Cite as: *Size Appeal of OSG, Inc.*, SBA No. SIZ-5718 (2016)

United States Small Business Administration
Office of Hearings and Appeals

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF: OSG, Inc., Appellant, RE: HPLogIt Management, LLC Appealed From Size Determination No. 05-2016-013	SBA No. SIZ-5718 Decided: March 8, 2016

APPEARANCES

David W. Lease, Esq., Smith, Lease & Goldstein, LLC, Rockville, Maryland, for Appellant

James A. Pikl, Esq., J. Mitchell Little, Esq., Scheef & Stone, LLP, Frisco, Texas, for HPLogIt Management, LLC

Gregory S. Donahoe, Contracting Officer, Army Contracting Command-Warren, Warren, Michigan, for the U.S. Department of the Army

DECISION[1]

I. Procedural History and Jurisdiction

On January 22, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 05-2016-013, finding HPLogIt Management, LLC (HPLogIt) is an eligible small business for the procurement at issue.

[1] This decision was originally issued under a protective order. OHA received one or more requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

OSG, Inc. (Appellant), who previously protested Appellant's size, contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find HPLogIt to be an other than small business for the instant procurement. For the reasons discussed *infra*, I deny the appeal, and affirm the size determination.

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. RFP

On September 30, 2015, the U.S. Army Contracting Command, Warren, Michigan (Army) issued Request for Proposals (RFP) No. W56HZV-15-R-0239 for the "complete remanufacturing" of Transparent Armor Assemblies (TAAs) for the Mine Resistant Ambush Protected All-Terrain Vehicles (M-ATVs) at the Red River Army Depot (RRAD). (RFP § C.1.) The Contracting Officer (CO) set the procurement aside for small businesses and designated North American Industry Classification System (NAICS) code 336992, Military Armored Vehicle, Tank, and Tank Component Manufacturing, with a corresponding 1,000-employee size standard.

According to the RFP, the Army will provide the contractor with used TAAs for the rear door, passenger door, driver's door, passenger windshield, and driver's windshield, and the contractor will determine whether they are salvageable. (*Id.* §§ C.2. and C.5.1.) "All assemblies deemed acceptable will have the transparent armor removed and returned to the Army for scrapping/salvaging." (*Id.* § C.5.1.) Then "[a]ll frames will be cleaned, blasted, inspected, primed and painted prior to re-installing new transparent armor from an approved supplier," and "TAAs with defroster capabilities must be fully tested prior to delivery." (*Id.*) All corroded areas will be cleaned, the corrosion removed, and treated with a rust inhibitor. (*Id.* § C.8.1.) During welding, blasting, and painting, the frames' mounting studs must be protected to ensure no damage to the threads occurs. (*Id.* § C.10.2.) The contractor must provide a secure facility for the work, including a perimeter fence. (*Id.* § C.1.)

The RFP specifies that the contractor must discard armor components with stage three or four corrosion, but retain for refurbishment components with stage one or two corrosion. *Id.*, § C.7.1. The contractor must examine areas around bolt holes for cracks or elongations and discard dented armor and bent frames and support panels. (*Id.* § C.7.2.)

The RFP states, "All transparent armor, seals, gaskets and electrical connections require 100% replacement with new parts." (*Id.* § C.6.1.) To this end, "[t]he contractor will supply certification documentation from the manufacturer for the transparent armor (glass) that it conforms to the material specification as noted on Original Equipment Manufacturer part drawing. The selected transparent armor manufacturer shall also be the contractor's source of

supply for the gasket in each assembly." (*Id.*) The RFP instructed offerors to procure the transparent armor and gaskets "from approved suppliers or a supplier who is in the final stages of approval or of receiving a waiver." (*Id.* § L.4.) There are three approved suppliers for the transparent armor: Appellant, SCHOTT Defense (SCHOTT) and PPG (Sierracin/Sylmar) (PPG). (*Id.*) Offerors were further instructed to provide a copy of its procedures for manufacturing and inspection, with a focus on material integrity throughout the refurbishment process. (*Id.* § C.10.1.)

B. Protest and Response

On December 17, 2015, the CO announced that HPLogIt was the apparent successful offeror. On December 23, 2015, Appellant protested HPLogIt's size. HPLogIt is not an eligible small business, Appellant alleged, because it is affiliated with either PPG or SCHOTT, both large firms, under the ostensible subcontractor and nonmanufacturer rules. Appellant reasoned HPLogIt is necessarily subcontracting with one of these two firms because there are only three approved suppliers of the transparent armor—Appellant, PPG, and Schott—and Appellant has not entered into a contract with HPLogIt to provide such armor. (Protest at 3-4.)

Appellant argued HPLogIt violates the ostensible subcontractor and nonmanufacturer rules because the transparent armor is the primary and vital requirement of the contract, whereas assembly is just a minimal task. To support this argument, Appellant included a declaration from its senior vice president, Mr. Louis Mitchener, asserting that, based upon Appellant's proposal and industry standards, the cost of the transparent armor should represent 80% of the contract cost. (Protest, Exh. 7.) Appellant provided a detailed description of its manufacturing process for the transparent armor. (Protest, Exh. 6.)

On December 31, 2015, HPLogIt responded to Appellant's allegations. HPLogIt explains that it will partner with PPG to supply the transparent armor. HPLogIt argued it is not in violation of the ostensible subcontractor rule because the purpose of the contract is to remanufacture transparent armor assemblies, not simply acquire new transparent armor. PPG is not the ostensible subcontractor, then, because it "is not performing remanufacturing services." To support this argument, HPLogIt drew the Area Office's attention to OHA's decision in *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). In that case, Appellant represented, OHA held the ostensible subcontractor rule does not apply, the contractor is the manufacturer of the end product and is performing the primary and vital tasks of the procurement, where the contractor acquired most of the manufactured components from its supplier, added in-house manufactured components, and integrated all the components into a final end product. (Protest Response, at 3.)

HPLogIt argued it is the manufacturer of the TAAs, so the nonmanufacturer rule does not apply. HPLogIt argued the remanufactured TAAs are the end-items being acquired, not transparent armor. In this regard, HPLogIt contended, this case is similar to *Size Appeal of Climatronics Corp. and Aerovironment, Inc.*, SBA No. SIZ-3062 (1989), where the offeror was "not simply installing the products of other manufacturers" but was "manufacturing a system by installing equipment and connecting it together in a way that suits the specifications of the [contracting agency]." (*Id.* at 4-5.)

Further, HPLogIt represents, PPG does not provide TAAs or have the ability to provide them. As a result, HPLogIt is the end manufacturer as a matter of law. (*Id.* at 5.)

In its proposal, HPLogIt represents it has extensive experience with working with military vehicle armor applications. HPLogIt's specialty is removing armor from returning vehicles, reconditioning and upgrading the armor. It also reconditions framed transparent armor, removing the damaged/delaminated glazing, reconditioning the frames, and installing new glazing into the frames. (Proposal at 1-2.) HPLogIt's proposal describes in detail its refurbishing process for transparent armor. HPLogIt has a [XXXX] square foot facility near RRAD prepared for this project, with multiple blast and paint booths with sufficient capacity to address the program. (*Id.*) The proposal describes how HPLogIt will pick up old assemblies from RRAD, inventory and inspect them, remove the old glazing from the frames, clean the frames, inspect the frames again with special gauges, prime and paint the frames, prepare the new transparent armor for installation, install the transparent armor, and seal it in place. (*Id.* at 2-13.) HPLogIt will then inspect, seal the underside of the assemblies, test the defroster, label the items, and conduct a final inspection. (*Id.* at 14-17.)

The proposal included a letter from PPG, confirming PPG was extending a credit line to HPLogIt "sufficient enough to support a procurement rate of [XX] shipsets per month of MATV part numbers." (Letter from D. Palermo to R. Zupanic (Oct. 28, 2015), Proposal, Attach. 5.) It also included a letter from Bancorp South, confirming the bank was prepared to make HPLogIt a working capital loan "for $[XXXX] plus." (Letter from A. Pinkham (Oct. 7, 2015), Proposal, Attach. 6.)

C. Size Determination

On January 22, 2016, the Area Office issued its size determination finding Appellant is a small business concern for the procurement at issue.[2] The Area Office determined HPLogIt is manufacturing the TAAs and is not affiliated with PPG under the ostensible subcontractor rule.[3]

The Area Office explained:

> For size purposes, there can be only one manufacturer of the end item being acquired. The manufacturer is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. The end

[2] In reaching this conclusion, the Area Office considered the employees of HPLogIt and its affiliate, Preston Hughs. HPLogIt's affiliation with Preston Hughs is not disputed on appeal, so further discussion of this relationship is unnecessary.

[3] The Area Office noted that HPLogIt, as the manufacturer, must comply with the Limitations on Subcontracting, 13 C.F.R. § 125.6(a)(2). Nevertheless, the Area Office did not determine whether HPLogIt complies with this rule because it is a responsibility matter to be determined by the CO. (Size Determination at 5.)

> item must possess characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed. The end item may be finished and ready for utilization or consumption, or it may be semifinished as a raw material to be used in further manufacturing. Firms which perform only minimal operations upon the item being procured do not qualify as manufacturers of the end item. Firms that add substances, parts, or components to an existing end item to modify its performance will not be considered the end item manufacturer where those identical modifications can be performed by and are available from the manufacturer of the existing end item:
>
> > (i) SBA will evaluate the following factors in determining whether a concern is the manufacturer of the end item:
> >
> > > (A) The proportion of total value in the end item added by the efforts of the concern, excluding costs of overhead, testing, quality control, and profit;
> > > (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 at 4-5, quoting 13 C.F.R. § 121.406(a)(2).) The Area Office noted that the RFP "does not simply call for a contractor to provide new transparent armor." (*Id.* at 5.) Rather, the "transparent armor is part of an assembly that must be received, unassembled, inspected, and refurbished." (*Id.*) Although the transparent armor is the most costly piece of the assembly, it is part of a complex final product requiring a large amount of labor and critical expertise. *Id.* The Area Office noted that HPLogIt's proposal takes fifteen pages to describe the remanufacturing process.

The Area Office then determined HPLogIt did not run afoul of the ostensible subcontractor rule, either, because HPLogIt is not unduly reliant upon PPG and PPG is not performing any of the contract's primary and vital functions. HPLogIt is not unduly reliant upon PPG because the RFP requires offerors to purchase the transparent armor from one of three sources. By purchasing this armor from PPG, then, HPLogIt is complying with the express terms of the RFP. PPG, moreover, is not performing any other function. PPG is not performing the primary and vital requirements of the contract because the RFP "requires many more aspects than just providing new transparent armor to the Army." (*Id.* at 6.) "While new transparent armor is a costly component, it is still just a component." (*Id.*)

D. Appeal Petition

On February 5, 2016, Appellant filed the instant appeal. Appellant argues the Area Office erred in finding HPLogIt was the manufacturer of the TAAs, and that PPG was not performing the primary and vital functions of the contract.

Appellant argues the Area Office misapplied the test for determining whether HPLogIt is the manufacturer, 13 C.F.R. § 121.406(b)(2). First, the Area Office did not even attempt to calculate the "proportion of total value in the end item added by the concern." Although the Area Office determined the transparent armor is the most costly piece of the assembly, this is not the same thing as making an actual calculation of proportionate value. Appellant restates that the transparent armor provided by PPG likely composes 80% of the TAAs' total value. (Appeal at 7.)

The second element of the manufacturer test—the importance of the elements added—also weighs in favor of finding HPLogIt is not the manufacturer. The transparent armor provides vision and blast protection, which is of the utmost importance to the Army. Frame assembly, by contrast, is collateral. Refurbishing the frame assembly does not transform the transparent armor in any material way. (*Id.* at 7, citing *Size Appeal of Envtl. Tech. Corp.*, SBA No. SIZ-2819 (1988).) To conclude HPLogIt is the manufacturer, Appellant contends, is akin to finding the builder of the frame which holds the Mona Lisa to be the creator of the painting. Like the Mona Lisa, the transparent armor "is the true final item that is the most sophisticated, labor intensive, and costly to produce." (*Id.* at 8.) The items added by HPLogIt, by contrast, are of minimal cost and importance.

Appellant asserts *Microwave Monolithics* and *Climatronics*, which HPLogIt relied on in its response to the protest, actually support Appellant's position. In *Microwave Monolithics*, the small business contractor, unlike HPLogIt, was responsible for 65% of the contract. Unlike the firm in *Climatronics*, HPLogIt is not is not fabricating and installing a complex system from component parts, but is simply removing a frame, refurbishing it, and reattaching it to newly manufactured transparent armor. (*Id.*)

Appellant maintains *Size Appeal of American Systems Corporation*, SBA No. SIZ-4022 (1995) is a more applicable case. In that case, OHA found the challenged firm was not the manufacturer when it would merely modify, assemble, install, and integrate the components into an agency's established computer system. Also relevant is *Size Appeal of Environmental Technology Corporation*, SBA No. SIZ-2819 (1988), where OHA held a challenged firm was not the manufacturer where the items provided by a large firm represented 63.9% of the contract. (*Id.* at 9.)

Appellant argues HPLogIt cannot qualify as a nonmanufacturer because it is not a reseller of transparent armor assemblies or any item of that nature. Further, PPG is a large business, and so HPLogIt is not providing the end item of a small business manufacturer. (*Id.*, citing 13 C.F.R. § 121.406(b)(1).)

Next, Appellant argues the Area Office clearly erred in determining HPLogIt is performing the primary and vital requirements, which Appellant argues, is the transparent armor provided by PPG. HPLogIt is merely a conduit for PPG to improperly sell its product under a small business set aside. *Id.* The Area Office's analysis on this point "consists of a single paragraph which contains mere bald conclusions unsupported by factual analysis." (*Id.* at 9-10.) The Area Office therefore failed to consider all aspects of the relationship, as is required in an ostensible subcontractor analysis. (*Id.*, citing *Size Appeal of C&C Int'l Computer and*

Consultants, Inc., SBA No. SIZ-5082.) The fact there are two other manufacturers of the transparent armor is irrelevant to whether there is undue reliance upon the armor manufacturer under the ostensible subcontractor rule. (*Id.* at 10.)

E. HPLogIt's Response

On February 23, 2016, HPLogIt responded to the appeal. HPLogIt argues Appellant has not identified any clear errors of fact or law, so OHA should affirm the size determination.

HPLogIt maintains the Area Office properly determined HPLogIt is the manufacturer of the remanufactured TAAs, because it found HPLogIt is responsible for the complex manufacturing process, which requires disassembling, refurbishing, and assembling the components into the TAAs. PPG is only providing the transparent armor, and is not performing any remanufacturing services, nor is it equipped to do so. To HPLogIt, Appellant's argument that refurbishment is only an incidental portion of the contract is mere disagreement with the Area Office, and does not establish clear error. (Response at 4.)

HPLogIt argues the Area Office properly found that while the transparent armor is the most costly piece of the assembly, the solicitation is for the assembly and includes evaluation, inspection and reconditioning of the assembly prior to inserting the new transparent armor. (*Id.* at 5, citing *Size Appeal of Tactical Micro, Inc.*, SBA No. SIZ-5646 (2015).) The Area Office considered all three factors: the value of the transparent armor in relation to the end item, the importance of HPLogIt's remanufacturing efforts, and HPLogIt's technical capabilities and processes. Contrary to Appellant's arguments, then, the Area Office conducted a proper inquiry into whether HPLogIt is the manufacturer. (*Id.* at 3-5.)

HPLogIt argues *American Systems Corporation* and *Environmental Technology Corporation* are inapposite. In the first case, the challenged concern was merely a systems integrator, obtaining nearly all the material for the contract from another firm. It was not manufacturing an end product. In the second case, the challenged concern proposed to supply a product manufactured by a large business that it merely relabeled, slightly modified, tested, packaged and delivered. It performed no manufacturing efforts. Here, by contrast, HPLogIt's proposal detailed the TAA remanufacturing process, not just mere resale of a transparent armor. (*Id.* at 5.)

HPLogIt maintains the Area Office did not err in finding no violation of the ostensible subcontractor rule. HPLogIt argues the fact that a large business supplies a major component in a manufacturing process does not make it an ostensible subcontractor. (*Id.* at 6, citing *Size Appeal of Kaiyuh Servs., LLC*, SBA No. SIZ-5581 (2014).) This is especially true for this solicitation, which mandates the transparent armor be obtained from one of three approved sources, two of which are large concerns. HPLogIt also cites to *Size Appeal of Bender Shipbuilding & Repair Co., Inc.*, SBA No. SIZ-2273 (1985), where a small business relied upon a large firm to supply specialized cranes, and OHA found the small firm was not unusually reliant when it would perform almost all the remaining work itself. (*Id.*).

Further, PPG will not be performing the primary and vital work, because the purpose of the solicitation is to procure remanufactured TAAs, not just transparent armor, which the Area Office properly found was just a component of the required product. PPG, moreover, has no remanufacturing capability, and could only serve as a component supplier. HPLogIt maintains the Area Office was correct in finding it would perform all the other tasks, and thus that PPG was not its ostensible subcontractor. (*Id.*, citing *Size Appeal of CymSTAR Servs., LLC*, SBA No. SIZ-5329 (2012).)

F. Supplemental Appeal

On February 23, 2016, after viewing the record under the terms of a protective order, Appellant supplemented its appeal. Appellant reiterates that HPLogIt is not the manufacturer when it will merely refurbish the frames which will hold the newly manufactured transparent armor. (Supp. Appeal at 2.)

Appellant also repeats the Area Office ignored the critical factor that the transparent armor is a significant majority of the end product's value, thus ignoring the requirements of 13 C.F.R. R. § 121.406(b)(2). Appellant points to language from HPLogIt's proposal which acknowledged the importance of the newly manufactured transparent armor to the project, refers to PPG as "our partner," and emphasizes PPG's ability to ramp up to produce the necessary sets of transparent armor. (*Id.* at 2-3.) From this, Appellant concludes HPLogIt's proposal supports Appellant's contention that the most important and substantive part of the procurement is the manufacture of the new transparent armor; frame assembly is collateral.

Appellant continues to argue PPG is an ostensible subcontractor. HPLogIt's proposal provides that PPG will supply the transparent armor, so PPG is performing the primary and vital requirements of the contract. The primary and vital requirements of the contract are those associated with the principal purpose of the acquisition. *Size Appeal of Santa Fe Protective Servs., Inc.*, SBA No. SIZ-5312, at 10 (2012); *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 17 (2011). Appellant maintains the principal purpose of this acquisition is to protect troops in the field with blast protection which also provides the ability to see outside the vehicle. (*Id.* at 3.)

Appellant maintains HPLogIt's reliance on OHA precedents is misplaced. In *Size Appeal of Bender Shipbuilding & Repair Co., Inc.*, SBA No. SIZ-2273 (1985), the challenged concern was performing 50% of the contract. Here, HPLogIt is responsible for a minority of the contract's value. In *Size Appeal of Tactical Micro, Inc.*, SBA No. SIZ-5646 (2015), the small business was performing the major share of the work, would assemble the final product, and oversaw the entire project. Here, HPLogIt has no oversight of the manufacture of the critical transparent armor. Similarly, HPLogIt's reliance on *Size Appeal of CymSTAR Services, LLC*, SBA No. SIZ-5329 (2012) is misplaced. That case held where a concern has the ability to perform the contract, will perform the majority of the work, and will manage the contract, the concern is performing the primary and vital functions. Appellant maintains PPG will perform the majority of the work here, by manufacturing the transparent armor, and so *CymSTAR* is inapposite. (*Id.* at 4.)

Finally, Appellant asserts the Area Office failed to conduct an adequate investigation. The Area Office did not calculate the proportion of total value HPLogIt's efforts added to the end item, excluding costs of overhead, testing quality control and profit, as required by 13 C.F.R. § 121.406(b)(2). Appellant provided with its appeal a detailed calculation, under oath, that transparent armor represented 80% of the contract value. Appellant maintains the record is absent any contracts or agreements between HPLogIt and PPG upon which to base a similar calculation based upon HPLogIt's proposal. (*Id.* at 5.)

Appellant maintains the Area Office further failed in its duty to examine all aspects of the relationship between HPLogIt and PPG, including any agreements between the two firms. (*Id.* at 5, citing *Size Appeal of C&C Int'l Computer and Consultants, Inc.*, SBA No. SIZ-5082 (2009).) The subcontract between HPLogIt and PPG is not in the record, and the Area Office thus failed to review it. Further, Attachment 5 to HPLogIt's proposal provides that HPLogIt is receiving a line of credit from PPG to perform the contract, which suggests undue reliance by HPLogIt upon PPG. Because the Area Office failed to consider this factor, it failed to conduct an adequate ostensible subcontractor analysis. (*Id.*)

G. CO's Response

On February 25, 2016, two days after the record closed in this case, the CO filed a response to the appeal. Because the CO made no request for an extension of time to file its response, the response is untimely and I will not consider it. *E.g., Size Appeal of Shoreline Servs., Inc.*, SBA No. SIZ-5466, at 8 (2013) (rejecting untimely response when no request for an extension was filed); *Size Appeal of Tiger Enters., Inc.*, SBA No. SIZ-4647 (2004) (rejecting various pleadings filed after the close of record).

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

I find Appellant has not met its burden of proving that the size determination is clearly erroneous. For the reasons discussed *infra*, the appeal is denied.

Appellant argues unconvincingly that HPLogIt is not the manufacturer of the TAAs. SBA regulations provide 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). Here, the Area

Office determined HPLogIt was the manufacturer and thus did not consider whether any non-manufacturer exceptions applied. The pertinent regulation provides:

> For size purposes, there can be only one manufacturer of the end item being acquired. The manufacturer is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. The end item must possess characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed. The end item may be finished and ready for utilization or consumption, or it may be semifinished as a raw material to be used in further manufacturing. Firms which perform only minimal operations upon the item being procured do not qualify as manufacturers of the end item. Firms that add substances, parts, or components to an existing end item to modify its performance will not be considered the end item manufacturer where those identical modifications can be performed by and are available from the manufacturer of the existing end item:
>
> (i) SBA will evaluate the following factors in determining whether a concern is the manufacturer of the end item:
>
> > (A) The proportion of total value in the end item added by the efforts of the concern, excluding costs of overhead, testing, quality control, and profit;
> > (B) The importance of the elements added by the concern to the function of the end item, regardless of their relative value; and
> > (C) The concern's technical capabilities; plant, facilities and equipment; production or assembly line processes; packaging and boxing operations; labeling of products; and product warranties.

13 C.F.R. § 121.406(b)(2).

In *Size Appeal of NMC/Wollard, Inc.*, SBA No. SIZ-5668, at 14 (2015), OHA interpreted this regulation in light of its regulatory history. OHA explained:

> 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.*

NMC/Wollard, Inc., SBA No. SIZ-5668, at 12-13 (2015). Based on this regulatory history, OHA has stated that where the challenged firm's modifications contribute no functionality in any of the key product specifications, the challenged firm cannot be reasonably viewed as the manufacturer. *Id.* at 14.

Here, the issue is, what is the Army acquiring. Appellant argues the transparent armor itself is what the Army is acquiring. However, the RFP does not support this argument, as it requires the complete remanufacturing of the TAAs, the doors and windshields that hold the transparent armor in place. These assemblies are necessary for the transparent armor to fulfill its dual function, of providing the troops using the M-ATVs both with protection and the capacity to observe their surroundings. The armor itself, while vital, cannot fulfill either of these functions by itself. It must be mounted in the assemblies.

Significantly, the RFP does not call for the manufacture of the armor itself. In fact, it does not address the manufacture of armor at all. Rather, the RFP calls, with particular emphasis, for the "complete remanufacturing" of the TAAs in which the transparent armor is to be mounted. The RFP goes into great detail about the tasks the contractor must perform to remanufacture the assemblies. The contractor must have a facility which meets the Army's standards for security. The frames are to be cleaned, blasted, inspected, primed and painted, prior to installing the armor. If the corrosion on the components is only stage one or two, they are to be cleaned, the corrosion removed, and the component treated with a rust inhibitor. The armor must be mounted in frames, and the studs in the frames carefully protected during the welding, blasting and painting process. The RFP, far from requiring the contractor to actually manufacture the transparent armor itself, contemplates that the contractor will procure the transparent armor from one of three approved suppliers, of which Appellant is one. I therefore conclude that the

manufactured products the Army is acquiring here are the TAAs. The transparent armor is a critical component to these assemblies, but it is not itself the subject of this procurement.

Turning to the factors the regulation requires to be considered, the Area Office noted the transparent armor is the most costly piece of the assembly. However, the RFP requires more than just this component. The proportion of the total value HPLogIt adds to the armor may not be that large, but proportion of total value is only one factor. The regulation does not mandate that any one of the three factors considered be determinative. *See* 52 Fed. Reg. 32,870, 32,875 (Aug. 31, 1987) ("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."). Further, I cannot rely here on Appellant's estimate that the transparent armor represents 80% of the value of the procurement. Appellant's arguments with respect to its own proposal cannot be considered here because its approach is not necessarily identical to that of HPLogIt, and its proposal is not in record. *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5359 (2012).

The other two factors to be considered weigh heavily in HPLogIt's favor. The importance of the elements added by HPLogIt is vital. It is the remanufactured assemblies which make the armor usable, and which permit it to fulfill its functions. Without the work performed by HPLogIt, the armor would be useless. The item procured here is not transparent armor, but TAAs, the doors and windshields which hold the armor in place on the M-ATVs so that it can function. They are analogous to the widget with the safety switch. While the value added by the concern which puts the switch on the widget may not be large in proportion to the total value, the concern is still the manufacturer because the switch is so important to the function of the end product. Here, the assemblies are essential to the function of the transparent armor. The armor must be mounted in these assemblies to provide the protection and observation capability to the troops using the M-ATVs. Because of the importance of its work to the end product here, HPLogIt must be considered the manufacturer.

Further, HPLogIt's proposal makes it clear HPLogIt will be performing the work at its own facilities, with its own equipment, and personnel, and that it has experience in working with military vehicle armor. HPLogIt has facilities near RRAD with the fencing required by the solicitation. PPG produces the transparent armor, but does not have capability to handle the remanufacturing of the assemblies. Therefore, the third factor also weighs in favor of finding HPLogIt the manufacturer here.

Appellant's precedents are inapposite. In *Size Appeal of American Systems Corporation*, SBA No. SIZ-4022 (1995), the challenged concern was merely a systems integrator, who would "unpack, assemble, connect, install, integrate, test" various components into the end items acquired. OHA concluded it did not transform the items to such a degree as to be their manufacturer. In *Size Appeal of Environmental Technology Corporation*, SBA No. SIZ-2819 (1988), the challenged concern only slightly modified a component purchased from another firm, then tested, assembled and packaged it. Again, OHA found this firm was not the manufacturer, because it not transformed the product. In contrast, HPLogIt is performing considerable work on the damaged assemblies, in accordance with the requirements of the solicitation, and will transform them from damaged to remanufactured, unlike the firms in *American Systems* and

Environmental Technology.

HPLogIt's work here is similar to that of the challenged concern in *Size Appeal of Sea Box, Inc.*, SBA No. SIZ-5613 (2014). That firm was to purchase used shipping containers to refurbish and sell to the Alabama National Guard, whose solicitation called for watertight shipping containers not showing signs of rust or damage. The firm would remove exterior walls that were dented, rusted or cracked and replace them with new metal, remove and replace gasket seals and flooring to meet water-tight requirements, sandblast the container to remove rust spots, repair holes with metal patches and prime and paint the container before shipping. This transformed a used, nonconforming container into one compliant with requirements of that solicitation. OHA held that this firm was the manufacturer of the containers. Similarly, HPLogIt will transform damaged transparent armor assemblies into remanufactured ones with new transparent armor, suitable for use on the M-ATVs. In line with the *Sea Box* precedent, HPLogIt is the manufacturer.

I therefore conclude that HPLogIt is the manufacturer of the TAAs to be procured here. HPLogIt will perform the work required by the solicitation, transforming the damaged assemblies into ones compliant with solicitation using its own facilities, equipment and employees. The transparent armor it will purchase from PPG is only a component of the end item being acquired, and, as received from PPG, not usable. HPLogIt will transform the armor by enclosing in the remanufactured assemblies, which it will provide to the Army. I affirm the Area Office's finding on this point.

I turn next to Appellant's contention that HPLogIt is affiliated with PPG under the ostensible subcontractor rule. Under SBA regulations, a subcontractor is an "ostensible subcontractor" when it is actually performing the primary and vital requirements of the contract, or the prime contractor is unusually reliant upon the subcontractor. In such a case, the challenged firm and its subcontractor are affiliated for the purposes of the procurement at issue. 13 C.F.R. § 121.103(h)(4). In determining whether the ostensible subcontractor rule is violated, the area office must examine all aspects of the relationship, including the terms of the proposal and any agreements, between the prime contractor and its subcontractor. *Id.*; *Size Appeal of C&C Int'l Computers and Consultants Inc.*, SBA No. SIZ-5082 (2009); *Size Appeal of Microwave Monolithics, Inc.*, SBA No. SIZ-4820 (2006). OHA has previously stated that ostensible subcontractor inquiries are "intensely fact-specific given that they are based upon the specific solicitation and specific proposal at issue." *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 12 (2010). OHA has held that where a concern has the ability to perform the contract, will perform the majority of the work, and will manage the contract; the concern is performing the primary and vital functions. *Size Appeal of CymSTAR Servs., LLC*, SBA No. SIZ-5329 (2012)

Here, Appellant argues that the principal purpose of the acquisition is to procure transparent armor. As a result, PPG is performing the primary and vital functions of the contract. The RFP, however, does not support this contention. Rather, the purpose of the acquisition is to obtain remanufactured transparent armor assemblies, not merely the armor itself. The RFP does not address the process of manufacturing the armor at all; indeed, it contemplates that the

awardee will obtain its armor from one of three approved sources.[4] The RFP does go into great detail on the steps necessary to produce the remanufactured assemblies, and HPLogIt will perform all of these functions. PPG will provide a crucial component of the assemblies, but it will not be performing any of the tasks required by the solicitation. HPLogIt has experience in performing this work, has the capacity to do it, having experience with military vehicle armor applications, will be performing this work in its own facilities, and will be managing the contract. HPLogIt is thus performing the primary and vital functions of the contract.

Appellant misunderstands what the work required by this solicitation is. The RFP requires the contractor to obtain transparent armor from one of three approved sources, and then to use it in the complete remanufacturing of the assemblies which will hold the armor in place on the M-ATVs. The manufacture of the armor itself is not the work required by the contract. Appellant's argument is similar to the unsuccessful argument of the appellant in *Size Appeal of iGov Technologies, Inc.*, SBA No. SIZ-5369 (2012). That appellant attempted to argue that a contract for production, logistics and sustainment support services for a tactical local area network was primarily a procurement for the computer hardware, and therefore the firm providing the hardware was that challenged concern's ostensible subcontractor. However, OHA found that the provision of the hardware was only a portion of the work required, and that the solicitation required not merely the provision of the hardware, but also the engineering and maintenance on an effective interconnected network. This was to be provided by the challenged concern, and so there was no ostensible subcontractor violation. Similarly, the work here is not merely the provision of the armor, but the remanufacture of the assemblies.

The fact that PPG, a large business, is providing the transparent armor does not make it an ostensible subcontractor. *Size Appeal of Kaiyuh Servs., LLC*, SBA No. SIZ-5581 (2014) (large firm vendor providing food to a cafeteria operation not an ostensible subcontractor). HPLogIt's citation to *Size Appeal of Bender Shipbuilding & Repair Co., Inc.*, SBA No. SIZ-2273 (1985) is relevant here. In that case a small firm obtaining specialized cranes from a large firm for a contract was found not to be in violation of the ostensible subcontractor rule. Appellant argues *Bender* is inapposite because in that case the small concern was performing most of the work. However, as noted above, HPLogIt is performing all the required work here, as well, obtaining the transparent armor from PPG as a component.

Appellant argues the Area Office erred in not obtaining a copy of the agreement between HPLogIt and PPG. While the Area Office should have done so, I find that this was harmless error. There is no need to review this agreement to determine which tasks PPG will be performing in this contract. PPG will provide the transparent armor, period. PPG will perform none of the tasks associated with the remanufacturing. I therefore conclude that a more thorough discussion of the agreement between HPLogIt and PPG would not have resulted in a different outcome, so the Area Office's failure to obtain it was harmless error. *Size Appeal of iGov Techs., Inc.*, SBA No. SIZ-5369 (2012).

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[4] If the Army had considered this a procurement primarily for the transparent armor, it is questionable whether it should have been a small business set aside, because with Appellant as the only small business among the approved sources, the acquisition could not have met the rule of two. FAR 19.502-2.1

Appellant argues that HPLogIt obtaining a line of credit from PPG suggests undue reliance upon PPG. OHA has held that obtaining financing from a subcontractor is a factor which can support a finding of violation of the ostensible subcontractor rule. *Size Appeal of STA Techs., Inc.*, SBA No. SIZ-4790 (2006). However, a review of HPLogIt's proposal shows that PPG is merely extending credit as a vendor to HPLogIt for its purchase of the transparent armor. The contract's overall financing will come from Bancorp South. Where the challenged concern can show it has financing from sources other than the subcontractor for most of the credit it must bring to the contract, there is no violation of the ostensible subcontractor rule. *Size Appeal of Giacare and Medtrust JV, LLC*, SBA No. SIZ-5690 (2015).

Accordingly, I conclude that Appellant has failed to establish that Area Office erred in finding that HPLogIt's contract with PPG for transparent armor violated the ostensible subcontractor rule.

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).

CHRISTOPHER HOLLEMAN
Administrative Judge