

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

**REDACTED DECISION FOR PUBLIC RELEASE**

SIZE APPEAL OF:

Mistral, Inc.,

Appellant,

RE: Commander Innovations, Inc.

Appealed From  
Size Determination No. 04-2018-001

SBA No. SIZ-5877

Decided: January 9, 2018

APPEARANCES

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

Troy A. Kingshaven, Esq., Derric G. Oliver, Esq., Fenton & Keller, Monterey, California, for Commander Innovations, Inc.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On October 19, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office), issued Size Determination No. 04-2018-001, concluding that Commander Innovations, Inc. (CI), is an eligible small business for the procurement at issue.

Appellant contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find that CI is not an eligible small business for this procurement. For the reasons discussed *infra*, I affirm the size determination and deny the appeal.

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<sup>1</sup> I originally issued this Decision under a Protective Order. After receiving and considering one or more timely requests for redactions, I now issue this redacted Decision.

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 Proposal

On April 7, 2017, the United States Air Force, AFLCMC/WNKAC, at Robins AFB, Georgia (Air Force), issued Solicitation No. FA8534-17-R-0001 (the RFP) for Commercial Armored Tactical Vehicles (CATVs). The Contracting Officer (CO) set the procurement aside for small business, and designated North American Industry Classification System (NAICS) code 336992, Military Armored Vehicle, Tank and Tank Component Manufacturing, with a corresponding 1,500 employee size standard, for this procurement. Initial Offers were due on May 16, 2017, with Final Proposal Revisions due on September 13, 2017.

The Statement of Work requires the contractor to build the CATVs to the specifications listed in Commercial Item Description A-A-59932 (CID). Specifications include a roof-mounted turret with weapon or the Common Remote Operated Weapon Station (CROWS), and ballistic protection sufficient to safeguard the four-man crew in hostile environments. (CID ¶ 2.1.) Required capabilities include a payload of 3,000 lbs. and towing a load of 4,200 lbs. across all surfaces. (CID and Rev. 2.) The CATVs must be built with parts supplied from commercial sources. (CID ¶ 2.1.)

The Air Force requested pricing for 14-19 CATVs, and separate prices for related items. The Air Force did not request a cost breakdown for the manufacture of the CATV itself. The Technical Evaluation subfactors are: Performance (payload and towing capacities, mobility, and brakes); CROWS compatibility (turret and hatch, gun mount, gunner's seat, gunner's visibility and protection); and Armor (armor and ballistic protection). (RFP at SSP Attach. 3, pp. 23-24.)

CI's Proposal states CI will be the prime contractor, and the other team members will be: [xxx]. (Proposal Technical Volume (Proposal) at 1-2.) CI will perform [xxx]. (*Id.* at 1.) CI will use the [xxx] as the original equipment manufacturer (OEM) vehicle for conversion into the required CATV. (Proposal at 3-4.) CI will purchase the OEM vehicle, disassemble it, scan the parts to be incorporated into the CATV for design engineering purposes, specify and order the required new parts, and assemble and finish the vehicle to the required standards.

CI will integrate a heavy-duty suspension with heavier springs and reinforce the frame and cross members to support the weight of the armor and to provide for off-road operation. (Proposal at 5-6.) The required modifications will increase the Curb Weight from the OEM vehicle's 7,548 lbs. to the CATV's 12,636 lbs., and the Gross Vehicle Weight Rating (GVWR), from 11,475 lbs. to 17,155 lbs. (*Id.*) The engine will be adapted to accept military fuels and tuned to increase output from [xxx] to support the increased weight and maintain speed, payload and towing capacity requirements. (*Id.*) CI will purchase and integrate the Turret and Gunner system, mounting it onto the roof, with an open-assist roof hatch that allows for one-handed operation,

and will reinforce the crew cab's structure to support the system. (Proposal at 12-13.) CI also will add an armored rear door to the crew cab allowing egress into the truck bed. (*Id.* at 25.)

### B. Protest and Area Office Proceedings

On September 19, 2017, the CO notified unsuccessful offerors that CI was the apparent successful offeror. On September 26, 2017, Mistral, Inc. (Appellant), an unsuccessful offeror, filed a size protest alleging that CI is not an eligible small business concern for this award. Appellant alleged, first, that CI is not the manufacturer of the item being procured and does not qualify as a nonmanufacturer. (Protest at 4-6.) In support, Appellant asserted that CI adds nothing of value to the CATVs and lacks technical capabilities to manufacture them; and [xxx], its business address is in a residential area, and its Commercial and Government Entity (CAGE) listing states it is a non-manufacturer. (*Id.* at 5-6.) Further, no Federal procurement database shows that CI has ever sold CATVs, or anything else, to the Government. (*Id.*) Second, Appellant alleged, “[f]or the same reasons”, CI “is an ostensible subcontractor since it is not manufacturing the CATVs, and therefore, cannot be providing the vital requirements of this contract which is the manufacture of the CATVs.” (*Id.* at 6.) The CO referred the protest to the Small Business Administration (SBA) Office of Government Contracting - Area IV (Area Office) for a size determination.

On September 19, 2017, CI submitted to the Area Office its Proposal, its response to the protest allegations, its completed SBA Form 355, corporate documents, employee count, and certain other information. This information shows that CI was established on June 30, 2016, and is owned by Rebecca and Kevin Griffin, who are also its only directors and officers. CI has no affiliates, and its employee count shows CI is well within the size standard for this procurement. CI denied Appellant's allegation it is not the manufacturer of the CATVs.

CI submitted additional information about its Proposal to the Area Office. This information describes the facility in Flint, Michigan, where the CATVs will be built, and describes the prior experience CI personnel have in developing, designing, and manufacturing military tactical vehicles. (CI Submission at 4, 6-8, Appendix B.) The facility, a former Army National Guard Automotive Facility, is owned by C3 Ventures, LLC (C3), but is being leased to CI. (CI Submission, Appendix A at 12-17.) In an October 6, 2017 letter, C3 describes the property to the Area Office and states it has granted a lease for the property to CI for manufacturing armored trucks, with a renewal option open until December 15, 2019, and the right of first refusal. (CI Submission, Appendix C.)

CI also provided a list of commercial components and parts to be procured from commercial vendors. In addition to the OEM vehicle, these include armor plates and armor glass, axles, diesel parts, gunner's protection kit and/or CROWS mounting kit depending on weapon configuration, body parts, bumpers, fender wells, and fasteners, chassis parts, run flat rims and tires, fuel filtration system, various electrical parts, and fire extinguishers. (CI Submission at 16-17.)

Also in the Area Office file are Evaluation Notices (ENs) from the Air Force. One of these requested the location for Inspection and Acceptance, to which CI responded with a Flint,

Michigan address. (EN No. CI-RFP-0002.) Another EN asked for workshare among prime and subcontractors. CI responded that it would have 87% of the work; [xxx]. (EN No. CI-RFP-0006.) Each subcontractor is a small business. (*Id.*) Another EN requested a price increase justification, to which CI presented a Basis of Estimate, summarized below.

[xxx]	\$ [xxx]
[xxx]	[xxx]
[xxx]	[xxx]
[xxx]	[xxx]
[xxx]	[xxx]
[xxx]	[xxx]
[xxx]	[xxx]
[xxx]	[xxx]
[xxx]	[xxx]
[xxx]	[xxx]
[xxx]	[xxx]
[xxx]	[xxx]
[xxx]	[xxx]
Total	[xxx]

(EN No. C-P-0001a.)

CI argued that the nonmanufacturer rule does not apply here because the procurement is not for commercial vehicles, but for CATVs with CROWS, and CI is manufacturing the end product. (CI Submission at 1.) The OEM, General Motors, does not manufacture armored trucks, and neither does any of CI's subcontractors. CI is the exclusive designer and manufacturer of this CATV end product. (*Id.* at 2.) Further, General Motors does not offer weapons packages for their vehicles, nor do they mount weapons stations on the vehicles they sell. (*Id.*) CI also argued the ostensible subcontractor rule does not apply here because CI is performing 90% of the primary and vital functions of this contract, including design and integration of the body armor, CROWS, and component upgrades to the base vehicle. (*Id.*)

#### B. The Size Determination

On October 19, 2017, the Area Office issued Size Determination No. 04-2018-001 (Size Determination), concluding that CI is the manufacturer of the end item being procured, that the ostensible subcontractor rule does not apply, and that CI is small for this procurement. The Area Office first noted the CAGE code, residential address, and internet allegations are irrelevant to the manufacturing issue, and then discussed CI's Proposal against the three regulatory factors, at 13 C.F.R. § 121.406(b)(2)(i), for determining who is the manufacturer of the end item. (Size Determination at 2-3.)

First, for the proportion of total value factor, the Area Office noted the RFP does not require manufacturing cost breakdowns, so it used the figures that were in the Proposal along with other information submitted by CI. The Area Office found the CI-provided cost figures to

be consistent with the figures in the Proposal. The Area Office found the [xxx] is \$[xxx] and the cost for [xxx] is \$[xxx], not including overhead, testing, quality control, and profit.<sup>2</sup> (Size Determination at 4.) Thus CI's contribution is over [xxx]% of the total cost (\$[xxx]) of the CATV. (*Id.*) Even after taking out costs that are not directly related to function (which the Area Office determined to be Body & Paint/Body Interior, Chassis Frame/Chassis Fuel, and Accessories), the value of CI's contributions totals \$[xxx], about [xxx]% of total cost. (*Id.* at 5.)

Second, for the importance of elements factor, the Area Office noted the regulatory importance of functional modifications, and that the RFP requires the CATV to be built from and modified with parts supplied from commercial sources. (*Id.* at 5.) The Area Office organized its discussion around the Evaluation Criteria: Performance, CROWS Compatibility, and Armor. Under Performance, the Area Office found the commercial vehicle CI is using is designed for wholly other purposes and functions, and requires substantial modification to meet the CATV specifications for performance, payload, towing capability, and braking. For example, CI must add .50 caliber armor steel plating, a structurally improved power frame, and an upgraded suspension system to support off-road operation and the additional weight of the armor and other upgrades. (*Id.* at 6.) The vehicle's Curb Weight would increase 67% and GVWR nearly 50%. (*Id.*) Under CROWS Compatibility, the Area Office noted that incorporating a remote weapon station is itself a major modification to the base vehicle, and it also requires the design and installation of structural reinforcement to support the CROWS and turret assembly on the roof. (*Id.* at 7.) Armor is also a substantial modification as the base vehicle is not armored, and the heavy armor requires modifications to the frame and suspension. (*Id.* at 7-8.) Each modification requires analysis of the existing base vehicle, design, and integration of the modification into the CATV. (*Id.* at 8.) The Area Office also noted CI's statement that the OEM does not manufacture armored trucks, offer weapons packages, or mount weapons stations on the vehicles they sell. (*Id.*)

Third, for the technical capabilities factor, the Area Office noted this includes facilities, equipment, and processes. The Area Office agreed with CI that the Flint facility, originally designed for the maintenance of larger trucks, is ideal for this work, as the development and integration of CATVs requires little fabrication, the armor being purchased from the supplier to specification. The Area Office also accepted CI's use of the Flint facility on the basis of an October 6, 2017 letter from the facility's owner granting CI the option to lease the facilities for the manufacture of CATVs. In a footnote, the Area Office noted the original Proposal had stated all work would be performed in St. Petersburg, Florida, while CI's Submission stated it would be performed at Flint, Michigan. It also provided CI's explanation for the change, which was that CI had originally offered an armor it makes in Florida, but during the EN process the armor was changed back to traditional steel armor, which is less costly in Michigan. CI noted it should have updated this description when it submitted its cost proposal. (Size Determination at 10, n.17.)

After concluding that all three regulatory factors weighed in favor of CI's being the manufacturer of the CATVs, the Area Office determined that CI is the manufacturer of the end item. (Size Determination at 11.) Based on this determination, the Area Office concluded it was

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<sup>2</sup> The Area Office calculated its percentages of cost using figures in the Proposal prior to EN No. C-P-0001a. The percentages there are not significantly different.

unnecessary to discuss whether CI qualifies as a nonmanufacturer. In a footnote, the Area Office dismissed Appellant's ostensible subcontractor allegation "as speculative" noting that the entire substance of this allegation was that CI "is not manufacturing the CATVs" with no evidence to demonstrate an ostensible subcontractor rule violation. (*Id.* at 11, n.21.)

Because CI has no affiliates and is, by itself, below the size standard, the Area Office concluded that CI is an eligible small business for this contract. (Size Determination at 10-11.)

### C. The Appeal

On October 19, 2017, Appellant received the Size Determination. On November 2, 2017, Appellant filed the instant appeal. On November 21, 2017, after Appellant's counsel had reviewed the unredacted Size Determination, CI's Proposal, and the other documents in the Area Office file under the terms of an OHA protective order, Appellant filed a Supplemental Memorandum.

Appellant argues the Area Office clearly erred in concluding that CI is the manufacturer of the CATVs. Specifically, Appellant asserts that CI does not have its own manufacturing facilities because the facility it will use is leased. (Appeal at 5 & n.1.) Further, the information about the lease and option was not in CI's Proposal as of Final Proposal Revisions. Appellant cites OHA's case law holding that the information in the proposal is controlling, and that changes of approach created in response to a protest may not be used to contradict the proposal. (Appeal at 5.) Thus, the Area Office's reliance on contrary information in CI's Submission is clear error.

As for the issue of whether 13 C.F.R. § 121.406(b)(2) permits a contractor to lease, rather than own, its manufacturing facility in order to qualify as the manufacturer of the end item made there, Appellant notes OHA left this issue unresolved in *Size Appeal of Technology Associates, Inc.*, SBA No. SIZ-5814 (2017), where the lease in question was not in effect on the day size was determined. (Appeal at 6.) Appellant urges OHA to decide this issue "by determining that merely renting a facility for the sole purpose of meeting the requirements of a particular contract does not constitute the use by a concern of 'its own facilities' under 13 C.F.R. § 121.406(b)(2). (*Id.*) Rather, OHA should require "some existing facility in operation which will be used in the performance of the manufacturing contract." (*Id.*)

Appellant also asserts the October 6, 2017 letter "is not an enforceable agreement" under contract law. (*Id.* at 7.) Further, the Area Office erroneously rejected Appellant's proffered evidence from Federal procurement databases and other online sources. (*Id.* at 7-9.)

Appellant further alleges that the Area Office erred in concluding that CI was not in violation of the ostensible subcontractor rule. The Area Office merely concluded in a footnote that because CI was the manufacturer of the CATVs, there was no ostensible subcontractor issue. However, because CI is not the manufacturer, it is not performing the primary and vital requirements of the contract, and thus is in violation of the ostensible subcontractor rule. Further, the Area Office failed to determine how CI would obtain a work force or financing to complete the contract. (*Id.* at 9-10.)

Appellant's Supplemental Memorandum (Supp. Mem.) provides in more detail the arguments of Appellant's original appeal concerning the Area Office's conclusion that CI is the manufacturer of the CATVs. Specifically, Appellant asserts CI "failed to ever mention its alleged Flint Facility during the EN process or when it submitted the site location with the cost proposal." (Supp. Mem. at 2.) Thus, the Area Office erred in relying on this "change in approach created in response to a protest" (*Id.*) Further, the October 6, 2017 letter is unsworn, is vague as to what arrangement exists between CI and C3, the landlord, and it contains no evidence of when the arrangement was entered into. (*Id.* at 3-4, citing CI Submission, Appendix C.) Appellant also questions the legitimacy of two purchase orders for CATVs that were submitted to the Air Force, and CI's possible use of an institute's equipment if needed (but not anticipated). (Supp. Mem. at 4.)

#### D. CI's Response to the Appeal

On November 21, 2017, CI responded to the appeal. CI asserts that it is the manufacturer of the CATVs and will use its own facilities to manufacture them. (Response at 2.) CI asserts that the manufacturer of the CATVs can only be CI; it cannot be C3, the Flint facility's landlord, who will contribute none of the design or manufacture of the CATVs; it cannot be Chevrolet, who manufactures only the stock pick-up trucks, and will contribute nothing to the transformation of the trucks into the CATVs the Air Force requires. "That transformation will be the product of CI's design and manufacturing expertise and efforts." (*Id.* at 2.)

As for the Flint facility, CI attaches a letter from C3 dated November 20, 2017 showing that the lease arrangement predated CI's final proposal revisions on September 10, 2017. CI also points to a reference to the Flint facility in its final proposal revisions at page 29. (*Id.* at 3.) As for Appellant's argument that a manufacturer must own, rather than lease, its facility, CI responds that there is no such requirement in statute, and asserts that if there is no OHA decision on this issue, it cannot be clear error for the Area Office to have determined that leasing the proposed facility is sufficient. (*Id.*) CI also makes policy arguments against requiring the ownership of manufacturing facilities.

CI vigorously takes issue with Appellant's characterization of CI as having no track record of manufacturing CATVs or any prior government contracting experience, pointing to the experience of its personnel in development, design, build, and manufacturing of military tactical vehicles. (*Id.* at 4.)

CI requests that OHA affirm the Area Office's determination that CI is the manufacturer of the CATVs, and that there is no ostensible subcontractor rule violation.

CI included four exhibits with its Response. Exhibit A consists of C3's October 6, 2017 letter, which is in the Area Office file, and another letter from C3 dated November 20, 2017. Exhibit B is a copy of CI's Final Proposal Revision, dated September 10, 2017, showing the Flint facility address on page 29 of the Model Contract. The cover letter states there are no changes to the Technical Proposal and the prices are the same as in the ENs. Exhibit C is a management personnel summary. Exhibit D is a copy of CI's completed SBA Form 355. With the exhibits is the Declaration of Kevin Griffin (Griffin Declaration), authenticating them.

### E. Other Pleadings

On November 24, 2017, CI objected to Appellant's Supplemental Memorandum. On November 28, 2017, Appellant opposed CI's Objection.

On November 28, 2017, Appellant moved to strike as new evidence the November 20, 2017 letter, which is part of CI's Exhibit A to its Response, and the Griffin Declaration authenticating it. On November 29, 2017, CI formally moved to admit the November 20, 2017 letter and the Griffin Declaration as new evidence, and opposed Appellant's motion to exclude these two items as new evidence. On December 5, 2017, Appellant opposed CI's November 29, 2017 Motion.

### III. Discussion

#### A. Timeliness, Supplemental Memorandum, New Evidence, and Standard of Review

Appellant filed its appeal within fifteen days of receiving the Size Determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

It is OHA's practice to permit parties (usually protestors) to supplement their pleadings after reviewing the Area Office files for the first time under a protective order. *E.g.*, *Size Appeal of Harbor Services, Inc.*, SBA No. SIZ-5576 (2014). This is particularly true when, as here, the matters in dispute are contract-specific and therefore cannot be thoroughly litigated without considering the specific terms of the challenged firm's proposal. CI's objection to the Supplemental Memorandum is **OVERRULED**.

Evidence not previously presented to the Area Office will not be considered unless the Administrative Judge orders its submission or a motion is filed establishing good cause for its submission. 13 C.F.R. § 134.308(a). Here, CI's belated motion does not establish good cause for admitting for the first time on appeal information that was available to it during the Area Office's size investigation and not submitted then. Appellant's motion for admission of new evidence included in the November 20, 2017 letter is **DENIED**.

As for the other items attached to CI's November 21, 2017 Response, C3's October 6, 2017 letter (part of Exhibit A), and CI's completed SBA Form 355 (Exhibit D) are already in the Area Office file so require no ruling. CI's Final Proposal Revision (Exhibit B) is not in the Area Office file but should have been, and so it is **ADMITTED** into the file on appeal. The management personnel summary (Exhibit C), similar to one in the Area Office file, is cumulative; I therefore decline to admit it. *See Size Appeal of Speegle Construction, Inc.*, SBA No. SIZ-5147 (2010). I need not rule on the Griffin Declaration. *See* 13 C.F.R. § 134.204(b)(3).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Size Determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Size Determination only if the Judge, after reviewing the record



and pleadings, has a definite and firm conviction 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 CI is not the manufacturer of the CATVs. The size 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 qualify as a nonmanufacturer. 13 C.F.R. § 121.406(a). Here, the Area Office determined that CI is the manufacturer and thus did not consider whether CI qualifies as a nonmanufacturer. The regulation continues:

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 (2015) (*NMC/Wollard*), OHA interpreted this regulation in light of its regulatory history. OHA explained that 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.

*NMC/Wollard*, at 13 (quoting 52 Fed. Reg. 32,870, 32,875 (Aug. 31, 1987)). Fifteen 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.” *NMC/Wollard*, at 13 (quoting 67 Fed. Reg. 70,339, 70,344 (Nov. 22, 2002)). SBA further 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.*; see also *Size Appeal of Potomac Electric Corp.*, SBA No. SIZ-5714, at 9-10 (2016) (*Potomac Electric*); *Size Appeal of OSG, Inc.*, SBA No. SIZ-5718, at 11 (2016) (*OSG*), *recons. denied*, SBA No. SIZ-5728 (PFR).

Based on this regulatory history, OHA reasoned that if a contractor's modifications contribute no functionality in any of the key product specifications, that contractor cannot be reasonably viewed as the manufacturer. *NMC/Wollard* at 13. In *NMC/Wollard*, the Army's procurement was for Aviation Light Utility Mobile Maintenance Carts (ALUMMCs), a light vehicle that the contractor had proposed to build based on the John Deere Gator. The protestor alleged that the contractor was merely reselling the product of a large business with minor modifications. The contractor, among other things, had to design, assemble, and install a new cargo bed to permit the vehicle to meet the Army's requirements for cargo bed payload and cargo tie-down capacity, and a model with somewhat less than those modifications had failed the required testing. *Id.* Other modifications were made by installing kits purchased from John Deere, but that company neither manufactures nor installs the kits the contractor needed. *Id.* at

14. OHA found these modifications sufficed to conclude the Area Office had correctly found the contractor was the manufacturer of the ALUMMCs. *Id.*

In *OSG*, the Army procurement was for “complete manufacturing” of Transparent Armor Assemblies (TAAs) for certain vehicles. The contractor was to receive used TAAs, determine if they were salvageable, strip, clean, blast, inspect, prime, and paint them, and then install the new transparent armor. The contractor would purchase the new transparent armor, and it was the most costly item. Despite the cost of the armor, OHA affirmed the Area Office determination that the contractor, not the supplier of the transparent armor, was the manufacturer, because the transparent armor alone, unmounted, did not serve the Army's purpose. *OSG* at 13. The contractor in *OSG* also had the capacity and facilities (including the Army-required perimeter fencing) to perform this work, whereas the supplier of the armor did not. *Id.*

In *Potomac Electric*, the National Oceanic and Atmospheric Administration (NOAA) procurement was for servo motor assemblies which must meet certain weight restrictions and whose electrical terminals must meet certain specifications in order to work with NOAA's equipment. The contractor was to take apart purchased subassemblies and perform extensive work to produce a motor compliant with the solicitation's requirements. The contractor would perform 52% of the costs, and also had the required facilities for the work. *OSG* at 10-11. OHA concluded the Area Office correctly found the contractor to be the manufacturer of the end item, the compliant servo motors. *Id.*

In the instant appeal, I find *NMC/Wollard*, *OSG*, and *Potomac Electric* are so similar to the instant appeal as to be controlling. In each case, the contractor has to do extensive work to bring the supplied items up to the procuring agency's requirements, and without that extensive work, the supplied items are useless to the agency. As in *NMC/Wollard*, the OEM vehicle cannot meet the cargo specifications without the contractor's extensive work designing, assembling, and installing a new cargo bed. The instant RFP's specifications go far beyond cargo. The CATV must have a roof-mounted turret with weapon (or the CROWS), and ballistic protection sufficient to safeguard the four-man crew in hostile environments. The roof-mounted turret with weapon and the required armor, in turn, require additional modifications to reinforce the OEM vehicle's frame, chassis, and other support elements, as well as modifications to the engine and drive train so it can perform to specifications despite the significantly greater weight. The CATV's Curb Weight is 67% more, and its GVWR is nearly 50% more than the OEM vehicle. Essentially, CI is tearing down the entire OEM vehicle and rebuilding it from the ground up, with additional parts that CI has to design, order, assemble, and install. The OEM here (General Motors) does not manufacture armored vehicles, and it does not arm the vehicles it sells. It manufactures only a stock pick-up truck that without considerable modification could not meet the Air Force's requirements for an armored and weaponized tactical vehicle that can perform in a war zone. Only CI manufactures the CATV.

Under the first factor of the three-factor manufacturer test of 13 C.F.R. § 121.406(b)(2), the contractor's proportion of total value in the end item, CI's contribution is over 71% of the total cost of the CATV. For the second factor, importance of the elements added by the contractor, it is clear from the above discussion that the CATV is a new, completely transformed vehicle: it is armored and weaponized, and can accept a variety of military fuels, unlike the OEM

vehicle, and it is much, much heavier and more powerful. Both the first and second factors strongly demonstrate that CI is the manufacturer of the CATVs.

The third factor of the manufacturer test concerns the contractor's technical capabilities, plant, facilities and equipment. Appellant focuses its principal argument on this factor, asserting the contractor must own, rather than lease, the facility being used for manufacturing. Appellant also argues that the information in the October 6, 2017, letter from C3 granting CI the option to lease the facilities for the manufacture of CATVs is not in the Proposal. In response, CI argues there is no statute, regulation, or OHA caselaw requiring the contractor to own the facilities used for manufacturing.

CI is correct that no statute or regulation requires the small business contractor to own (rather than lease or rent) the facilities used in a manufacturing contract. And, to date, OHA has made no definitive ruling on this issue because the issue has never been squarely presented. In some OHA decisions, the leased facilities come up only in connection with post-protest attempts to re-write proposals, as in *Size Appeal of Technology Associates, Inc.*, SBA No. SIZ-5814 (2017) and *Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815 (2017). The fact the facility is leased as opposed to owned by the contractor, was not at issue. On the other hand, in *Size Appeal of Precision Lift, Inc.*, SBA No. SIZ-4876 (2007), OHA overturned a size determination concluding that manufacturing would take place in Canada, on finding that the procured item actually would be made in a leased facility in Montana. Location of the facility, not the fact it was leased, was the issue presented there. Likewise, in *Size Appeal of CymSTAR Services, LLC*, SBA No. SIZ-5329 (2012), OHA affirmed a size determination finding the contractor is the manufacturer of the end item, where important work would take place in a leased facility. The fact the facility is leased was not raised as an issue.

Here, the RFP and CID make no specific requirements about the facilities the contractor would use; in fact, the only question asked about facilities is where the inspection of the first unit would take place. Unlike in *OSG*, there is no specification for the manufacturing facility, not even for a security specification such as a perimeter fence. Because the RFP and the CID do not require the manufacturing facilities to be owned by the contractor, I conclude there is no basis for holding that the phrase in the regulation “its own facilities” requires a contractor to outright own in fee simple absolute the facilities that it will use to manufacture the product to be sold to the procuring agency. Businesses frequently rent or lease facilities in order to manufacture products. The facility used by a business is usually owned by another entity, even if the realty-owning entity has the same owners as the operating company. I conclude that, in the absence of a requirement in the solicitation, the phrase “its own facilities” in the regulation means that the contractor need only occupy and control the facilities, if not as an owner, then as a lessor or tenant. Thus, the fact the Flint, Michigan, facility will be leased has no bearing on the adequacy of the contractor's manufacturing facilities.

Appellant is correct when it states that OHA's case law holds that the information in the Proposal is controlling, and that changes of approach created in response to a protest may not be used to contradict the proposal. *E.g.*, *Size Appeal of Technology Associates, Inc.*, SBA No. SIZ-5814 (2017). Here, however, there is not a change of approach created in response to a protest. Rather, it is clear from CI's response to EN No. CI-RFP-0002, which preceded the final proposal

revisions, that the location where it would perform the work had been moved to Flint, Michigan. Further, the final proposal revision and the October 6, 2017 letter both state that manufacturing will be in Flint, Michigan. Therefore it is clear that CI included as part of its proposal that the place where it would be performing the transformation of inorganic substances, including the assembly of parts and components, into the final CATVs, would be the facility in Flint, Michigan. This is not an instance, such as in *Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815 (2017), where information given to the Area Office during the size investigation contradicted the contractor's proposal. Accordingly, I conclude that the Area Office did not err in relying upon CI's information that it would manufacture the CATVs in Flint, Michigan.

Appellant's ostensible subcontractor claim is utterly meritless. The ostensible subcontractor rule provides that a prime contractor and its subcontractor may be treated as affiliates if the subcontractor performs the primary and vital requirements of the contract, or if the prime contractor is unusually reliant upon the subcontractor. 13 C.F.R. § 121.103(h)(4). The rule "asks, in essence, whether a large subcontractor is performing or managing the contract in lieu of a small business [prime] contractor." *Size Appeal of Colamette Constr. Co.*, SBA No. SIZ-5151, at 7 (2010).

Appellant had provided no substantive evidence in support of that allegation. The record here reflects that three subcontractors together will provide less than 15% of the value of the contract. As noted above, CI will perform the important manufacturing itself. There is nothing whatever in the record to support Appellant's claim, and I agree with the Area Office's conclusion that an investigation into that issue would be futile.

Finally, the Area Office did not err in not examining how CI would obtain a work force or financing to complete the contract. These are responsibility determinations, and are the province of the CO, not the Area Office. *Size Appeal of Synergy Solutions, Inc.*, SBA No. SIZ-5841, at 11 (2017).

I conclude that the Area Office correctly determined that CI is the manufacturer of the end item being acquired, the CATVs. Because CI is the manufacturer, it need not also qualify as a nonmanufacturer. See 13 C.F.R. § 121.406(a). By itself, CI is below the 1,500 employee size standard, and it has no affiliates; therefore, CI is eligible as a small business for this procurement.

#### 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. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge