

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

SIZE APPEAL OF:

Precision Standard, Inc.

Appellant

Appealed from
Size Determination No. 05-2007-043

SBA No. SIZ-4858

Issued: July 18, 2007

DECISION AND REMAND ORDER

I. Introduction and Jurisdiction

On June 7, 2007, the Office of Government Contracting, Area Office V (Area Office) of the Small Business Administration (SBA) issued Size Determination No. 05-2007-043 (the size determination) dismissing the size protest of Precision Standard, Inc. (Appellant). The Area Office dismissed Appellant's size protest because Appellant (1) Lacked standing, and (2) Relied on an outdated regulation. Appellant received the size determination on June 8, 2007, and filed its appeal on June 22, 2007.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

II. Issue

Whether the Area Office made a clear error of fact or law when it dismissed Appellant's size protest for lack of standing and reliance on an outdated regulation.

III. Facts

A. Findings of Fact

1. On April 25, 2007, the Defense Supply Center-Richmond (DSCR) issued Request for Quotation (RFQ) No. SPM4A7-07-Q-7423 for window panels for a specified Sikorsky aircraft CAGE number and part number. DSCR set this procurement aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBC).

2. On May 30, 2007, Appellant filed a timely size protest against Airdale Express, LLC (Airdale), the apparent successful offeror under a DSCR's RFQ. Appellant alleged it had

submitted a quote on or about May 3, 2007 and that Airdale does not qualify as a nonmanufacturer under 13 C.F.R. § 121.406(b)(1)(ii) because the items being supplied under the solicitation are military aircraft parts that are not commercial items provided for public use.

3. On June 5, 2007, DSCR forwarded the protest to the Area Office. The handwritten notes of the assigned size specialist reflect DSCR “confirmed” that it did not receive an offer from Appellant. The size specialist indicates the contracting officer informed her that DSCR did not receive a quote from Appellant and in turn, she informed the contracting officer SBA would dismiss the protest based upon lack of standing and an outdated regulation.

4. On June 7, 2007, the Area Office issued a size determination dismissing the protest. The Area Office stated that in accordance with 13 C.F.R. § 121.1001(a)(8) Appellant would have to submit an offer to have standing. Based upon the representations the Area Office received from the DSCR, the Area Office stated to Appellant the following: “Since you did not submit an offer to DSC-R, you do not have standing to protest.” The Area Office also concluded Appellant relied on language from an earlier version of the regulation to allege that Airdale does not qualify as a nonmanufacturer and since that was the only reason Appellant set forth challenging Airdale’s size, Appellant’s protest was dismissed.

5. Appellant also protested the award to Airdale at the U.S. Government Accountability Office (GAO). In response to the GAO protest, DSCR argued GAO should dismiss Appellant’s bid protest because DSCR did not receive a quote from Appellant. Based on the evidence submitted to it, GAO determined Appellant transmitted its quotation by facsimile five days prior to the deadline and DSCR received the quote, but DSCR lost the quote before it could be delivered to the contracting officer. However, since GAO had no evidence to discern the content of Appellant’s quote before closing, GAO stated it would not disturb DSCR’s decision not to reopen the competition to evaluate Appellant’s quote or allow Appellant to challenge the award to Airdale. Thus, despite being found to have submitted a quote, on June 20, 2007, GAO dismissed Appellant’s protest because Appellant did not meet the definition of an interested party under 4 C.F.R. § 21.0(a), *i.e.*, Appellant is not “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.” *Matter of Precision Standard, Inc.*, B-299835, June 20, 2007.

6. On June 22, 2007, Appellant filed the instant appeal of the size determination with OHA.

B. The Appeal

Appellant appealed the Area Office’s dismissal of its size protest. First, Appellant argues it does have standing in this matter because Appellant submitted a quote.¹ Appellant cites GAO’s decision acknowledging that Appellant had demonstrated it properly and timely

¹ For the purposes of 13 C.F.R. § 121.1001(a)(8), when a contracting activity issues a Request for Quotations (RFQ) a “quote” is the functional equivalent of an “offer” which applies when a contracting activity issues a Request for Proposals (RFP). See FAR 2.101’s definition of “Solicitation.”

submitted a quote for the solicitation and that DSCR subsequently lost that quote. Appellant asserts since it submitted an offer it is eligible to file a size protest.

Appellant also asserts the Area Office erred in dismissing Appellant's protest because Appellant cited language from an earlier version of 13 C.F.R. § 121.406. Appellant states the current version of 13 C.F.R. § 121.406 still supports Appellant's claims that the solicitation requires military aircraft parts, Airdale has no manufacturing facilities, and Airdale brokers its government contracts. Appellant concedes the current version omits the requirement for sales to the general public, but Appellant maintains the current 13 C.F.R. § 121.406 requires that the nonmanufacturer is "primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied." Appellant argues, because Airdale is neither a wholesaler or retailer and does not "normally" sell the type of item, Airdale does not qualify to provide manufactured products as a nonmanufacturer under the current 13 C.F.R. § 121.406.

Finally, Appellant reasserts and elaborates on its original protest. Appellant argues Airdale's repeated violations of the regulations must be considered in light of the purpose of the program for SDVO SBCs.

C. DSCR's Response

On July 6, 2007, DSCR counsel filed a Response to the Appeal. Although the DSCR does not cite or reference SBA's Protest Standing Regulations (13 C.F.R. § 121.1001), DSCR avers Appellant lacks standing to protest Airdale's size. The DSCR also challenges Appellant's allegation that award to Airdale violated the nonmanufacturer rule.

DSCR alleges the Area Office dismissed Appellant's size protest because "it failed to adequately quote on this procurement." Specifically, although the Appellant avers and the GAO found otherwise, the DSCR alleges Appellant did not submit a quote in response to the RFQ. DSCR also alleges, in a footnote, that the GAO did not reach the question of whether Appellant failed to respond to the RFQ.

DSCR maintains Appellant has changed its argument. Specifically, Appellant's protest argued Airdale did not qualify under an outdated version of 13 C.F.R. § 121.406(b)(ii),² while Appellant's alleges Airdale does not meet the requirements of the present nonmanufacturer rule because Airdale is primarily engaged in the retail or wholesale trade and sells aircraft parts.³

D. Appellant's Reply to DSCR's Response

On July 10, 2007, Appellant filed a Reply to DSCR's Response. Appellant asserts it does have standing because it provided a quote, regardless of the DSCR's argument.

² Both the DSCR and the Area Office (in the size determination) use an incomplete citation to the obsolete regulation at issue. The correct citation is 13 C.F.R. § 121.406(b)(1)(ii)(2004), which is the same citation as is currently in effect.

³ DSCR makes other arguments concerning the nonmanufacturer rule that are not germane to this Decision and Remand Order.

Appellant also argues Airdale is not a qualifying nonmanufacturer under the current version of 13 C.F.R. § 121.406(b)(1)(ii). Appellant argues that merely because Airdale provides aircraft parts does not mean that it normally sells the type of parts at issue in the RFQ. Specifically, Appellant argues:

Given the literally thousands of parts that comprise each aircraft and the hundreds of aircraft types utilized by the Government, it is inconceivable that a contractor that may regularly provide one part for one type of aircraft can be considered as a wholesaler/retailer for all parts for all types of aircraft. The language of the regulation is very specific. The nonmanufacturer must be primarily engaged in the retail or wholesale trade of the type of item being supplied.

Appellant's Reply, at 2 (emphasis in original). Appellant also asserts that the aircraft window in question had not been supplied by Airdale before in the 750 contracts awarded to it except for a contract it subcontracted to a large business.

Appellant also includes arguments concerning the responsibility of Airdale. I will not recite Appellant's arguments regarding Airdale's responsibility because responsibility determinations rest with the contracting officer unless referred to the SBA by the contracting officer. *See* 13 C.F.R. § 134.102; FAR 9.103(b); FAR 9.104(d).

IV. Discussion

A. Applicable Law

1. Timeliness

An appeal must be filed within 15 days of receipt of a size determination when it pertains to a pending procurement. 13 C.F.R. § 134.304(a)(1).

2. Standard of Review

The standard of review for size appeals is whether the Area Office based its size determination upon a clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. *See Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office erred in making a key finding of law or fact. Thus, I must evaluate whether the Area Office: (1) Properly considered available and relevant facts; (2) Evaluated the arguments of the parties; and (3) Correctly applied the regulations and law to the relevant facts in making its size determination.

3. Applicable Regulations

a. Standing

Standing to initiate size protests is governed by 13 C.F.R. § 121.1001. This regulation provides, in relevant part:

Who may initiate a size protest or request a formal size determination?

(a) Size Status Protests.

...

(8) For SBA's Service Disabled Veteran-Owned Small Business Concern program, the following entities may protest in connection with a particular service-disabled veteran-owned procurement:

- (i) Any concern that submits an offer for a specific service disabled veteran-owned small business set-aside contract;
- (ii) The contracting officer;
- (iii) The SBA Government Contracting Area Director; and
- (iv) The Associate Administrator for Government Contracting, or designee.

b. Nonmanufacturer Rule

When a concern is not a manufacturer of a product, its qualification to provide manufactured products under a small business set-aside or 8(a) contract is governed by 13 C.F.R. § 121.406. The relevant portion of that regulation, in effect on April 25, 2007, the day DSCR issued the RFQ, provides:

(b) Nonmanufacturers. (1) A concern may qualify for a requirement to provide manufactured products as a nonmanufacturer 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; and
- (iii) Will supply the end item of a small business manufacturer or processor made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(3) of this section.

c. Content of Size Protests

Requirements for the content of size protests are governed by 13 C.F.R. § 121.1007, which provides in relevant part:

b) A protest must include specific facts. A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest

must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for a protest. Where materials supporting the protest are available, they should be submitted with the protest.

(c) Non-specific protests will be dismissed. Protests which do not contain sufficient specificity will be dismissed by SBA.

B. Analysis

1. Timeliness

Appellant appealed the size determination within 15 days of receiving it. Therefore, Appellant's appeal is timely. 13 C.F.R. § 134.304(a)(1).

2. New Evidence

Appellant supplemented its Appeal Petition with a copy of GAO's decision, *Matter of Precision Standard, Inc.*, B-299835, June 20, 2007. In accordance with 13 C.F.R § 134.308(a), new evidence not previously presented to the Area Office will not be considered on appeal, unless a motion is served and filed establishing good cause for the submission of the new evidence, or the judge orders submission of the evidence. The judge is charged with ensuring an efficient, prompt, and fair determination of each case, 13 C.F.R § 134.218(b), including the swift presentation of evidence to ascertain the truth. 13 C.F.R § 134.223(a); Fed. R. Evid. 611(a).

The GAO's decision in *Matter of Precision Standard, Inc.*, was not issued until after the Area Office issued its size determination and therefore the Area Office did not have an opportunity to review the GAO decision. However, the GAO decision presents evidence the Area Office did consider in dismissing Appellant's protest. Moreover, the information contained in the GAO decision assists me in resolving an inconsistency between the parties and sheds new light on an insufficiently supported conclusion in the Area Office determination. Therefore, I **ADMIT** the GAO decision on my own initiative into the Administrative Record.

3. The Area Office Made a Clear Error in Finding Appellant Lacked Standing

When it issued the June 7, 2007 size determination dismissing Appellant's protest, the Area Office was unaware of the facts discussed by the GAO in its June 20, 2007 decision. See *Matter of Precision Standard, Inc.*, B-299835, June 20, 2007. Specifically, the Area Office was unaware that the DSCR's own records indicate Appellant provided a quote to the DSCR under the RFQ. Instead, the Record establishes the DSCR insisted Appellant did not provide a quote in response to the RFQ and that the size specialist relied upon DSCR's representations (Fact 3). Unfortunately, even though we do not know what was in the quote, it is clear from the Record, which now includes Appellant's assertion and the GAO protest decision, that Appellant did submit a quote with the DSCR, and the DSCR misplaced that quote (Fact 4). Therefore, pursuant to 13 C.F.R. § 121.1001(a)(8), Appellant submitted an offer and has standing to challenge Airdale's compliance with the nonmanufacturer rule.

I also find, even without the GAO decision, that the Record is insufficient to sustain a finding that Appellant lacked standing. Specifically, Appellant alleged it submitted a quote (Fact 2). In response the size specialist called the DSCR personnel and noted a few remarks concerning their version of the events (Fact 3). However, I find that as a matter of law that the mere notation of remarks attributed to DSCR personnel is unreliable hearsay. Therefore, the material in the Record is insufficient to overcome the presumption that Appellant told the truth in its protest. Only if the size specialist had asked the DSCR personnel to submit formal statements pursuant to 28 U.S.C. § 1746 of all the relevant facts, would it be possible for the Area Office to conclude it had evidence sufficient to find there was no standing. *See* 13 C.F.R. § 121.1009(d). Even then, the Area Office should have asked Appellant for its version of the facts.

Specifically, the Record lacks any indication that the Area Office even attempted to discuss Appellant's alleged lack of standing with Appellant. However, based on evidence Appellant provided to the GAO, the GAO was able to conclude Appellant submitted a quote. Under these circumstances, the Area Office's actions here are inconsistent with the authority granted SBA by 13 C.F.R. § 121.1009(b) because the Area Office was faced with a clear conflict between what Appellant asserted and what it learned from the DSCR. Under these circumstances, the Area Office's failure to further develop the facts is clear error.

4. The Area Office Made a Clear Error of Law in Dismissing Appellant's Protest Because Appellant Cited an Obsolete Regulation

Area offices are responsible for applying current regulations to the specific facts raised by protestors. *See* 13 C.F.R. § 121.1007(b). That is, while the regulations require a contractor to identify specific facts, there is no requirement that it provide a perfect reference to the regulation it claims was violated. Instead, 13 C.F.R. § 121.1007 requires:

(b) A protest must include specific facts. A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given.

Thus, as long as a protestor gives reasonable notice as to the grounds of the protest to the protested concern, an area office must consider the protest. Hence, if a protestor gives facts that are sufficient to indicate non-compliance with current regulations, the area office must decide the protest on the merits and cannot dismiss the protest merely because a contractor has cited an obsolete or inapplicable regulation. Attention to imperfectly rendered but specific protests is consistent with SBA's mission to render size determinations that protect the integrity of its programs. *See Size Appeal of Ross Aviation, Inc.*, SBA No. SIZ-4840, at 12-15 (2007).

In this case, I find the protestor gave adequate notice of potential violations of the nonmanufacturer rule. Specifically, among other allegations Appellant's protest alleged the following:

5. Based upon information [sic] belief, Airdale is not a manufacturing concern, but was award the contract on the basis of being a small business nonmanufacturer pursuant to 13 C.F.R. § 121.406.

6. Based upon further information and belief Airdale is comprise of a husband and wife, and has no manufacturing facilities and few or no other employees and solely acts as a broker under a number of Government contracts.

7. PSI [Appellant] alleges that Airdale does not qualify as a nonmanufacturer on the basis of the following:

a. Pursuant to 13 C.F.R. § 121.406(b)(ii) a concern may qualify for a requirement to provide manufactured products as a nonmanufacturer if its:... “It is primarily engaged in the wholesale or retail trade and normally sells the item being supplied to the general public....” (sic)

...

10. PSI further alleges that allowing Airdale to perform under the subject contract frustrates the very purpose of the SDVOB program, which is to afford qualified contractors opportunities to perform government contracts. If Airdale is allowed to maintain the contract, it will be able to order all products from non-SDVOB concerns, as evidenced by the fact that the listed supplier for the units is Control Logistics, Inc., who based upon information and belief is not a SDVOB.

Based upon the foregoing Appellant has alleged that Airdale does not manufacture the windows and that the supplier may not be a small business. These are facts that are important under the current rule and I find these facts, as alleged by a protestor, are sufficient to raise legal issues under existing regulations. Accordingly, the Area Office was obligated to have inquired as to whether Airdale regularly sold the type of item being supplied and should not have dismissed the protest merely because there is a difference in the regulation cited by Appellant and the regulation currently in effect. Instead, the Area Office must apply the facts to the current regulation. Had the Area Office investigated the facts consistent with the applicable regulation, it could have determined whether or not a violation of the nonmanufacturer rule existed. Then, the Area Office could have explained to Appellant whether Airdale was or was not in compliance with the nonmanufacturer rule.

I also note that I find Appellant’s arguments concerning the number and type of aircraft parts to be relevant. I take notice that there are many different systems within aircraft, including avionics, weapons, engines, landing, auxiliary power, heating and cooling, air frame, etc. Expertise and ability to manufacture one system or a part applicable to that system does not imply expertise and ability to manufacture another system or parts for that system. Accordingly, I hold the language in 13 C.F.R. § 121.406(b)(1)(ii) requiring a contractor to normally sell the type of item being supplied requires area offices to apply a rule of reason. This means area offices must inquire as to whether a contractor actually sells the type of item involved and does

not mean, for example, that because a contractor sells aircraft tires it also “typically” sells windows, avionics, engine parts, etc.

V. Conclusion

For these reasons, the Area Office’s June 7, 2007 size determination is REVERSED, VACATED, and REMANDED. Upon remand, the Area Office is ORDERED to issue a new size determination in this matter and to discuss, in detail whether Airdale:

1. Is primarily engaged in the retail or wholesale trade;
2. Normally sells windows of the type (the type of item) relevant to the RFQ;
3. Will be buying the item from a small business manufacturer or processor made in the United States or has obtained a waiver of that requirement under 13 C.F.R. § 121.406(b)(3).

THOMAS B. PENDER
Administrative Judge