

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

SIZE APPEAL OF:

Sea Box, Inc.,

Appellant,

RE: Containers Unlimited, LLC

Appealed From
Size Determination No. 3-2014-079

SBA No. SIZ-5613

Decided: November 12, 2014

APPEARANCES

Robert A. Farber, Esq., Director of Contracts and Counsel, Sea Box, Inc., East Riverton, New Jersey

Gina C. Hasty, President, Containers Unlimited, LLC, Bartow, Florida

DECISION

I. Introduction and Jurisdiction

On September 10, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2014-079, denying a size protest filed by Sea Box, Inc. (Appellant) against Containers Unlimited, LLC (CU). In its protest, Appellant alleged that CU is not an eligible small business under the size standard associated with the subject procurement, because CU would not manufacture the end items or comply with the nonmanufacturer rule, 13 C.F.R. § 121.406(b).

On appeal, Appellant maintains that the Area Office improperly denied the protest, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

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.

II. Background

A. Solicitation and Protest

On July 22, 2014, the Alabama National Guard (Guard), Property and Fiscal Office, Montgomery, Alabama issued Request for Quotations (RFQ) No. W912JA-14-Q-0002 for cargo containers. The specifications stated: “Prefer new. Slightly used and/or refurbished containers are acceptable on the condition that they are water tight and are not showing signs of rust damage.” The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 332439, Other Metal Container Manufacturing, with a corresponding size standard of 500 employees. Quotations were due July 29, 2014.

On July 31, 2014, the Guard announced that CU was the apparent awardee. On August 5, 2014, Appellant filed a size protest contending that CU would not manufacture the containers and instead would purchase them from a foreign source. (Protest at 2-3.) The CO forwarded the protest to the Area Office for review.

On August 29, 2014, CU responded to Appellant's protest. CU claimed that it is the manufacturer of the containers because CU will purchase used containers and “completely refurbish” them. (Response at 2.) CU provided a cost breakdown indicating that, after excluding overhead and profit, only 32% of CU's estimated costs are attributable to the “used base container[s] to be refurbished.” (*Id.*, Ex. 3.) Labor and materials associated with the refurbishment process represent 21% and 22% of costs, respectively. (*Id.*) The remainder of CU's costs is for transportation to and from CU's facility. (*Id.*) CU stated that the company has five employees and no affiliates.

B. Size Determination

On September 10, 2014, the Area Office denied Appellant's protest. The Area Office found that CU is the manufacturer of the containers.¹

The Area Office recited the test for determining whether a concern is the manufacturer of the end item. “SBA will consider: (1) the proportion of total value in the end item added by the concern; (2) the importance of the elements added by the concern to the function of the end item; and (3) the concern's technical capabilities, *i.e.*, plant, facilities, and equipment.” (Size Determination at 5, citing *Size Appeal of Fernandez Enters., LLC*, SBA No. SIZ-4863 (2007) and 13 C.F.R § 121.406(b)(2)(i).)

The Area Office found that CU acquires used shipping containers in a variety of conditions, and maintains a facility for the refurbishment of containers. For this procurement,

¹ The Area Office also determined that CU is not affiliated with two other concerns identified in the protest, Southern Air Compressor and G & S Services Corporation. Appellant does not challenge these findings on appeal, so further discussion of them is not necessary.

“CU will completely refurbish the container[s] to meet the required specifications of the customer.” (*Id.* at 4.) For example:

CU must remove exterior walls that are dented, rusted or cracked and replace those areas with new metal; remove and replace gaskets seals to meet the water tight requirements; sandblast the container to remove rust spots; replace flooring to meet the water tight requirements; repair or replace holes and openings in the ceiling with metal patches; and prime and paint the interior and exterior of the container before it is shipped to the customer.

(*Id.* at 4-5.) The Area Office noted that CU provided the Area Office with “invoices for shipping, materials used in the refurbishing process and invoices for containers sold to commercial accounts.” (*Id.* at 5.) CU also submitted a cost breakdown, which “demonstrates that over 68% of the cost of the refurbished container is attributable to the labor and materials required to refurbish the shipping container.” (*Id.*)

The Area Office concluded that CU satisfies all three elements of the test to qualify as the manufacturer of the containers. The first element of the test is met because a large portion of the total cost of the finished containers is attributable to CU's refurbishment. The second element of the test is met because CU will modify the containers so that the refurbished containers are functional, water-tight, and with no visible rust. The third element of the test is met because CU uses its own plant, facilities, and equipment to refurbish the containers. (*Id.* at 5-6.)

The Area Office also noted that it had conducted its own independent research into the manufacturing of shipping containers. According to the Area Office, shipping containers are “manufactured overseas” and there is “no option to have these containers modified overseas and shipped directly” to the United States. (*Id.* at 5.) The Area Office posited that modifying the containers could render them “inadequate for shipping purposes,” and “[t]here is no indication that a manufacturer would modify the container and then place an empty container on a ship to the United States as this would constitute valuable shipping space that could not be utilized because of the potential for not having a [functional] container.” (*Id.*)

C. Appeal

On September 25, 2014, Appellant filed the instant appeal with OHA. Appellant maintains that the size determination is clearly erroneous and should be reversed.

Appellant contends that the Area Office erred in determining that CU is the manufacturer of the shipping containers. Appellant argues that CU merely purchases used containers in poor condition and then repairs them. (Appeal at 12.) To Appellant, such repair work is not the same as “manufacturing” a container. The fact that 68% of CU's costs may be attributable to refurbishment does not change this fact, because much of these costs are for work that is cosmetic in nature and/or is not required by the solicitation. Appellant argues that the Area Office mistook “CU's excessive expenditures as ‘significant additional functional value.’” (*Id.*) Appellant includes hyperlinks to shipping containers for sale on eBay, and argues that the unit price of these containers is less than CU's unit price for refurbished containers. (*Id.* at 11-12.)

The proportion of total value that CU adds is therefore overstated. Appellant concludes that CU fails the first element of the three-part test set forth at 13 C.F.R. § 121.406(b)(2)(i). (*Id.*)

Appellant reasons by analogy that a used car dealer who fixes up an old Toyota is not a manufacturer, nor is a handyman who sells an old air conditioner that he repaired. (*Id.* at 9-10.) Appellant argues that the same is true of CU. Crucially, CU repaired—but did not produce—the foreign containers. Because “CU added no parts or components which transformed the used container into a new or different end item,” CU is not the manufacturer, as 13 C.F.R. § 121.406(b)(2) requires. (*Id.* at 11.) Accordingly, the second element of the three-part test—the importance of the elements added by CU—is not met because CU will merely bring defective items up to minimum standards.

Appellant argues that the third element of the test, which considers the contractor's plant, facilities, and equipment, also is not met. Appellant contends that “CU[']s capabilities are those of a repair facility, not a manufacturer.” (*Id.* at 12.) To support this point, Appellant quotes the Area Office's observation that “CU ... is primarily engaged as a refurbisher and seller of shipping containers.” (*Id.*, quoting Size Determination at 4.)

Appellant complains that the Area Office should have clarified that the nonmanufacturer rule does not apply to this case. Further, even if that rule were applicable, CU does not comply with it because CU is not supplying the end item of a small business made in the United States. (*Id.* at 6.)

Appellant challenges the Area Office's research into the manufacturing of shipping containers. First, Appellant disputes the notion that all shipping containers are manufactured overseas. Appellant maintains that containers are also made in the United States by at least three firms, including Appellant itself. (*Id.* at 4.) Next, Appellant addresses the Area Office's assertion that a producer would not place an empty container on a ship to the United States. Appellant argues that containers can be, and are, shipped empty at the purchaser's election. (*Id.* at 5.) Third, Appellant argues, the Area Office incorrectly assumed that the containers here required special modifications. On the contrary, the Guard sought to acquire standard shipping containers without modifications. (*Id.* at 5-6.)

D. CU's Response

On October 14, 2014, the date of the close of record, CU intervened and responded to the appeal. CU argues that OHA should affirm the size determination.

CU emphasizes that “slightly used and/or refurbished containers” were acceptable to the Guard according to the RFQ. Furthermore, refurbished containers are treated as a unique item, with a separate National Stock Number. (Response at 1.)

CU argues that its refurbishment work is essential to ensuring that the containers are safe, rust-free, water-tight, and serviceable for many years. Appellant's claim that CU will make unnecessary cosmetic repairs is therefore not accurate. (*Id.* at 1-3.) Furthermore, CU contends that, just like the original manufacturers of the containers, CU will perform extensive welding,

grinding, drilling, blasting, priming, and top-coating. (*Id.* at 2.)

CU then argues that the containers available on eBay show signs of rust or damage and do not take transportation costs into consideration. As a result, they are inapposite to this procurement and shed no light on CU's costs. (*Id.* at 3-4.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the 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 an 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

This appeal lacks merit and must be denied. When a manufacturing or supply contract is set aside for small businesses, the prime contractor either must be the manufacturer or producer of the end item being acquired, or must fall within certain “non-manufacturer” exceptions. 15 U.S.C. § 637(a)(17); 48 C.F.R. § 19.102(f); 13 C.F.R. § 121.406; *Size Appeal of MI Support Servs., LP*, SBA No. SIZ-5297 (2011). For size purposes, there can be only one manufacturer of an end item. 13 C.F.R. § 121.406(b)(2). The manufacturer is “the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances . . . into the end item being acquired.” *Id.*; *Size Appeal of Fernandez Enters., LLC*, SBA No. SIZ-4863, at 6 (2007). The manufacturer need not produce all of the end item's component parts. *Size Appeal of Lanzen Fabricating N., 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.”). However, a firm that performs only “minimal operations” upon the end item does not qualify as a manufacturer. 13 C.F.R. § 121.406(b)(2). Such activities include unpacking; on-site assembly; installing; and integrating components, nearly all of which were produced by a single manufacturer. *Size Appeal of Am. Sys. Corp.*, SBA No. SIZ-4022, at 4 (1995) (concluding that the challenged firm was “serving as a dealer, rather than the manufacturer.”). In assessing whether a concern is the manufacturer of an end item, SBA will consider: (1) the proportion of total value in the end item added by the concern, excluding costs of overhead, testing, quality control and profit; (2) the importance of the elements added by the concern to the function of the end item; and (3) the concern's technical capabilities, such as plant, facilities and equipment. 13 C.F.R. § 121.406(b)(2)(i).

In this case, the record supports the Area Office's conclusion that the functions performed by CU are more than “minimal operations.” The end item being acquired is a water-tight shipping container free of rust. Section II.A, *supra*. To produce these items, CU will remove exterior walls that are dented, rusted or cracked and replace those areas with new metal; remove and replace gaskets seals and flooring to meet the water-tight requirements; sandblast the

container to remove rust spots; repair or replace holes and openings in the ceiling with metal patches; and prime and paint the interior and exterior of the container before it is shipped to the customer. Section II.B, *supra*. Thus, CU will transform a used shipping container—which may be nonconforming, rusty, or leaky—into a water-tight, rust-free container, characteristics that were specifically demanded by the Guard in the RFQ. Contrary to Appellant's suggestions, then, this refurbishment work does not appear to be unnecessary or cosmetic in nature. Rather, it involves transforming the used container itself, work that represents the largest share of the end item's total cost.²

Appellant attempts to distinguish between mere “repair” work and “manufacturing,” but this argument is ultimately unpersuasive. Both SBA regulations and OHA precedent recognize that a firm may transform an existing item to such an extent that the firm becomes the manufacturer. 13 C.F.R. § 121.406(b)(2); *Size Appeal of Fernandez Enters., LLC*, SBA No. SIZ-4863, at 6 (2007). Thus, it is possible that by investing labor and materials into refurbishing used durable goods, such as a vehicle or air conditioner, a firm could qualify as the manufacturer for purposes of § 121.406(b)(2)(i).

Lastly, I find no merit to Appellant's claim that CU's facilities are appropriate only for refurbishment, and not for manufacturing. As OHA has explained, a firm may assemble component parts and still qualify as the manufacturer of an end item. *E.g., Lanzen Fabricating*, SBA No. SIZ-4723, at 5. In that situation, the firm would have the facilities of an assembler, and not of a manufacturer. Logically, then, CU is not precluded from being the manufacturer of the containers under § 121.406(b)(2)(i) merely because CU's facilities are intended for refurbishment.

IV. Conclusion

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

KENNETH M. HYDE
Administrative Judge

² CU represented to the Area Office that the labor and materials associated with refurbishing the shipping containers together accounted for 43% of CU's total costs, whereas the used shipping containers themselves were only 32% of total costs. *See* Section II.A, *supra*.