

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

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

NMC/Wollard, Inc.,

Appellant,

RE: International Automated Systems, Inc.

Appealed From

Size Determination No. 04-2015-029

SBA No. SIZ-5668

Decided: June 29, 2015

APPEARANCES

David S. Black, Esq., Elizabeth N. Jochum, Esq., Holland & Knight LLP, Tysons, Virginia, for Appellant

E. Sanderson Hoe, Esq., John W. Sorrenti, Esq., Covington & Burling LLP, Washington, D.C., for International Automated Systems, Inc.

DECISION¹

I. Introduction and Jurisdiction

This is the second appeal arising from a size protest filed by NMC/Wollard, Inc. (Appellant) against International Automated Systems, Inc. (IAS). Appellant maintains that IAS is not an eligible small business for the subject procurement of Aviation Light Utility Mobile Maintenance Carts (ALUMMCs) because IAS is not the manufacturer of the ALUMMCs. Rather, Appellant asserts, IAS is merely reselling the product of a large business, John Deere & Company (John Deere), with minor modifications. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

The U.S. Small Business Administration (SBA) 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 timely filed the instant appeal on March 23, 2015.² Accordingly, this matter is properly before OHA for decision.

II. Background

A. RFP

On June 6, 2013, the U.S. Department of the Army (Army) issued Request for Proposals (RFP) No. W58RGZ-13-R-0023 seeking a contractor to deliver a minimum of 51 and a maximum of 2,000 ALUMMCs. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 333924, Industrial Truck, Tractor, Trailer and Stacker Machinery Manufacturing, with a corresponding size standard of 750 employees.

According to the RFP's Product Item Description (PID), “[t]he ALUMMC is a rugged lightweight, mobile maintenance vehicle that is capable of providing Army aviation units with flightline support on a worldwide basis.” (SOW, Attach. 1, § 1.3.) “The ALUMMC is capable of transporting a maintenance crew of two (2) persons and a minimum cargo of 800 pounds (lbs).” (*Id.*) Further, “[t]he ALUMMC will also transport small sized cargo, such as packaged petroleum products, repair components, and other maintenance supplies to help support . . . maintenance within a unit's operational area.” (*Id.*)

In developing the RFP, the Army prepared a Capabilities Production Document (CPD). (Email from L. Byrd to D. Gordon (Feb. 18, 2015).) The CPD identified four Key Performance Parameters (KPPs):

- (1) KPP 1 — **Mobility**. The ALUMMC will have [All Wheel Drive (AWD)] capability with a selectable two/four wheel drive system. (Threshold = Objective)
- (2) KPP 2 — **Occupancy**. A minimum of (2) occupants, (driver with one passenger), (Threshold) will utilize this cart to support mission requirements. Having a capability to accommodate four (4) occupants, (driver with three passengers), (objective) will further support aircraft launches and recoveries of a platoon-sized section of an Aviation flight company or detachment.
- (3) KPP 3 — **Fuel Compatibility**. The fuel compatibility during all operating conditions shall be compatible with the Army standard fuel (JP-8) (Threshold) or

² Ordinarily, a size appeal must be filed within 15 calendar days of receipt of the size determination. 13 C.F.R. § 134.304(a). Here, Appellant received the size determination on March 6, 2015. Fifteen calendar days after March 6, 2015, was March 21, 2015. Because March 21, 2015, was a Saturday, the appeal petition was due on the next business day: Monday, March 23, 2015. 13 C.F.R. § 134.202(d).

Multi-Fuels, including JP-8 (Objective). A closed-circuit refueling port with mechanical access for open port refueling is desired.

(4) KPP 4 — **Cargo Bed Payload**. The ALUMMC will be capable of transporting 800 pounds of cargo or equipment in addition to passengers (Threshold) or 1200 pounds (Objective).

(CPD at 1.) The CPD indicated that the following characteristics are Key System Attributes (KSAs) of the ALUMMCs:

Additional Attributes

Attribute	Production Threshold	Production Objective
Attribute 1 — Cargo Tie-down Capability	Equipped with tie-down points to restrain and secure a maximum cargo weight	Threshold = Objective
Attribute 2 — Transportability	Transportable without restriction by standard highway, rail, marine, and air modes	Threshold = Objective
Attribute 3 — Safety Features	Standard safety equipment I/A/W MIL-STD-882D	Threshold = Objective
Attribute 4 — Instrumentation Package	Multi-functional to help alert operator on status of equipment functions	Threshold = Objective
Attribute 5 — Access to Engine and Drive Train Compartments	Accessibility without having to depend on use of internal or supplemental power/systems	Threshold = Objective
Attribute 6 — Rollover Protection System (RPS)	Mountable and Removable within 20 Minutes	Threshold = Objective

(*Id.*)

Because the ALUMMCs would be used worldwide, the PID contained the following temperature requirements:

3.4.1 Temperature.

3.4.1.1 Operational - The ALUMMC shall be capable of starting and operating from temperatures range of -25 °F to+ 120 °F.

3.4.1.2 Storage- The ALUMMC shall be designed to be stored in temperatures range from -50 °F to +160 °F.

3.4.1.3 Engine Block Heater- The ALUMMC shall be equipped with a permanently installed (110V AC) electrical device that draws no more than 15

amps. It shall be capable of maintaining engine coolant temperature at +80 °F above ambient temperature.

3.4.1.4 Oil Pan Heater- The ALUMMC shall be designed for installation of an oil pan heater (110V AC) electrical device.

(PID § 3.4.1.)

The ALUMMC also had to comply with a number of military standards, including MIL-STD-209K. (RFP Attach. 5, Detailed Test Plan § 2.6.3.a.) MIL-STD-209K imposes “military-unique interface requirements developed specifically for ensuring that the lifting and tiedown provisions on military equipment meet the physical, functional and operational environment attributes for transportation assets of the Defense Transportation System (DTS).” (MIL-STD-209K, “Interface Standard for Lifting and Tiedown Provisions,” at ii (Feb. 22, 2005).)

The RFP stated that the contract would be awarded to the offeror with the lowest-priced technically-acceptable proposal. To be considered for award, offerors in the competitive range were required to submit a production sample for testing and evaluation. (RFP § L.)

B. Testing

The Army determined that IAS's proposal was within competitive range, and IAS submitted a production sample for testing. During lift and tie-down provision testing, IAS's first sample failed the rear tie-down provision test. (Email from L. Byrd to L. David (Oct. 29, 2013).) IAS then modified the rear tie-down provisions to comport with MIL-STD-209K.

On June 5, 2014, after two rounds of discussions, IAS submitted its second Final Proposal Revisions (FPR), in which IAS proposed a new cargo bed for the ALUMMC. IAS explained that “[XXXXXXXXXXXXXXXXX],” which IAS had initially proposed. (FPR at 6.) IAS stated that the new cargo bed was “[XXXXXXXXXXXXXXXXX].” (*Id.* at 7.)

C. Protest

On July 30, 2014, the CO announced that IAS was the apparent awardee. On August 6, 2014, Appellant filed a size protest challenging IAS's size. Appellant alleged that IAS would be reselling the John Deere Gator as an ALUMMC. Therefore, “because [IAS] is not proposing to supply the end item of a small business manufacturer and because it does not normally sell the type of item being supplied,” IAS cannot qualify under the nonmanufacturer rule. (Protest at 2.) Appellant contended that “IAS is not engaged in the business of manufacturing or selling vehicles of any type, including aviation maintenance carts.” (*Id.* at 5.) In addition, Appellant attached photographs of IAS's proposed ALUMMC, noting the John Deere logo on the front grille. (*Id.* at 7-8.) The CO forwarded the protest to the SBA Office of Government Contracting, Area IV (Area Office) for review.

D. NMC/Wollard I

On September 10, 2014, the Area Office issued Size Determination No. 04-2014-046 denying Appellant's protest and finding that IAS is the manufacturer of the ALUMMC. On October 1, 2014, Appellant appealed to OHA, arguing that the Area Office did not properly analyze whether IAS is the manufacturer. According to Appellant, the record revealed that IAS is merely reselling John Deere Gator with minor modifications, and IAS did not demonstrate that it has the facilities and equipment necessary to perform the contract.

On January 9, 2015, OHA granted the appeal and remanded the matter to the Area Office. *Size Appeal of NMC/Wollard, Inc.*, SBA No. SIZ-5632 (2015) (*NMC/Wollard I*). OHA found that the Area Office relied upon unsupported data in IAS's protest response, and made assumptions about IAS's rates of overhead and profit, without verifying the accuracy and validity of this data through IAS's cost/price proposal or other contemporaneous cost/pricing information. On remand, OHA directed the Area Office to obtain IAS's cost/price proposal and, if necessary, other contemporaneous cost/price information, to accurately evaluate the proportion of the total value in the ALUMMCs added by IAS. OHA further instructed the Area Office to examine the importance of the modifications performed by IAS to the function of the ALUMMCs.

E. Remand Investigation

On January 30, 2015, as part of the remand proceedings, IAS submitted to the Area Office cost estimates that IAS had prepared for in-house use prior to submitting its offer. IAS also submitted comments in which IAS argued that its modifications represent approximately [XX]% of the ALUMMC's total value, and are essential to its function.

IAS explained that the modifications to the Gator are necessary to comply with MIL-STD-209K, and that, absent the modifications, the Gator does not meet these criteria. To make the ALUMMC compliant with MIL-STD-209K, IAS argued, it had to “[XXXXXXXXXXXXXXXXX].” (IAS Comments, at 5.) IAS created more than [XXXXXXXXXX] detailing these steps. IAS also built in [XXXXXXXXXXXXXXXXX] into the Gator's [XXXXXXXXXXXXXXXXX]. These modifications, IAS argued, are not merely cosmetic or minor, but are “structural, foundational, functional, and essential” to the Army's specifications for the ALUMMC. (*Id.* at 6.)

IAS performs other modifications to meet the Army's specifications that the ALUMMC function in extreme cold weather conditions. [XXXXXXXXXXXXXXXXX]. Without these modifications, IAS argued, the Gator would not meet the Army's cold-weather specifications. (*Id.*)

Accompanying its comments, IAS submitted a sworn declaration from its president, Mr. Douglas Hansen. In his declaration, Mr. Hansen avers that IAS will install four option kits that IAS will purchase from John Deere. John Deere, however, does not manufacture or install these kits. (Hansen Decl. ¶ 9.)

On January 30, 2015, Appellant submitted comments to the Area Office regarding the respective contributions of IAS and John Deere to the ALUMMC. Appellant argued that IAS

admits that its modifications are minor and that the “vast majority of the functional requirements of the PID” are met by the Gator without modifications. (Appellant's Comments at 2-3.) Appellant contended that, at most, IAS is responsible for 24 of the 94 specifications. (*Id.* at 4.) Further, many of these specifications are not functionally significant.

In conducting the remand investigation, the Area Office corresponded with the Army. The Area Office asked the CO for a “description of the things which you consider the most important characteristics of the ALUMMC.” (Email from D. Gordon to L. Byrd (Feb. 4, 2015).) The Army responded that the KPPs and KSAs “are the absolute items the [ALUMMC] must meet.” (Email from K. Downs to L. Byrd (Feb. 10, 2015).)

F. The Instant Size Determination

On February 27, 2015, the Area Office issued Size Determination No. 04-2015-029 concluding that IAS qualifies as the manufacturer of the ALUMMCs. The Area Office explained that in determining whether a firm is the manufacturer of an end-item, SBA will consider:

- (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;
- (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.

(Size Determination No. 04-2015-029 at 2, quoting 13 C.F.R. § 121.406(b)(2)(i).)

With regard to the proportion of total value added by IAS, the Area Office explained that the Army did not require offerors to submit detailed cost breakdowns and line item data. Instead, the Area Office examined contemporaneous cost data that IAS had prepared for in-house use to estimate its modification costs. From this data, the Area Office observed that the cost to IAS for a partially completed Gator is \$[XXXXXXX], and the cost of IAS's modifications is \$[XXXXXX] per unit, or [XX]%³ of the cost of the ALUMMC. (*Id.* at 3.) Because the modifications' functional significance must be taken into account, the Area Office subtracted the modifications it deemed “not directly related to function.” (*Id.*) After removing these modifications, the value of IAS's contribution is \$[XXXXXX] per unit, or [XX]%⁴ of the cost of the ALUMMC. (*Id.*)

³ The specific percentage has been redacted at IAS's request, but the Area Office found that IAS's modifications represented less than 40% of the ALUMMC's total value.

⁴ The specific percentage has been redacted at IAS's request, but the Area Office found that, after excluding modifications not directly related to function, IAS's modifications represented less than 30% of the ALUMMC's total value.

