze all the relevant information to decide whether Spacesaver IM is in fact manufacturing the end items being procured by this RFQ. Most importantly, the Area Office must carefully apply the test set forth at 13 C.F.R. §121.406(b)(2) to the facts of this case rather than accepting Spacesaver IM's statements at face value.

IV. Conclusion

The Area Office erred in failing to fully investigate and analyze the issues presented in this matter. Accordingly, the size determination is VACATED, and this case is REMANDED to the Area Office for further consideration consistent with this Order.

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CHRISTOPHER HOLLEMAN  
Administrative Judge