

WHO IS THE MANUFACTURER IN A SMALL BUSINESS SET-ASIDE?

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When a manufacturing or supply contract is set aside for small businesses, the Small Business Administration (“SBA”) size regulations require that the prime contractor either be the manufacturer of the end item being procured (and the end item must be manufactured or produced in the United States); or must comply with certain nonmanufacturer exceptions. 13 CFR § 121.406. A recent Size Appeal at the SBA Office of Hearings and Appeals (“OHA”) considered what type of actions by a company qualifies it as a “manufacturer.” *Size Appeal of MPC Containment Sys., LLC and GTA Containers, Inc.*, SBA No. SIZ-5802, Jan 11, 2017.

The Defense Logistics Agency was procuring collapsible fuel tanks, and set aside the procurement for small businesses in a North American Industry Classification System (“NAICS”) code for supplies. Avon Engineered Fabrications, Inc. was announced as the awardee, but was protested as “not small” for several reasons, the most important of which was the assertion that Avon was not the “manufacturer” of the tanks. The protesters asserted that the end item was not the assembled tanks, but rather the coated fabric material used to create the tanks because it was the most expensive component of the end item. The SBA area office determined that Avon was the manufacturer of the end item because the company would transform the rubber fabric of which the tanks were made, and other components and assemblies, into the contract deliverables. MPC and GTA appealed to OHA.

The size regulations at 13 CFR § 121.406 states that for size purposes, 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. *Id.*

The same regulation identifies three factors to be considered in determining whether a concern is the manufacturer of the end item:

- (1) 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;
- (2) The importance of the elements added by the concern to the function of the end item, regardless of their relative value; and
- (3) The concern's technical capabilities; plant, facilities and equipment; production or assembly line processes; packaging and boxing operations; labeling of products; and product warranties.

OHA acknowledged that Avon was not the manufacturer of the rubber fabric that constituted the bulk of the contract value. But, OHA has repeatedly stated in its decisions that the proportion of value added by the manufacturer can be “a very small proportion of [the] total value, provided that the concern adds important functionality.” In fact, if the modifications performed by the

challenged concerns are essential to the function of the end product, the challenged firm will be deemed the manufacturer.

OHA noted that Avon would transform the fabric through a series of labor and machine steps into collapsible tanks. OHA conclude that Avon's work was of "crucial importance" because without Avon's modification and assembly, the coated fabric alone would not function as a collapsible fuel tank—and furthermore, Avon would perform this modification and assembly work in its own facilities and with its own employees. OHA held that the SBA Area office had reasonably determined that Avon would transform raw materials into the end items being acquired, and therefore qualified as a manufacturer within the meaning of 13 CFR § 121.406.

The TAKEAWAY: As always, careful reading of the regulations and their application to the facts are important. OHA used not only the text of the regulations but the repeated size appeal decisions in this area in determining who was the "manufacturer" of this item.