The Area Office then considered the importance of the modifications and determined that “there is little doubt that IAS's modifications are essential to the function and performance of the [ALUMMC].” (*Id.* at 7.) The Area Office explained that, according to the CPD, four fundamental characteristics distinguish the ALUMMC and are critical to its performance and function: (1) all-wheel drive capability; (2) two-person occupancy; (3) fuel compatibility; and (4) cargo bed payload. (*Id.* at 4.) The Area Office observed that the Gator purchased from John Deere already came with all-wheel drive capability and fuel compatibility, and these functions needed no modifications. Although the John Deere also came with two-person occupancy, IAS would perform some modifications, such as [XXXXXXXXXXXXXXXXXXXX]. (*Id.* at 4-5.) Installation of these items would require seven labor hours—nearly [XX]% of IAS's total labor hours—for each ALUMMC. As for the cargo bed, the John Deere did not come with one, so IAS had to design and build it. According to the Area Office, “[t]he cargo bed produced by and available from [John Deere] is useless to the Army because the applicable specification, MIL-STD-209K, and its requirements, is unique to the military.” (*Id.*) The Area Office observed that, in IAS's estimation, installing the cargo bed would account for nearly [XXX] of the total labor hours devoted to all ALUMMC modifications.

Further, IAS will install an [XXXXXXXXXX]. The Area Office remarked that although “[t]he cost of these items is not large[,] . . . these modifications are essential to the performance of the ALUMMC.” (*Id.*) The Area Office quoted an Army official's remark that “an ALUMMC shipped to Alaska may be useless without such items.” (*Id.*) IAS would also apply [XX]. (*Id.* at 6.)

Next, the Area Office explained that IAS is installing option kits purchased from John Deere. The Area Office determined that, because IAS incurs the cost of procuring these items and expends labor installing them, these option kits are properly considered part of IAS's contribution. The Area Office noted that John Deere “neither manufactures the kits nor offers installation.” (*Id.*)

Finally, the Area Office considered IAS's technical capabilities and concluded that “IAS possesses the requisite plant and all of the needed facilities and equipment specified in the regulation.”⁵ (*Id.* at 7.)

In sum, the Area Office concluded that “IAS's contributions to the end item being produced are anything but minimal operations.” (*Id.* at 8.) The Area Office reasoned that “[a]lthough several of the alterations it will perform are minor, a number of the modifications IAS is performing are both substantive and substantial—without IAS's extensive engineering design work (plus its assembly and installation)—the [ALUMMC] would have no cargo bed at all and be useless to the Army.” (*Id.*)

⁵ Appellant does not dispute this finding, so it is unnecessary to discuss the Area Office's reasoning on this point.

G. Appeal

On March 23, 2015, Appellant appealed the size determination to OHA. Appellant argues that the Area Office clearly erred in concluding that IAS is the manufacturer of the ALUMMCs.

Appellant asserts that the Area Office improperly analyzed the three factors set forth at 13 C.F.R. § 121.406(b)(2)(i). Appellant cites several reasons why the Area Office erred in analyzing the first factor. First, the cost spreadsheet utilized by the Area Office does not accurately represent the respective costs of IAS's and John Deere's contributions to the ALUMMC. (Appeal at 10, citing *Size Appeal of Marwais Steel Co.*, SBA No. SIZ-3884, at 3 (1994) and *Size Appeal of DynaLantic Corp.*, SBA No. SIZ-5125 (2010).) Next, because IAS merely provides the labor for installing parts and kits acquired from John Deere, it was erroneous for the Area Office to credit IAS with the cost of acquiring these parts and kits. Third, the Area Office included costs that were not directly related to function. Finally, because the total value of IAS's modifications are [less than 30%] of the ALUMMCs' total value, it was erroneous to conclude that IAS satisfies the first element of the test.

Appellant also alleges error with respect to the second factor. Appellant first contends that the modifications required to meet the occupancy and cargo bed capabilities are not themselves “functionally important,” because they represent just two of the four fundamental requirements of the ALUMMC and “an insignificant proportion of the overall vehicle functionality.” (*Id.* at 11.) Next, because IAS did not manufacture the John Deere options package used to meet the occupancy function, and the extent of IAS's modifications is not substantial, the Area Office should not have considered this work significant. Further, the Army did not recognize [XXXXXXXXXXXXXXXXXXXXXXXXXXXX] as KPPs, and these modifications provide only minor functionality. Accordingly, the Area Office incorrectly concluded that these modifications contribute significant functionality to the ALUMMC.

As for the cargo bed, Appellant argues that even if the Area Office were correct in crediting IAS with manufacturing it, this element alone is not sufficient grounds to conclude that IAS is the manufacturer of the ALUMMC. (*Id.*)

Appellant contends that the record contains “critical evidence” that demonstrates IAS's contributions are minimal. For example, IAS provided an overview of how the John Deere vehicle, by itself, meets the Army's requirements, and IAS characterized its own modifications as “minor.” (*Id.*) IAS's proposal stated further that the John Deere vehicle:

[XX]

(*Id.* at 12, quoting proposal (emphasis added by Appellant).) Further, Appellant argues, the proposal “touts *John Deere manufacturing processes* as the basis for [IAS's] quality assurance and control strengths.” (*Id.* (emphasis Appellant's).) IAS also included a picture of John Deere's assembly line. (*Id.* at 13.)

Appellant then argues that even if IAS performs every non-COTS modification, IAS is only responsible for ensuring that the ALUMMC meets approximately one-quarter of the

specifications (24 of 94). (*Id.*) If anything, Appellant contends, this number is inflated because many of the 24 specifications are redundant or are only partially completed by IAS. Moreover, many of these specifications—which include [XXXXXXXXXXXXXXXXXXXX]—are not functionally important to the ALUMMC. (*Id.* at 16.) Appellant stresses that the standard Gator will satisfy at least 70 of the specifications before IAS's modifications. These specifications include most of the core functional elements of the ALUMMC. (*Id.* at 17.)

Appellant explains that, because IAS is not the manufacturer of the ALUMMC, IAS must comply with the nonmanufacturer rule if it is to be eligible for the instant procurement. IAS, though, cannot comply with this rule. The nonmanufacturer rule requires that a small business (1) have 500 or fewer employees; (2) be primarily engaged in the retail or wholesale trade of the item being supplies; (3) take ownership or possession of the end items with its own personnel, equipment, or facilities in a manner consistent with industry practice; and (4) supply the end item of a small business manufacturer made in the United States. IAS, argues Appellant, fails the second and fourth elements of the nonmanufacturer rule. IAS is not supplying the end item of a small business because John Deere is a large business with over 67,000 employees, well above the 750-employee size standard. Appellant argues that IAS fails the second element of the nonmanufacturer rule because IAS does not normally sell aviation maintenance carts, and there are no such vehicles currently available for sale on IAS's website. Indeed, none of the items on IAS's website fall within NAICS code 333924.

H. IAS's Response

On April 22, 2015, IAS responded to the appeal. IAS asserts that the appeal is largely speculative and provides no basis for overturning the size determination. The conclusion that IAS manufactures the ALUMMC is fully supported by the record.

IAS asserts that it has over 25 years of experience in the design, engineering, furnishing, and installation of mechanized and flight-line support equipment, and has a long history of supplying military grade, heavy-duty systems, components, and products for aircraft and airfield flight-line support. (Response at 2.)

IAS argues that the Area Office fully evaluated the factual information in the record in accordance with applicable law and regulations and reached a reasoned decision. IAS states that the Area Office applied the three-factor test established at 13 C.F.R. § 121.406(b)(2)(i) and correctly determined that IAS is the manufacturer of the ALUMMCs. With respect to the first factor, IAS argues that the Area Office considered the value added by IAS's modifications, and determined that IAS would contribute [XX]% of the ALUMMCs' total value. (*Id.* at 7-8.) IAS argues that, although this work amounts to [XXXX] of the ALUMMC's total value, the modifications add substantial value. *See Size Appeal of Graham Brake and Diesel Co.*, SBA No. SIZ-3327, at 6 (1990) (although the firm's efforts constituted less than 40% of the total value of the end item, the firm was a manufacturer where its “assembly efforts constitute a significant contribution to the end item, without which, the [end item] could not comply with requirements of the solicitation.”).

IAS states that it developed the cost data relied upon by the Area Office at the time it was preparing its proposal, and that the data present a fair estimate of the costs for each element IAS added to the ALUMMC. There is no support, IAS argues, for Appellant's allegations that these cost estimates are inaccurate. (Response at 9.)

With respect to the second part of the manufacturer test, functionality, IAS states that the Area Office reasonably determined that IAS's modifications are essential to the function of the ALUMMC the Army seeks to procure. IAS asserts that Appellant's arguments to the contrary “ignore required specifications for the ALUMMC, rel[y] on outdated versions of IAS's proposal documents, and appl[y] the wrong measure to determine whether IAS's modifications contribute to the function of the ALUMMC.” (*Id.*) IAS cites the provisions in the CPD and PID requiring the ALUMMC to meet temperature requirements and lifting and tiedown provisions. IAS argues that the Gator does not meet these specifications without modifications. As such, the Area Office reasonably concluded that the Gator was “useless to the Army” before IAS completed the modifications. (*Id.*)

In addition, as IAS explained to the Area Office on remand, IAS performs other modifications necessary to meet the Army's military tie-down criteria. These improvements include the design, assembly, and installation of a heavy duty cargo bed, which [XXX]. (*Id.* at 10-11.)

Appellant's argument that IAS will perform only 24 of the 94 specifications is misleading, IAS contends, because IAS's contribution is not measured in terms of how many modifications IAS makes. Rather, IAS's contribution is measured by the importance of the elements added to the end-item's function, regardless of their relative value. (*Id.* at 11, citing 13 C.F.R. § 121.406(b)(2)(i)(B).)

IAS asserts that the Area Office's findings with respect to IAS's capabilities, the third part of the manufacturer test, are correct and fully supported by the record. IAS indicates that it has been manufacturing the ALUMMCs at its facilities, and has already delivered 150 ALUMMCs to the Army. (*Id.* at 12.)

Finally, IAS argues that Appellant's claims regarding the nonmanufacturer rule are untimely and should be dismissed. IAS states that NAICS code 333924 and classification code 23 were identified in the synopsis posted on the FedBizOpps website on February 7, 2013. Thus, all offerors knew or should have known that the waiver associated with NAICS code 333924 and Product Services Code 2320 would apply to this procurement. (*Id.* at 13.) IAS argues that the “NAICS and Product Services Code combination triggered the waiver and in part affected eligibility for award,” so Appellant was required to challenge this combination of NAICS and Product Services Code within 10 days of publication. (*Id.*) Because Appellant failed to do so, its arguments should be dismissed.

I. Supplemental Appeal

On April 22, 2015, after reviewing the Area Office file under the terms of a protective order, Appellant moved to supplement its appeal.

Appellant repeats its assertion that the Area Office erred in finding IAS to be the manufacturer of the ALUMMC. The basis for the Area Office's decision is that IAS will contribute [XX]% of the total value of the ALUMMC, and that the modifications are necessary to meet two of the four KPPs. (Supp. Appeal at 2.) These facts, however, do not support finding IAS to be the manufacturer of the ALUMMC. Appellant contends “it is clear legal error to conclude that a small business that contributes only [XX]% of the total value of the end item ... contributes a significant amount of the total value under this factor.” (*Id.* at 4.) Moreover, Appellant points out, many of the modifications performed by IAS—[XXXXXXXXXXXXX]—are not key characteristics.

Appellant disputes the Area Office's conclusion that IAS is contributing [XX]% of the ALUMMC's total value, on two grounds. This figure, Appellant maintains, erroneously includes a [XXXX] on IAS's costs for “[XXXXX]” of its modifications. Appellant argues that such costs are too speculative to be reliable and are irrelevant to the inquiry of proportionate value. Without this [XXXX], Appellant argues that IAS's contribution falls to [XX]% of the total value of the ALUMMC. (*Id.* at 3-4.)

Second, the Area Office should not have included the material cost of the kits for [XXXXXXXXXXXXXXXXXXXXXXXXX]. Appellant argues that IAS cannot claim credit for the cost of parts manufactured by another firm just because IAS installs those parts. IAS can only claim credit for the labor it expends installing them. Without the material cost of these [XX] kits, Appellant's contribution is only [XX]% of the total value of the ALUMMC. (*Id.* at 4.)

Appellant contends further that the Area Office should have considered the KSAs identified by the Army. This omission is significant, Appellant argues, because the Army identified the KSAs in addition to the KPPs as “the absolute items the system must meet.” (Email from K. Downs to L. Byrd (Feb. 10, 2015).). Appellant argues that IAS is responsible for none of the KSAs.

J. IAS's Reply

On May 7, 2015, IAS moved to reopen the record in order to reply to the supplemental appeal. IAS argues that the supplemental appeal makes new arguments not previously raised and “contains unsupported assertions and erroneous information about the effects of IAS's modification and manufacturing activities,” so there is good cause to allow IAS's reply. (Motion at 2.) For good cause shown, IAS's motion is GRANTED. 13 C.F.R. § 134.207(b); *Size Appeal of Advanced Projects Research, Inc.*, SBA No. SIZ-5504, at 6-7 (2013) (admitting response to appeal supplement); *Size Appeal of iGov Techs. Inc.*, SBA No. SIZ-5359, at 7 (2012) (extending the close of record to allow moving party “to address alleged errors and inconsistencies.”)

IAS argues that, contrary to Appellant's contentions, modifications to the John Deere Gator are necessary to meet two of the KSAs: cargo tie-down capability and transportability. IAS contends further that the Area Office reasonably focused on the KPPs because the KSAs are not mandatory requirements. (Reply at 1-2.)

IAS then addresses Appellant's assignments of error with respect to the Area Office's calculation that IAS's modifications will constitute [XX]% of the ALUMMC's value. IAS argues that Appellant provides no support for its claims that the Area Office should not have considered the [XXXX] and that [these] costs are too speculative to be considered. IAS argues that all costs in a price proposal are estimates and therefore speculative. IAS explains that it included the [XXXX] because of the indefinite nature of the procurement. The difference between the minimum purchase requirement of 51 ALUMMCs and the maximum of 2,000 created considerable uncertainty as to the cost IAS would have to bear. (*Id.* at 2.)

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

The instant case presents the question of how much work a prime contractor must perform in order to be considered the “manufacturer” on a contract for supplies or manufactured products. SBA regulations stipulate that, when a manufacturing or supply contract is set aside for small businesses, the prime contractor either must be the manufacturer of the end item being acquired, or must fall within certain non-manufacturer exceptions. 13 C.F.R. § 121.406(a). “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.” 13 C.F.R. § 121.406(b)(2). A concern that performs minimal operations upon the end item is not the manufacturer. *Id.* In addition, for size purposes, there can be only one “manufacturer” of an end item. *Id.*; *Size Appeal of Sea Box, Inc.*, SBA No. SIZ-5613 (2014). The regulations identify three factors to be considered in deciding whether a concern is the “manufacturer” of an end item: (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, irrespective of their relative value; and (3) the concern's technical capabilities, such as plant, facilities and equipment. 13 C.F.R. § 121.406(b)(2)(i).

Here, Appellant emphasizes that IAS will be contributing relatively little of the total dollar value of the ALUMMCs. Specifically, the Area Office found that IAS would modify the Gator vehicles purchased from John Deere, and that IAS's modifications represent [less than 40]% of the total cost of the ALUMMCs. *See* Section II.F, *supra*. IAS's share falls to [less than 30]% if modifications “not directly related to function” are excluded. *Id.* IAS counters, however, that some of its modifications are critical to the functionality of the ALUMMCs. Further, the

Area Office concluded that IAS is the manufacturer of the ALUMMCs, notwithstanding the limited dollar value of IAS's contributions.

Because the regulations themselves do not conclusively resolve this dispute, it is appropriate to consider the regulatory history. When SBA created the first two criteria for determining whether a concern is the “manufacturer” of an end item or is performing only minimal operations, SBA remarked:

Neither of [these] factors . . . would necessarily have more weight than the other. The circumstances of each case would dictate which factor is more important in that particular instance. For example, a solicitation requires a widget with a safety switch, large manufacturer A makes the widget without such a switch, and small concern B puts the switch on the widget. The end product is the widget with a safety switch. Even though the value added by concern B to the end product may be a very small proportion of its total value, concern B may still be the “manufacturer” of the end product (*i.e.*, widget with safety switch) because the safety switch is so important to the function of the end product.

52 Fed. Reg. 32,870, 32,875 (Aug. 31, 1987). Several years later, in proposing the third factor to the test, SBA stated that it was “add[ing] clarifying language to § 121.406(b)(2) to explain what a firm that makes changes to an item and then resells it must do to qualify as an eligible small business manufacturer.” 67 Fed. Reg. 70,339, 70,344 (Nov. 22, 2002). SBA commented that:

If a firm adds something to an item that the manufacturer of that existing item does not provide, the firm will be considered the manufacturer of the ultimate end item (*i.e.*, the item plus the addition). For example, if firm A manufactures a saw, the Government wants to purchase a saw with a safety switch, and firm B adds a safety switch to the saw, firm B, and not firm A, will be considered the manufacturer of the end item (*i.e.*, saw with safety switch) provided firm A does not itself make or provide a saw with safety switch. Similarly, a firm that merely installs a video card that the manufacturer of a computer could have installed will not be considered the manufacturer of [the] computer.

Id.

Turning to the instant case, the Army informed the Area Office that the KPPs and KSAs “are the absolute items the [ALUMMC] must meet.” Section II.E, *supra*. Ten characteristics, then, are essential to the ALUMMC's function: (1) all-wheel drive capability; (2) two-person occupancy; (3) fuel compatibility; (4) cargo bed payload; (5) cargo tie-down capability; (6) transportability; (7) safety features; (8) instrumentation package; (9) engine and drive train compartment access; and (10) rollover protection. If IAS's modifications contribute no functionality in any of these categories, then IAS cannot be reasonably viewed as the manufacturer, and the Area Office will have clearly erred in determining as much.

It is undisputed, however, that IAS's modifications are necessary to meet KPP 4 - Cargo Bed Payload. Before IAS redesigned the ALUMMC to the degree that it did in its June 5, 2014

FPR, the test vehicle failed the rear tie-down provision test. *See* Section II.B, *supra*. IAS then designed, assembled, and installed a [XXX] cargo bed that [XXXX]. IAS also [XXXXXXXXXX]. These modifications are essential to a functional end product, as the RFP defines the ALUMMC as a cargo transportation vehicle that can transport at least 800 pounds. *See* Section II.A, *supra*. The FPR also makes plain that IAS's modifications are necessary to meet the cargo tie-down capability KSA.

Appellant argues that many of the modifications IAS will perform are minor and not functionally significant. It is true that many of IAS's modifications are cosmetic, including work like [XXXXXXXX]. If these modifications were all IAS was contributing, IAS likely would not meet the second element of the manufacturer test. However, as described above, IAS is performing other modifications which are essential to the function of the ALUMMC.

Appellant also argues that IAS's modifications represent no more than [XX]% of the total value of the ALUMMC, and that OHA has never affirmed a finding that a firm is the “manufacturer” when it contributes so little of the end item's total value. The problem for Appellant, though, is that Appellant can point to no case in which OHA has reversed such a finding, either. Moreover, the regulatory history makes clear that neither of the first two factors set forth in 13 C.F.R. § 121.406(b)(2)(i)—the proportion of total value added by the concern and the importance of the elements added—has greater weight than the other. According to SBA's commentary in the *Federal Register*, the proportion of value added by the manufacturer could be “a very small proportion of its total value” as long as the concern adds important functionality. 52 Fed. Reg. 32,870, 32,875 (Aug. 31, 1987); *see also* *Size Appeal of Virtual Media Integration*, SBA No. SIZ-4447, at 6 (2001) (“Regardless of the relative value of [the challenged firm's] efforts, the Area Office must consider the importance of the elements that [the challenged firm] added to the function of the end item.”). This is also illustrated by the examples provided by SBA in the regulatory history, which indicate that a small business may be considered the manufacturer of an end item if it purchases that item from another company and adds significant functionality unavailable from the original manufacturer. In the instant case, because the procurement requires a cargo transportation vehicle and IAS's cargo bed modifications are critical to this function, IAS is properly viewed as the manufacturer notwithstanding the dollar value of IAS's contributions.

Appellant also complains that some of IAS's modifications are accomplished by installing kits acquired from John Deere, but this fact is immaterial for two reasons. First, IAS is not building the cargo bed from kit. Second, IAS maintains that John Deere does not manufacture or install the kits IAS is purchasing, and Appellant offers no evidence to the contrary. The kit modifications, then, do not detract from finding IAS to be the manufacturer of the ALUMMC.

Lastly, although the Area Office found that IAS is contributing [XXX] of the ALUMMC's total value, this does not necessarily present a problem with the limitation on subcontracting. By statute, the “cost of materials” is deducted when determining compliance with the rule, so costs IAS incurs for acquiring the Gator would be excluded when analyzing whether IAS has violated the limitation on subcontracting. 15 U.S.C. § 657s(a)(2); *Size Appeal of Red River Computer Co.*, SBA No. SIZ-5512, at 16 (2013). Further, compliance with the rule is “an element of responsibility and not a component of size eligibility.” 13 C.F.R. § 125.6(e).

Thus, whether or not IAS complies with the limitation on subcontracting is beyond the scope of this appeal. *Size Appeal of Shoreline Servs.*, SBA No. SIZ-5466, at 10 (2013).

IV. Conclusion

Appellant has not demonstrated clear error in the size determination. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge