United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: M1 Support Services, LP, Appellant, Appealed From Size Determination No. 5-2011-068	SBA No. SIZ-5297 Decided: December 15, 2011

APPEARANCES

William A. Roberts, III, Esq., Richard B. O'Keeffe, Jr., Esq., John R. Prairie, Esq., and Benjamin Kohr, Esq., Wiley Rein LLP, Washington, D.C., for M1 Support Services, LP

Richard B. Oliver, Esq., and Steffen G. Jacobsen, Esq., McKenna Long & Aldridge LLP, Los Angeles, California, for CymSTAR Services, LLC

Ramon F. Castillo, Contracting Officer, Hill Air Force Base, Utah, For the U.S. Department of the Air Force

DECISION[1]

I. Introduction and Jurisdiction

On August 25, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 5-2011-068 finding M1 Support Services, LP (Appellant) ineligible as a small business for the procurement at issue. On September 12, 2011, Appellant appealed the size determination to the SBA Office of Hearings and Appeals (OHA). For the reasons discussed below, the appeal is denied.

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, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

[1] This decision was initially issued on October 31, 2011. Pursuant to 13 C.F.R. § 134.205, I afforded each party an opportunity to file a request for redactions if that party desired to have any information redacted from the published decision. OHA received one or more timely requests for redactions and considered any requests in redacting the decision.

II. Background

A. Solicitation, Proposal, and Protest

On April 26, 2010, the U.S. Department of the Air Force issued Request for Proposals (RFP) No. FA8223-09-R-3005 seeking Total A-10 Aircrew Training Systems (ATS) Support. The Contracting Officer (CO) set aside the procurement entirely for small businesses and designated North American Industry Classification System (NAICS) code 336413, Other Aircraft Parts and Auxiliary Equipment Manufacturing, with a corresponding size standard of 1000 employees.

The RFP included a lengthy Performance-Based Work Statement (PBWS) outlining contractual requirements. According to the PBWS, the contractor would operate, maintain, and support sophisticated aircraft simulators — known as Full Mission Trainers ("FMTs") — and other Aircraft Training Devices (ATD) located at various Air Force bases worldwide. PBWS at ¶ 2.1.1(a) and section 3.3. As directed by the Air Force, the contractor would make modifications and upgrades to this equipment. PBWS at ¶ 2.1.1(b) and section 3.2. In addition, the contractor would provide engineering and non-engineering services to operate a Training Systems Support Center (TSSC) located at Davis-Monthan Air Force Base, Arizona. PBWS at ¶ 2.1.1(c) and section 3.4.

The RFP stated that the Air Force could, at its option, order up to three new FMTs during each year of the contract. PBWS at ¶ 3.1.11; RFP section B, Contract Line Item Numbers (CLINs) 0035-37, 1035-37, 2035-37, 3035-37, 4035-37. According to the RFP, an FMT consists of several components, including "a cockpit, an [Instructor Operator Station (IOS)], a 360 degree field-of-view visual display and projection system, a PC Image Generator, an [electronic warfare (EW)] Threat Server, and a Host computer/power equipment cabinet." PBWS at ¶ 1.2(2)(1). The RFP did not identify production of new FMTs as one of the principal purposes of the contract. PBWS at ¶ 2.1.2.

In responding to the RFP, offerors were asked to submit a proposal divided into five volumes: an executive summary (Vol. I), a technical proposal (Vol. II), past performance information (Vol. III), a cost/price proposal (Vol. IV), and contractual documentation (Vol. V). RFP at ¶ L.2.2. As part of the technical proposal, offerors were instructed to "describe their approach to the acquisition or procurement of an A-10C FMT device." RFP at ¶ L.4.2.4.3. The RFP further stated that, for purposes of determining each offeror's total evaluated price, the Air Force would assume that one or more new FMTs would be purchased during each year of the contract. RFP at ¶ M.4.3.

Appellant submitted its initial proposal in response to the RFP on September 24, 2010. Final proposal revisions were due April 22, 2011.

Appellant's proposal identified [subcontractor][2] as Appellant's principal subcontractor.

[2] The identity of Appellant's subcontractor for the instant procurement has been redacted throughout the decision. All references to [subcontractor] refer to this firm.

The proposal stated that [subcontractor] would provide "TSSC Engineering, device manufacturing and technical reachback support" for the procurement, whereas Appellant's role would be "the overall program management, contractor logistics support, field maintenance and operations support functions." Proposal, Vol. I at 2; *see also* Vol. III at 3 ("[Subcontractor] will perform TSSC support, engineering, modifications and new device manufacturing on the program"). The proposal further indicated that "[XXXXXXXXXXXXX]," and proceeded to identify [subcontractor] as the "vendor" for such components. Proposal, Vol. II at 106-07. The proposal emphasized that Appellant had chosen to partner with [subcontractor] due to [XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX].

In its price proposal, Appellant included multi-million dollar subcontractor costs for the CLINs associated with production of new FMT devices, but Appellant's own costs were projected to be zero. Proposal, Vol. IV, Attachment 1. Appellant proposed that, as the prime contractor, it would have no labor, fringe benefits, or other direct costs for any of these CLINs. *Id.* The proposal further stated that the pricing for these CLINs had been developed by [subcontractor]. Proposal, Vol. IV at ¶ 4.1.

On July 25, 2011, offerors were notified that Appellant was the apparent successful offeror. On August 1, 2011, CymSTAR Services, LLC (CymSTAR), a disappointed offeror, filed a protest challenging Appellant's size eligibility. CymSTAR alleged that Appellant's proposal violated the "ostensible subcontractor" rule, 13 C.F.R. § 121.103(h)(4). According to the protest, Appellant "cannot perform the primary and vital requirements of this contract, and is unusually reliant on its proposed subcontractor, [subcontractor]." Protest at 1.

B. Size Determination

On August 8, 2011, the Area Office notified Appellant of the protest and requested Appellant's response and other information. Although the protest had focused upon alleged violation of the ostensible subcontractor rule, the Area Office expanded the scope of the review to consider Appellant's compliance with 13 C.F.R. § 121.406. The Area Office explained that "[u]pon noticing that the agency assigned a manufacturing NAICS code to the procurement, [the Area Office] also asked [Appellant] to include a listing of manufactured items that would be supplied under the contract and identification of the manufacturer in its response." Size Determination at 1.

On August 15, 2011, Appellant submitted its response to the Area Office. Appellant stated that "[b]ased upon the SBA's reported determination that this is a contract for manufactured products," Appellant would commit to manufacturing any new FMTs that the Air Force might order under the contract. Response at 19. Appellant explained that the approach set forth in its proposal could be modified such that [XXXXXXXXXXXXXXXXXXXXXXX] *Id.*

On August 25, 2011, the Area Office issued its size determination. The Area Office first found that Appellant is affiliated with two other concerns — Mission First Services, LLC and M1 Support Services GmbH — through common ownership. Size Determination at 2. When combined, Appellant and its affiliates have more than 500 employees but fewer than 1000

employees. *Id.*

The Area Office next observed that, under 13 C.F.R. § 121.406, a small business acting as the prime contractor on a manufacturing contract that is set-aside for small businesses must either be the manufacturer of the end item, or must qualify for an exception as a non-manufacturer. Because the ATS contract was set-aside for small businesses, was assigned a manufacturing NAICS code, and included an option for the production of new FMT devices, the Area Office determined that 13 C.F.R. § 121.406 applied to the procurement. *Id.* at 3.

The Area Office next examined the respective roles of Appellant and [subcontractor] in the production of new FMT devices. The Area Office reviewed statements in Appellant's proposal indicating that [subcontractor] would manufacture new FMT devices, but also recognized that Appellant had asserted in its response to the protest that Appellant itself could instead manufacture the FMTs by assembling and integrating the components, and testing the completed devices. *Id.* at 6-7. The Area Office found that:

> [Appellant's] response [to the protest] indicates that '[Appellant] tentatively planned to have [subcontractor] perform the majority of any manufacturing work required under the contract, as [XXXXXXXXXXXXXXXXXXXXXXXXX].' However, [Appellant] asserts that it now plans to [XXXXXXXXXX].

Id. at 7. The Area Office further noted that, according to Appellant, the labor associated with assembly, integration and testing accounts for [XX]% of the total cost of a new FMT. *Id.* at 7-8.

The Area Office proceeded to examine "whether [Appellant's] assembly of the major components and [performance of the] associated tasks of integration and quality control qualifies [Appellant] as a 'manufacturer."' *Id.* at 8. The Area Office concluded that such efforts do not constitute manufacturing. The Area Office found that "[Appellant] is not manufacturing any of the five major components required in a new FMT." *Id.* Further, "[t]hese major components basically already have characteristics; they just need[] to be linked or integrated into one another." *Id.* Thus, in the Area Office's view, "[Appellant] is not actually manufacturing anything. It is putting the items together so that they work with one another." *Id.* The Area Office concluded that "[Appellant] is integrating manufactured items into an operational device. Therefore, [Appellant] is not a manufacturer." *Id.* at 9.

Having determined that Appellant would not itself manufacture new FMTs for the ATS contract, the Area Office considered whether Appellant might qualify for an exception as a non-manufacturer. The Area Office found, however, that Appellant has more than 500 employees, and is not eligible for any exception. *Id.* The Area Office concluded that "[s]ince [Appellant] is not the manufacturer [of the new FMTs] and cannot meet the Non-Manufacturer Rule, it is not small for this procurement." *Id.* In light of this determination, the Area Office found it unnecessary to address whether Appellant's proposal also violated the ostensible subcontractor rule.

C. Appeal Petition

On September 12, 2011, Appellant filed its appeal petition. Appellant contends that the

size determination is clearly erroneous and should be reversed.

Appellant explains that "[t]he Air Force emphasized to prospective offerors throughout the procurement process that it considered the A-10 ATS contract to be a contract for services, not supplies or manufactured products." Appeal at 5. Appellant observes that the RFP included various provisions normally applicable to services contracts, and made new device manufacturing merely an option which might, or might not, be exercised. In developing its proposal, Appellant divided work between itself and [subcontractor] based on its understanding that the contract was for services. *Id.* at 7. After the size protest was filed, however, Appellant learned that "notwithstanding the Air Force's representations that this was a contract for services, the SBA would treat the A-10 ATS procurement as a manufacturing contract." *Id.* at 8. Therefore, Appellant "committed in its [protest] response to manufacture any A-10 FMTs procured by the Air Force under the contract." *Id.* at 9. Appellant argues that, under the approach it outlined to the Area Office in response to the protest, Appellant will perform assembly, integration, and testing essential to creating new FMTs, and therefore should have been considered the "manufacturer" of the devices within the meaning of 13 C.F.R § 121.406.

Appellant maintains that the size determination is "based on the flawed premise that a firm that performs assembly, integration and testing cannot qualify as the manufacturer of an end item, a position that is directly contrary to well-established OHA case law." *Id.* at 14-15. Appellant asserts that such activities represent a vital contribution to the FMTs, and that the Area Office incorrectly reasoned that assembly, integration and testing are not part of the manufacturing process. Appellant cites a number of prior OHA decisions recognizing that assembly of components to produce a required end item is sufficient to designate the assembler as the manufacturer. According to Appellant, "[t]he Area Office ignored this well-established OHA precedent and made no effort to assess the significance of the assembly, integration and testing efforts to be performed by [Appellant] in producing the A-10 FMTs. This constitutes clear legal error and, by itself, provides sufficient grounds for granting [Appellant's] appeal." *Id.* at 17.

Appellant reviews the three-factor test set forth at 13 C.F.R. § 121.406(b)(2)(i) for determining which firm is the manufacturer of an end item, and argues that each factor supports the conclusion that Appellant itself is manufacturing the FMTs. Appellant contends that the first factor — the proportion of total value added by the efforts of the concern — is met because [XX]% of the total cost of a new FMT is attributable to assembly, integration and testing. The second factor — the importance of the elements added by the concern to the function of the end item — is met because the individual component parts of an FMT have no value to the Air Force until they are assembled and integrated. Appellant states that "[i]t is not until [Appellant] procures and assembles these components, installs the [requisite] software, and performs multiple rounds of verification testing that they become a fully functioning A-10 FMT system that is capable of meeting the solicitation's requirements." *Id.* at 21. With regard to the third factor — the concern's manufacturing capabilities — Appellant insists that it has sufficient experience and capability to produce the FMTs. Appellant states that "[t]he Area Office misapplied the three-factor 'manufacturer test' in this case because it failed to reasonably consider the assembly, integration and testing efforts to be performed by [Appellant] in manufacturing the A-10 FMTs. Had the Area Office reasonably considered the significant tasks

that will be performed by [Appellant], it would have concluded that [Appellant] qualifies as the manufacturer of the A-10 FMTs." *Id.* at 18.

D. CymSTAR's Response to the Appeal

On September 28, 2011, CymSTAR filed its response to the appeal. CymSTAR contends that, according to Appellant's proposal and teaming agreement with [subcontractor], Appellant would not actually perform any assembly or integration efforts under the ATS contract. CymSTAR recites a number of passages from Appellant's proposal indicating that [subcontractor], not Appellant, would perform all those tasks. Thus, CymSTAR maintains, "whether assembly, integration and testing efforts can constitute manufacturing for the purpose of [13 C.F.R. § 121.406] is a moot point, because [Appellant] will not be performing any of those activities for this procurement. Instead [Appellant] proposed to subcontract all such work to [subcontractor], which does not qualify as a small business." Response at 9.

CymSTAR further argues that Appellant's contention that it would perform significant assembly, integration and testing on the ATS procurement is derived not from Appellant's proposal, but rather from Appellant's response to the size protest. CymSTAR maintains that, under OHA precedent, Appellant's proposal is controlling, and any alternate approach set forth in the protest response must be given little or no weight.

CymSTAR also observes that the Area Office did not reach CymSTAR's protest allegation that [subcontractor] is an ostensible subcontractor of Appellant. Therefore, in the event that OHA grants this appeal, CymSTAR maintains that the case must be remanded to the Area Office for consideration of the ostensible subcontractor issue.

E. CO's Response to the Appeal

On September 28, 2011, the CO submitted his response to the appeal.

The CO explains that, in consultation with small business specialists, he selected NAICS code 336413 for the ATS procurement after determining that it was "the most appropriate fit for the sum of requirements acquired." CO Statement at 2. He states that this NAICS code, and a similar predecessor code, "have been the preferred codes in ATS service procurements since the early 1990's." *Id.*

With regard to the production of new FMTs, the CO states that the major components of the device are available from a limited number of suppliers. Furthermore, the components themselves have no value to the Air Force until they are assembled and integrated into a complete end item. *Id.* The CO maintains that "[f]rom [Appellant's] proposal, it is abundantly clear that [Appellant] is not taking a completed FMT from a subcontractor or retailer, dis[as]sembling the unit, and then shipping it to an Air Force site and simply reassembling the item. The end-item does not exist until [Appellant] procures the various parts and components and then manufactures the end FMT by applying complex logistical, engineering, electrical, mechanical, alignment, and software processes." *Id.* at 3.

The CO emphasizes that Appellant's proposal demonstrated, to the Air Force's

satisfaction, that Appellant was capable of producing new FMT devices. *Id.* at 2-3. The CO requests that OHA vacate the size determination and find that Appellant is "a small business concern and a manufacture[r] under NAICS [code] 336413 for this procurement so that the Air Force may award the ATS [contract] to [Appellant]." *Id.* at 3.

III. Discussion

A. Standard of Review

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

B. Analysis

When a manufacturing or supply contract is set aside for small businesses, an offeror must either be the manufacturer or producer of the end item, or must fall within certain "non-manufacturer" exceptions. 13 C.F.R. § 121.406; *see also* Federal Acquisition Regulation (FAR) 19.102(f). In the instant case, the Area Office found that the procurement in question was set-aside for small businesses, was assigned a manufacturing NAICS code, and involved the production of manufactured end items (*i.e.*, new FMT simulators). The Area Office therefore determined that 13 C.F.R. § 121.406 was applicable to the procurement. The Area Office further found that Appellant itself would not manufacture the FMT devices. Nor did Appellant satisfy the requirements for any exception as a non-manufacturer. As a result, the Area Office concluded that "[s]ince [Appellant] is not the manufacturer [of the new FMT simulators] and cannot meet the Non-Manufacturer Rule, it is not small for this procurement." Size Determination at 9.

In seeking to overturn the size determination, Appellant suggests that the procurement is predominantly for services, rather than supplies or manufactured products. Appeal at 5 - 6. Appellant observes that the production of new FMT devices is merely optional under the ATS procurement, so that the Air Force will not necessarily purchase any new FMT devices at all. Furthermore, the Air Force did not identify FMT device manufacturing as one of the acquisition's "primary activities," and advised offerors during the competition that it considered the procurement to be predominantly for services. Thus, according to Appellant, "[n]otwithstanding that [the Air Force] identified a manufacturing NAICS code in the [RFP], the Air Force made it clear to offerors in multiple ways that the Air Force intended to treat the ATS contract as a contract for services." *Id.* at 6. It is well-settled that the requirements of 13 C.F.R. § 121.406 do not apply to procurements for services. *See, e.g., Size Appeal of OSC Solutions, Inc.*, SBA No. SIZ-5253 (2011). Thus, determining whether the ATS procurement is for supplies or services is significant to considering whether the Area Office properly invoked 13 C.F.R. § 121.406 in the first instance.

I find no error in the Area Office's determination that 13 C.F.R. § 121.406 is applicable here. According to the regulation, 13 C.F.R. § 121.406 applies to procurements that have been assigned a manufacturing or supply NAICS code. 13 C.F.R. § 121.406(b)(3). In this case, the CO

plainly designated a manufacturing NAICS code (336413, Other Aircraft Parts and Auxiliary Equipment Manufacturing) for the ATS procurement. In determining the appropriate NAICS code, a CO must select the NAICS code that best describes the principal purpose of the product or service being acquired in light of the industry description in the *NAICS Manual*,[3] the description in the solicitation, and the relative weight of each element in the solicitation. 13 C.F.R. § 121.402(b). Consistent with these requirements, the CO states that he purposefully selected NAICS code 336413 for the ATS procurement because it was "the most appropriate fit for the sum of requirements acquired." CO's Statement at 2. Appellant, or another interested party, could have challenged the CO's choice of NAICS code if it believed that a services code was instead appropriate. Because there was no appeal of the NAICS code designation, though, the CO's choice of NAICS code is final and is no longer subject to review. 13 C.F.R. § 121.402(c); FAR 19.303(c). Furthermore, the fact that the ATS procurement contains a substantial services component in addition to manufacturing does not preclude application of 13 C.F.R. § 121.406. The regulation states that, when a procurement with a manufacturing or supply NAICS code includes a mix of supplies and services, the rule "applies only to the supply component." 13 C.F.R. § 121.406(b)(4) and Example 2. Accordingly, the Area Office correctly determined that 13 C.F.R. § 121.406 applies to the manufacturing aspects of the ATS procurement. In other words, to be considered a small business for this procurement, Appellant must either be the manufacturer of the new FMT simulators, or must qualify for an exception as a nonmanufacturer.

In its appeal, Appellant contends that assembly, integration, and testing constitute "manufacturing" within the meaning of 13 C.F.R. § 121.406. Indeed, the regulation specifically recognizes that "the assembly of parts and components, into the end item being acquired" is encompassed within manufacturing. 13 C.F.R. § 121.406(b)(2). Furthermore, 13 C.F.R. § 121.406 sets forth a three-factor test for determining which firm is the "manufacturer" of a particular end item.[4] The test emphasizes the relative importance and dollar value of each firm's contribution in producing the end item, but does not require that the "manufacturer" must be the firm which produces the individual component parts. Thus, argues Appellant, although Appellant will not itself produce any of the requisite parts for new FMT simulators, Appellant is nevertheless the "manufacturer" because it will be performing the crucial functions of assembling and integrating those parts into a functional end item. Appellant explains that, under the approach it outlined to the Area Office in response to the protest, Appellant:

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[3] Executive Office of the President, Office of Management and Budget, *North American Industry Classification System* (2007), *available* at http://www.census.gov/eos/www/naics/ (hereinafter *NAICS Manual*).

[4] 13 C.F.R. § 121.406(b)(2)(i). For purposes of the regulation, there can be only one "manufacturer" of a given end item. 13 C.F.R. § 121.406(b)(2). 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).

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Appeal at 2. The Area Office, however, determined that assembly and integration efforts do not constitute manufacturing. The Area Office remarked that "[Appellant] is not a manufacturer; it is a systems integrator" and that "[Appellant] is not actually manufacturing anything. It is putting the items together so that they work with one another." Size Determination at 8. According to Appellant, the size determination is clearly erroneous because it is "based on the flawed premise that a firm that performs assembly, integration and testing cannot be the manufacturer of an end item." Appeal at 2.

I agree with Appellant that, under 13 C.F.R. § 121.406, a firm which assembles and integrates components into an end item can be the "manufacturer," although it is necessary to consider the complexity of those efforts and their relative importance in producing the end item. *Size Appeal of Lanzen Fabricating North, Inc.*, SBA No. SIZ-4723, at 4 (2005) (recognizing that "assembly of components to produce the required end item is sufficient to designate the assembler as manufacturer of the end item"); *Size Appeal of Virtual Media Integration*, SBA No. SIZ-4447, at 6-7 (2001) (weighing evidence of the value and importance of assembly, integration, and testing efforts to determine a product's manufacturer); *Size Appeal of Nordic Sensor Technologies, Inc.*, SBA No. SIZ-4373, at 3 (1999) ("This Office's well-established interpretation of the regulation is that the assembly of components to produce the end item is sufficient to designate the assembler as the end item's manufacturer."). The problem with Appellant's argument, however, is that its proposal for this particular acquisition does not indicate that Appellant would be performing any assembly or integration efforts (or any other manufacturing activity). Rather, Appellant's proposal expressly stated that its subcontractor, [subcontractor], would be responsible for the production of new FMT simulators. Based on Appellant's proposal, Appellant would have no significant role in manufacturing the FMT devices. Thus, while Appellant is correct that a firm performing assembly and integration efforts could be the "manufacturer" of an end item, the issue is ultimately immaterial here because Appellant's proposal does not demonstrate that Appellant would actually perform such work.

As discussed in Section II.A, *supra*, there were numerous statements in Appellant's technical proposal indicating that [subcontractor] would be responsible for manufacturing new FMT devices. *E.g.*, Vol. III at 3 ("[Subcontractor] will perform ... new device manufacturing on the program"). Similarly, Appellant's price proposal included multi-million dollar subcontractor costs for the CLINs related to the production of new FMTs, but Appellant's own costs were projected to be zero. Thus, it is clear from the proposal that [subcontractor] would be responsible for producing new FMT trainers without any significant involvement by Appellant.[5]

[5] The Area Office also considered a teaming agreement between Appellant and [subcontractor]. The teaming agreement provided that "[Appellant], as the Prime contractor will provide all Program Management Office support required for the program to include, but not limited to [Contract Data Requirements List] submissions, Cost reporting, and being the primary customer interface. Furthermore, [Appellant] will provide the Contractor Logistics support

Appellant does not dispute that, according to its proposal, [subcontractor] would manufacture new FMT devices. The proposal simply does not indicate that any assembly, integration, or testing would be performed by Appellant itself. Instead, Appellant first made a commitment to manufacture the FMTs in its response to the size protest.[6] Appellant explains that upon learning that the Area Office considered the ATS contract to be a manufacturing vehicle, Appellant "committed in its [protest] response to [itself] manufacture any A-10 FMTs procured by the Air Force under the contract." *Id.* at 9. Under the approach outlined in its protest response, "[Appellant's] personnel (instead of [subcontractor] personnel) will perform all of the assembly, integration and testing efforts necessary to produce a fully functioning and compliant A-10 FMT system," although Appellant concedes that this is "not what [Appellant] had originally stated" in its proposal. *Id.* Accordingly, the issue presented here is whether Appellant's proposal can be superseded by Appellant's response to the protest.

OHA has repeatedly held that documents created in response to a protest may not be used to contradict an offeror's actual proposal. *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 16 (2010) (rejecting contentions as to how much work would be performed by a subcontractor, because those contentions were inconsistent with the offeror's proposal); *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071, at 20 (2009) ("Appellant's representation of their incumbency status in its Proposal, which predates the current dispute, is entitled to great if not controlling weight. Thus, it is too late for Appellant to attempt to claim otherwise now and it will not be entertained."); *Size Appeal of Fernandez Enterprises, LLC*, SBA No. SIZ-4863, at 7 (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."). I therefore find that Appellant's proposal is far more probative of Appellant's intended manufacturing approach than are the arguments raised by Appellant in response to the protest. Here, Appellant's proposal stated that [subcontractor] would manufacture new FMT devices, and Appellant itself would

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(CLS) personnel at the training locations." Teaming Agreement, Exhibit A — Workshare. According to the agreement, "[subcontractor] will fulfill the Training System Support Center (TSSC) [*cont.*] requirements of the solicitation. [Subcontractor] will perform the Suite 7 modification any other hardware/software modifications required by the resultant contract." *Id.* Like Appellant's proposal, then, the teaming agreement gives no indication that Appellant itself would be involved with the manufacturing of new FMT devices.

[6] Unlike Appellant, the CO appears to suggest that Appellant's proposal did make a definite commitment that Appellant would manufacture the FMTs. The CO contends that "[f]rom [Appellant's] proposal, it is abundantly clear that [Appellant] is not taking a completed FMT from a subcontractor or retailer, dis [as]sembling the unit, and then shipping it to an Air Force site and simply reassembling the item. The end-item does not exist until [Appellant] procures the various parts and components and then manufactures the end FMT by applying complex logistical, engineering, electrical, mechanical, alignment, and software processes." CO's Statement at 3. The CO does not, however, address Appellant's role in the manufacturing of new FMT devices vis-à-vis [subcontractor], and does not identify any provisions in Appellant's proposal indicating that Appellant itself would manufacture the devices. Accordingly, the CO's comments do not persuasively establish that, based upon Appellant's proposal, Appellant would have any role in the manufacturing of new FMT devices.

have no role in that process. Accordingly, the Area Office properly determined that Appellant was not the manufacturer of the new FMTs.

It is also worth noting that, for purposes of compliance with the nonmanufacturer rule in a negotiated procurement, size is determined as of the date of the final proposal revisions. 13 C.F.R. § 121.404(d). In this case, final proposal revisions were due April 22, 2011, but Appellant's response to the Area Office was not submitted until August 2011. Consequently, the approach that Appellant outlined in its protest response has no bearing on whether the firm would be considered a small business as of the date of final proposal revisions.

Because the Area Office correctly determined that Appellant is not the manufacturer of the FMT devices, the only remaining issue is whether Appellant qualifies for an exception as a nonmanufacturer. The Area Office determined that Appellant did not qualify for any of the exceptions, and noted that Appellant exceeds the 500-employee standard applicable to such exceptions. Size Determination at 9. Appellant does not identify any error in this portion of the Area Office's analysis, and does not contend that it does qualify for an exception. I therefore find that Appellant does not qualify for any of the nonmanufacturer exceptions.

IV. Conclusion

Appellant's proposal for this procurement clearly indicated that [subcontractor], not Appellant, would be manufacturing the new FMT devices. Although Appellant correctly argues that assembly, integration, and testing may constitute “manufacturing” within the meaning of 13 C.F.R. § 121.406, that issue is immaterial here because Appellant's proposal does not indicate that Appellant would be performing any assembly, integration, or testing.

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge