APPEARANCES

Jonathan D. Shaffer, Esq., Mary Pat Buckenmeyer, Esq., Zachary D. Prince, Esq., Smith Pachter McWhorter PLC, Tysons Corner, Virginia, for Coulson Aviation USA, Inc.

DECISION

I. Procedural History and Jurisdiction

On December 2, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2017-008 finding Coulson Aviation USA, Inc. (Appellant) is not 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 Appellant is an eligible small business for the instant procurement. For the reasons discussed infra, I deny the appeal, and affirm the size determination.


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1 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.
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, Statement of Work, and Proposal

On September 17, 2014, the Department of Air Force (Air Force) issued Solicitation No. FA8504-14-R-31382 as a Request for Proposals (RFP) for Retardant Delivery Systems (RDS). The Contracting Officer (CO) set the procurement aside for small business and designated North American Industry Classification System (NAICS) code 336411, Aircraft Manufacturing, with a corresponding 1,500 employee size standard, as the appropriate code. Appellant submitted its Technical Proposal (Proposal) on May 26, 2015. Appellant submitted its final proposal revisions on April 7, 2016. These revisions only addressed price; they did not vary the Technical Proposal. On May 18, 2016, the CO awarded the contract to Appellant.

The Statement of Work (SOW) calls for the contractor to design, engineer, develop, manufacture, and install a 3,500 gallon RDS for seven demilitarized HC-130H aircraft which the Air Force will provide. (SOW at 6.) The aircraft will then be transferred to the U.S. Forest Service for use in firefighting. (Id.) The contractor effort includes structural modification of the aircraft to enable the firefighting tank to be rolled into and out of the aircraft. (Id.) The tank is to be an internally mounted gravity constant flow RDS, easily removable within 6 man hours and shall not adversely impact the normal operations of any other aircraft system. (Id.)

The contractor will provide on-site engineering support for installation and testing during the RDS modification of the aircraft. (SOW at 7.) Installation will be at the contractor's secure facility including sufficient hangar and ramp space. (Id. at 10.) The contractor will provide the government a Quality Assurance Plan that will define the quality control process used to ensure that dimensional accuracy, material selection, and assembly of the RDS meets specifications and matches the configuration baseline. (SOW at 10-11.)

The Proposal states Appellant will subcontract work to its affiliate, Coulson Aircrane, Ltd. (CAL), aircraft Original Equipment Manufacturer [xxx], and [xxx] other firms. (Proposal at 2.) CAL has “extensive experience in aerial dispersion system tank fabrication, assembly, and airframe integration.” (Id. at 3.) Appellant's Representations and Certifications (FAR 52.215-6) states Appellant intends to perform the work for this contract at [Place].

The production will be in eight phases: [xxx]. (Id. at 5-7.) In Phase 1, “[xxx].” (Id. at 5.) For Phase 2, “[xxx].” (Id.) In Phase 3, [xxx]. (Id. at 7.) [xxx] will perform Phases 4, 5, and 6. (Id. at 6-7.) Appellant will perform Phases 7 and 8 with subcontractors. (Id.)

Appellant's Proposal further states: [xxx]. (Proposal at 8.)

Moreover, “[xxx].” (Id.) The Proposal lists this [xxx]. (Id. at 9.) Next the Proposal describes [xxx], noting “[xxx].” (Id. at 10.) [xxx]. (Id. at 11.) [xxx]. (Id. at 13.)
B. Protest and Area Office Proceedings

On October 19, 2016, the CO filed a size protest. The protest alleged Appellant's Portland, Oregon, location has no manufacturing capability, and that the product Appellant would supply may be manufactured by CAL in British Columbia, Canada. The CO forwarded the protest to the SBA Area Office for a size determination. On October 26, 2016, the Area Office notified Appellant of the protest and requested various information and documents concerning itself and its affiliates, which Appellant provided.

On November 2, 2016, Appellant responded to the size protest. Appellant asserted it is the manufacturer of the RDS system and, while it will receive support from CAL and other subcontractors, Appellant maintains it is the party responsible for manufacturing the end item RDS units the Air Force is procuring here. Appellant asserted it has experience in performing this type of work, is a United States concern, and has extensive operational facilities in the United States. (Response at 1-2.)

Appellant provided its registered business office address in Portland, Oregon, and its Operations and Maintenance office in Reno, Nevada, which is Appellant's operational, regulatory, and logistics center for its aerial firefighting tank systems. (Id. at 2.) Appellant presented five certificates issued by the Federal Aviation Administration (FAA), including for the design, support, and manufacture of aerial firefighting tanks on FAA-approved aircraft. Appellant intends to use the certificates to perform this contract. (Id. at 2-4.)

Appellant also stated: [xxx]. (Id. at 2-3.) This undertaking appears nowhere in the Proposal as submitted to the Air Force.

Appellant asserted that it is an independently owned and operated small business, that it complies with the limitations on subcontracting, that SBA's regulations do not require all manufacturing to be performed in the United States, and that its Proposal complies with the RFP. (Id. at 6.) Appellant also will perform more than [xxx]% of the work itself, pointing to cost data at Exhibit 2. (Id.) Further, Appellant will manufacture the “end item” in the United States, as demonstrated in the attached Exhibit 3. (Id. at 8.) Appellant noted also that the CO's letter refers to Appellant's submission of a [xxx]. (Id. at 6.)

Appellant identified the RDS tank system as the end item, noted it understands the “newly raised Air Force concerns” concerning [xxx], but because it already has the capability and will manufacture the end item in the U.S., the Air Force concerns are not warranted. Appellant stated it plans to retain its Reno facility and to add space in [xxx]. Appellant asserted it would conduct end assembly for the RDS tanks in Reno and [xxx]. (Response, Ex. 3, at 1.)

Appellant set out how it will allocate work, by CLIN: CLIN 0001 (Non-Recurring Engineering): Appellant [xxx]%, with [xxx]% divided among [xxx]; CLINs 0002, 0003, and 0006 (Trial Kit, Verification Kit, and Production Kit): Appellant [xxx]% of parts and materials and [xxx]% of the manufacturing by value, with [xxx] [xxx]% for [xxx] processes of [xxx]; and

2 The Area Office performed an Internet search and found an accountant's office there.
CLIN 0008 (Support Equipment Tools): Appellant [xxx]% with [xxx] [xxx]%.
Appellant will perform all other processes and all assembly in the U.S. (Response, Ex. 3, at 2-3.)

On November 7, 2016, Appellant provided its April 17, 2014 lease for hangar space in Reno (on which the user is identified as “Coulson Group of Companies”), and photos of work being done on C-130s at various locations in the U.S. (Nov. 7, 2016 Response, Ex. 1, 2.) Appellant asserted that it has a significant U.S. presence, maintains significant assets here, does significant work in the U.S., and will have adequate U.S. employees to perform the contract. (Nov. 7, 2016 Response at 1.) As for the Area Office's query that Appellant has only [xxx] employees, Appellant stated that, as a small business, it could not hire beyond its “core group” until it actually starts work. (Id. at 3.) Appellant stressed it will manufacture the end item, the RDS tank, in the U.S. but, as a small business, cannot lease additional space “until it knows the contract will go forward.” (Id. at 5.) Appellant provided a table breaking out costs as a percentage of total contract value; Appellant's direct labor and intellectual property (combined) are [xxx]%, and with materials and indirect costs Appellant has [xxx]% of total contract value. [xxx] has [xxx]%, and other subcontractors have [xxx]% (Id., Ex. 4.) This cost table was not included in the Proposal; however, Appellant also noted that the Air Force did not require the detailed costing data that SBA requires. (Nov. 7, 2016 Response at 5.)

The next day, Appellant provided further information on its staff flexibility and surge capacity, emphasizing that the end item being manufactured here is a firefighting tank, not an aircraft. (Email to Area Office, Nov. 8, 2016.) In response to later questions, Appellant stated it holds the FAA Supplemental Type Certificates for the design and manufacture of the tank and provided detailed payroll records for itself and all affiliates. (Email to Area Office, Nov. 16, 2016.) Appellant told the Area Office that its Final Proposal Revisions were for price only and that the Technical Proposal was not changed. (Email to Area Office, Nov. 17, 2016.)

The Area Office requested Appellant to describe the type of work performed at Reno, and whether the site had any manufacturing facilities. Appellant responded with an example for similar work it had performed on a C-130 aircraft. The manufacturing was performed at a California facility, but once the C-130 went into its operational phase, the base in Reno was opened where regulatory oversight, servicing, light and heavy maintenance for the aircraft was conducted, with electrical hydraulic components and small parts manufacturing for the RADS-XXL tank. Appellant maintains it has always operated on a “scalable” format in response to its needs. Appellant stated the Reno operation will be increased to encompass the end item manufacture of the tanking system as it did in California. (Letter to Area Office, Nov. 22, 2016.)

B. Size Determination

On December 2, 2016, the Area Office issued a size determination finding Appellant not in compliance with the nonmanufacturer rule and therefore ineligible for the instant contract. The Area Office first found Appellant, together with its affiliates, is within the applicable size standard. (Size Determination at 1-10.) The Area Office noted Appellant's fixed and mobile operations, with staffing levels that vary from month to month according to operating needs. Appellant's payroll documentation shows an average of [xxx] employees as of April 7, 2016. (Size Determination at 13-14.)
The Area Office then turned to the question of whether Appellant is the manufacturer of the end item to be provided, the RDS. The Area Office noted Appellant's Proposal specifies that activities to be performed in connection with the Detail Part Fabrication and Assembly Fabrication, Kit Fabrication, and Kit Shipment will be done by [xxx], and that [xxx]. (Id. at 14-15, citing Proposal at 5-6.) The Proposal highlights [xxx], and emphasizes Appellant's management, administrative, testing, and engineering capabilities. (Id. at 17.) The Proposal makes multiple references to [xxx] of the RDS. (Id.) The Proposal also indicates [xxx]. (Id.) [xxx]. (Id. at 17, quoting Proposal at 8.)

The Area Office also summarized its correspondence with Appellant, noting Appellant's assertions that its operations and staffing are scalable, that it is the holder of the FAA certificates, that it would increase its Reno operation to encompass end-item manufacture of the RDS, as it had done in California on an earlier contract. (Id. at 15-16.) However, the Area Office pointed out that the Reno hangar lease [xxx], and that the cost table submitted on November 7, 2016, is not part of the Proposal, and not useful because items could not be verified and are not sufficiently separated out. (Size Determination at 16-17.) Further, the Area Office stated, since the Proposal was the basis for the award to Appellant, it must give more weight to the details in Appellant's Proposal in making the size determination, as opposed to contrary claims made in Appellant's response to the size protest. (Id.)

The Area Office found that [xxx] has an average of [xxx] employees, while Appellant has [xxx] employees between two locations. Further, while Appellant has the rights to intellectual property and FAA certifications, the Area Office found Appellant had not proven its two locations “have permanent manufacturing footprints.” (Id. at 17-18.) More importantly, the Area Office found the Proposal states [xxx] to manufacture the product. The Area Office, thus, was not convinced Appellant is the manufacturer of the end item, because Appellant has only [xxx] employees and material costs that are abnormally low for a manufacturing concern. The Area Office found the overwhelming evidence in the record points to [xxx], not Appellant, as the manufacturer of the RDS tank. (Id. at 18.)

The Area Office then proceeded to determine whether Appellant qualifies as a nonmanufacturer. It first noted there is no waiver for the end item, the RDS. (Id. at 18.) Then it noted Appellant's primary industry, identified on its Form 355, is Aerial Firefighting Service, and concluded Appellant does not engage in the wholesale or retail trade of the RDS. (Id. at 19.) Further, Appellant is providing the product of [xxx], is not a domestic producer of the item being supplied. (Id.) Accordingly, the Area Office concluded that Appellant does not meet the requirements of the nonmanufacturer rule and is ineligible to supply the RDS system on the instant procurement. (Id.)

C. The Appeal Petition

On December 16, 2016, Appellant filed the instant appeal. Appellant asserts the Area Office erred in concluding Appellant is not the manufacturer of the end item being supplied. (Appeal at 6-7.) Specifically, Appellant argues the Area Office misapplied the test to determine whether Appellant was the manufacturer of the RDS. (Id.)
Appellant argues the three factors of the test, at 13 C.F.R. § 121.406(b)(2)(i), are: (A) the proportion of total value of the end item added by the efforts of the concern, (B) the importance of the elements added by the concern to the function of the item, and (C) the concern's technical capabilities, plant, facilities, equipment, and processes. (Id. at 7.) In applying these factors, SBA considers the nature of the procurement, focusing on what is being purchased to determine the relative value of contributions made to the end product. No single factor is determinative, and regulatory history provides that the circumstances of each case would dictate which factor is more important in that particular instance. (Id. at 7, citing Size Appeal of OSG, Inc., SBA No. SIZ-5718 (2016), Size Appeal of Virtual Media Integration, SBA No. SIZ-4447 (2001), Size Appeal of Potomac Electric Corporation, SBA No. SIZ-5714 (2016), and 52 Fed. Reg. 32780 (Aug. 31, 1987).)

Appellant maintains the first two factors are dispositive and weigh heavily in its favor, because the RFP requires the contractor to “design, engineer, develop, manufacture and install” the RDS tank system. (Appeal at 8.) Thus, under Factor (A), Appellant will provide the vast majority of the value of the end item through the production of the design, engineering data, and intellectual property, which are especially significant since the RFP expressly includes significant design and engineering elements. (Id.) Further, under Factor (B), the RDS could not function without Appellant's significant design, development and engineering drawings and data, software design, manufacturing experience and certificates. (Id.) Appellant emphasizes its design and engineering work is by far the most important element of the end item, as the RDS could not function without it. (Id.)

Given the RFP requires the awardee to “design, engineer, develop, manufacture, and install” the RDS tank system, Appellant argues Factor (C) should be given less weight than Factors (A) and (B). (Id.) The Area Office erred by putting undue weight on Factor (C) and by evidencing unwarranted skepticism regarding Appellant's technical capabilities based on its current employee count and facilities. Even if the Area Office's skepticism was correct, it should not be dispositive because Factors (A) and (B) are controlling. (Id.)

Appellant also argues Factor (C) weighs in its favor. Appellant stated its intent to perform the assembly at its Reno facilities, and would perform the assembly itself “notwithstanding any suggestion to the contrary in its proposal.” (Id. at 9.) Appellant argues the Area Office erred by relying “almost exclusively” on the Proposal, and by failing to consider Appellant's submissions to the Air Force and the Area Office that demonstrate Appellant is the manufacturer of the RDS, based upon the totality of the circumstances. (Id.)

Appellant asserts the Air Force's award without discussions or clarifications “tacitly” indicates Appellant has met any manufacturing test. (Id.) Appellant submitted clarifying information to the Area Office, and the Area Office erred by failing to consider those submissions regarding the manufacturing process. (Id.) Appellant argues its November 2, 2016 response to the protest demonstrates it has significant assets and performs manufacturing work in the U.S. (Id.)
Appellant asserts it has substantial experience in RDS manufacturing and installation, and holds eight FAA certificates on aircraft operations and modifications. Appellant has extensive U.S. operations and facilities, including the Reno facility and multiple mobile offices. (Id. at 9-10.) Appellant maintains the RDS is a highly complex system, and Appellant has built three of them, operating the only two late model C-130s that have the system, and was the manufacturer on both planes. (Id. at 11.) Appellant maintains it will manufacture the RDS in Reno, [xxx]. (Id.)

Appellant maintains its direct labor, engineering drawings and data, intellectual property, including trade secrets and its related contributions to the RDS far exceed anything done by [xxx] or its other subcontractors. (Id. at 12.) Appellant refers to and reiterates its November 2nd submission to the Area Office showing work allocation by CLIN. (Id. at 13-14.)

Appellant takes issue with the Area Office's assertion that Appellant has no “permanent” manufacturing footprint, noting that none is required, and that Appellant has previously manufactured and installed an RDS at its California facilities, and has moved its operational base to Reno. Appellant is conducting regulatory, oversight, servicing, light and heavy maintenance for the C-130 at Reno, along with electrical, hydraulic and small parts manufacturing for the RDS. (Id. at 14.)

Appellant maintains SBA's regulations do not require that all manufacturing be conducted in the U.S. Some manufacturing may be performed elsewhere as long as the end item is manufactured in the U.S., which Appellant asserts it will do. Appellant 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. (Id. at 14-15.) Appellant argues the manufacturer need not produce all of the end item's component parts, citing Size Appeal of Sea Box, Inc., SBA No. SIZ-5613 (2014), and Size Appeal of Lanzen Fabricating North, Inc., SBA No. SIZ-4723 (2005). Appellant asserts it will perform the complex and significant work itself and bear more than 50% of the cost. An end item can have only one manufacturer, and here that is Appellant. (Id. at 15.)

Appellant asserts its submissions to the Area Office explained in detail how it would comply with SBA's regulations, and the Area Office's skepticism borders on an improper responsibility determination, citing Size Appeal of Spiral Solutions and Technology, Inc., SBA No. SIZ-5279 (2011). Appellant argues the Area Office's failure to meaningfully consider and weigh all of its submissions outside the Proposal is a material error of law, as OHA regularly considers evidence beyond the proposal when determining whether an entity complies with the manufacturing rules. (Appeal at 16, citing Size Appeal of Potomac Electric Corporation, SBA No. SIZ-5714 (2016), Size Appeal of Virtual Media Integration, SBA No. SIZ-4447, and Size Appeal of Martin Manufacturing, SBA No. SIZ-2934 (1988).)

Appellant further maintains the Area Office erred in determining Appellant could not be the manufacturer based upon its employee count, again in the nature of an impermissible responsibility determination. Appellant has the personnel and resources to conduct the required manufacturing because it uses a fluid staffing plan based upon signed contracts, and argues it is prudent to add personnel only when the concern is ready to manufacture the items. Appellant asserts it has manufactured and installed four RDS tanks, one in Canada, and then three in the
The cyclical nature of these contracts dictates a fluid staffing plan. (Appeal at 17.) Under the schedule for this contract, manufacturing cannot start until nine months after award, giving Appellant ample time to hire additional staff. (Id. at 18.)

Finally, Appellant argues the Area Office erred in assessing manufacturing costs. Appellant maintains the Area Office requested cost information in a form and level of detail not required by the RFP. (Appeal at 19, citing 13 C.F.R. § 121.406(b)(2)(i)(A)-(B).) Appellant reiterates that its cost includes the intellectual property for the RDS tanks, which Appellant has developed at great expense. (Appeal at 19.) SBA's regulations consider as part of the manufacturing process all associated costs and effort, and the costs associated with Appellant's contribution to the manufacturing processes exceed [xxx]% when intellectual property, design, engineering, engineering drawings and data, development and other relevant costs are properly included in the manufacturing analysis. (Id. at 19-20.)

Appellant does not contest the Area Office's conclusion that Appellant also does not qualify as a nonmanufacturer.

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 date for determining the size of a challenged concern is generally the date the concern submits its written self-certification that it is small to the procuring activity as part of its initial offer, including price. 13 C.F.R. § 121.404(a). In this case, Appellant submitted its initial offer on May 20, 2015. The date for determining compliance with the nonmanufacturer rule is the date of the challenged concern's submission of final proposal revisions. 13 C.F.R. § 121.404(d). Here, Appellant submitted its final proposal revisions on April 7, 2016.

Appellant asserts it is the manufacturer of the RDS system here being provided. The 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).)

Here, the Area Office reviewed the Proposal, and concluded that [xxx], and not Appellant, is the manufacturer of the RDS system being procured. The Area Office relied upon the Proposal, which stated [xxx], not Appellant's, will fabricate all details and assemblies in-house. The Proposal emphasizes [xxx], stating [xxx] will perform the manufacturing and assembly processes. The main facility for manufacturing will be [xxx] in [Place]. The Proposal assures the Air Force that [xxx] necessary to fabricate the RDS components. It is [xxx], which the Proposal submits in response to the requirements of the RFP. Other subcontractors will perform the installation of the RDS in the HC-130s. Appellant will perform system checkouts and tests, and deliver the aircraft. Appellant's Representations and Certifications state that the work will be performed in [Place].

It is therefore clear that [xxx] is the concern which with its own facilities is performing the primary activities in transforming materials into the end item being acquired, the RDS. While the RDS is semifinished once it leaves the [Place] site, it is [xxx] which will install the RDS, not Appellant. Appellant argues the RFP requires the awardee to “design, engineer, develop, manufacture and install” the RDS, and that Appellant is providing the majority of the end value of the item through its design and engineering of the RDS. However, the regulation addresses the manufacture of the end item being acquired, not its design. Appellant's contributions to the design and engineering of the RDS are not relevant here in determining whether it is the manufacturer. *Size Appeal of Camp Noble, Inc.*, SBA No. SIZ-5644 (2015). The design work, testing and delivery which Appellant will perform do not constitute manufacturing. *Size Appeal
of M1 Support Services, LP, SBA No. SIZ-5297 (2011). The question is which concern is physically transforming raw materials into the RDS, and that is [xxx], not Appellant.

Appellant attempts to argue the Area Office erred in relying upon its Proposal, and not taking into account the information Appellant had submitted in response to the protest. However, it is the Proposal which was the basis for Appellant's receiving the award, and Appellant's size must be determined as of the date of that Proposal. Appellant's Response attempts to re-write its Proposal so that it is Appellant which is performing the fabricating and assembly of the RDS. However, the Area Office properly considered these post hoc changes to the Proposal to be of less weight than the Proposal itself. The best source to evaluate a concern's manufacturing operations is its own description of how it proposes to perform the contract: its Proposal. OHA has repeatedly held that documents created in response to a protest may not be used to contradict an offeror's proposal. Size Appeal of Camp Noble, Inc., SBA No. SIZ-5644 (2015); Size Appeal of M1 Support Services, LP, SBA No. SIZ-5297 (2011); Size Appeal of Fernandez Enterprises, LLC, SBA No. SIZ-4863 (2007).

Appellant argues that OHA has permitted the consideration of materials outside of the proposal in determining compliance with the manufacturing rules. However, the cases Appellant relies on all dealt with the submission of supplemental materials. None of these cases allowed the consideration of submissions which greatly varied or contradicted the proposal, as Appellant attempts to do here. Size Appeal of Potomac Electric Corporation, SBA No. SIZ-5714 (2016); Size Appeal of Virtual Media Integration, SBA No. SIZ-4447; Size Appeal of Martin Manufacturing, SBA No. SIZ-2934 (1988).

Appellant is attempting to re-write its Proposal in response to the protest. Appellant's submissions undertake wholesale revision of its Proposal so that it, and not [xxx], is manufacturing the RDS system. But, as noted above, this Appellant may not do. Appellant's size must be determined as of the date of its initial proposal, and its compliance with the nonmanufacturer rule as of the date of its final proposal revisions. Appellant's revision of its Proposal in response to the protest took place well after its submission of its Proposal. It is to Appellant's Proposal that the Area Office properly looked to determine whether Appellant was performing the manufacturing work here. While a manufacturer need not produce all of an end item's component parts, Appellant here does not appear to be performing the physical work of manufacturing at all. Appellant's Proposal makes clear that [xxx] is performing the manufacturing work here, not Appellant. Therefore the Area Office properly found Appellant not to be the manufacturer. Size Appeal of M1 Support Services, LP, SBA No. SIZ-5297 (2011).

The Area Office then looked to whether Appellant was in compliance with the nonmanufacturer rule. A concern may qualify as a small business for a requirement to supply manufactured products if it:

(i) Does not exceed 500 employees;

(ii) Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied;
(iii) Takes ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice; and

(iv) Will supply the end item of small business manufacturer, processor or producer made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(5) of this section.

13 C.F.R. § 121.406(b)(1).

The Area Office found that Appellant was not in compliance with (ii) and (iv). The Area Office relied upon Appellant's characterization of its business as Aerial Firefighting in its SBA Form 355 to find it was not primarily engaged in the wholesale or retail trade of the RDS. Appellant provided information in its Response to show that it does sell RDS systems. But I cannot find that Appellant established that it was primarily engaged in the wholesale or retail trade of the RDS. Further, the Area Office relied upon [xxx] location to conclude Appellant was not supplying an end item produced in the United States. I find that this is incontestable. The Proposal clearly states that [xxx] in [Place]. Appellant makes many references to its Nevada facilities in its response to the protest and the appeal are contrary to the clear language in the Proposal. Appellant cannot now re-write its proposal to comply with the regulation. Appellant is providing an end item manufactured in [xxx], and thus is not in compliance with the nonmanufacturer rule. Size Appeal of Fernandez Enterprises, LLC, SBA No. SIZ-4863 (2007).

I therefore find no error in the Area Office's finding that Appellant failed to comply with the nonmanufacturer rule. Accordingly Appellant is not an eligible small business for this procurement.

It is thus clear that the Area Office did not err in concluding that [xxx], and not Appellant, is the manufacturer of the RDS system. That the Air Force awarded without discussions is irrelevant here, because the issue is which firm is performing the manufacturing, not whether the award to Appellant was appropriate. Further, Appellant's argument the Area Office erred in questioning its number of employees is irrelevant here. The issue is, which firm will be performing the manufacturing, and here Appellant's Proposal makes clear that it is [xxx], not Appellant. Similarly, the cost information Appellant submitted was not part of its Proposal, and it shows relatively small costs for [xxx], and larger costs for Appellant. The Area Office properly discounted post hoc submissions which were not consistent with the Proposal. Finally, the cost that [xxx] firms may have been eligible for award does not change the requirement of the nonmanufacturer rule, that if the challenged concern is supplying the product of a manufacturer, then the item must be produced in the United States.

I therefore conclude that Appellant has failed to establish the Area Office erred in concluding Appellant was not the manufacturer of the RDS, was not providing an end item produced in the United States, and therefore was not in compliance with the nonmanufacturer rule, and was not an eligible 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 U. S. Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge