

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

SIZE APPEAL OF:

M&S Foods Ltd. Co.

Appellant

Appealed from

Size Determination No. 3-2008-37

SBA No. SIZ-4971

Decided: July 14, 2008

APPEARANCES

Pamela J. Mazza, Isaias “Cy” Alba, IV, PilieroMazza PLLC, Washington, D.C., for Appellant.

Johnathan M. Bailey, Bailey & Bailey, P.C., San Antonio, Texas, for Hardie’s Fruit & Vegetable Co., Inc.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. The Procurement and Protest

On July 24, 2006, the Defense Logistics Agency (DLA) Defense Supply Center Philadelphia issued solicitation SPM300-06-R-0008 (solicitation). The purpose of the solicitation is to provide a full line of fresh fruit and vegetable support to Department of Defense (DOD) and non-DOD activities for twelve regions located throughout the United States. The

Contracting Officer (CO) set the procurement totally aside for small business and assigned North American Industry Classification System (NAICS) code 424480, Fresh Fruit and Vegetable Merchant Wholesalers, with a corresponding 500 employee size standard.

On March 12, 2008, the CO notified unsuccessful offeror Hardie's Fruit & Vegetable Co., Inc. (Hardie's) that the apparent successful offeror for the San Antonio region was M&S Foods Ltd. Co. (Appellant).

On March 17, 2008, Hardie's filed a size protest with the CO. Hardie's asserted Appellant is other than small because of Appellant's affiliation with Fresh Point-City Produce, LP (City), a subsidiary of Fresh Point, Inc., a company owned by Sysco Corporation, a large business. Hardie's alleged Appellant must rely entirely on City because Appellant does not own produce storage or distribution facilities in Texas.

On March 18, 2008, the CO forwarded the size protest to the Small Business Administration (SBA) Office of Government Contracting - Area III (Area Office), in Atlanta, Georgia.

B. The Size Determination

On April 17, 2008, the Area Office issued its size determination. The Area Office acknowledged a waiver of the nonmanufacture rule was granted for the procurement allowing a small business to buy from a large business. The Area Office stated that the waiver does not cede the prime contractor's responsibility to perform the primary and vital requirements of the contract.

The Area Office determined that the primary and vital requirements of the contract are the delivery and warehousing of the produce. The Area Office noted that Appellant is responsible for accounts and the day-to-day management of the procurement. However, the Area Office found Appellant is not capable of labeling, packaging, and distributing the produce. The Area Office determined that Appellant cannot perform the requirements of the procurement without City performing the more complex and costly requirements. Thus, based on the totality of the circumstances, the Area Office found Appellant is unusually reliant on its subcontractor and affiliated with City and Sysco Corporation. The Area Office deemed Appellant other than small for this procurement.

C. The Appeal

On April 22, 2008, Appellant filed the instant appeal with the Office of Hearings and Appeals (OHA). Appellant argues the Area Office's size determination finding Appellant is unduly reliant on City, under 13 C.F.R. § 121.103(h)(4), is based on clear error of fact and law. First, Appellant asserts the size determination contradicts a prior determination by the Area Office, issued on February 23, 2007, finding Appellant small for an identical procurement. Second, Appellant asserts the Area Office erroneously relied on the ostensible subcontractor rule even though the nonmanufacture rule applies to the procurement. Finally, Appellant argues the Area Office's assertions that Appellant is not performing the primary and vital requirements of

the procurement are incorrect; Appellant states it is responsible for the management functions, sales and marketing, supply chain, proposal creation, customer service, and created and maintains the electric ordering system.

Based on the clear errors of law and fact, Appellant argues the Area Office's size determination is arbitrary and capricious and requests OHA overturn it.

D. Hardie's Response

On May 8, 2008, Hardie's responded to Appellant's Appeal. Hardie's argues Appellant's Appeal should be dismissed for failure to comply with 13 C.F.R. § 134.305 or, in the alternative, denied for failure to demonstrate legal or factual error.

Hardie's argues Appellant failed to comply with OHA's rules of procedure. Specifically, Hardie's asserts Appellant failed to list Hardie's on its Appeal certificate of service and failed to serve Hardie's with a copy of its Appeal as required by 13 C.F.R. § 134.305. Hardie's states it was required to seek out and obtain a copy of the Appeal by its own efforts. Hardie's cites *Size Appeal of AQW, Inc.*, SBA No. SIZ-4359 (1999), to support its argument.

Moreover, Hardie's asserts Appellant's arguments based on a prior size determination are irrelevant. Hardie's states size determinations are procurement specific and non-binding. Additionally, Hardie's argues Appellant is incapable of performing the primary and vital requirements of the procurement and is completely dependent on Sysco. Finally, Hardie's states Appellant's reliance on Sysco is not excused because of the waiver of the nonmanufacture rule.

E. Appellant's Reply to Hardie's Response

On May 12, 2008, I granted Appellant's May 12, 2008 Motion to Reply to Hardie's Response.

On May 19, 2008, Appellant filed a reply to Hardie's response. Appellant argues dismissal for inadequate service is inappropriate in this case. Appellant states it served Hardie's with a copy of the Appeal within two days of filing the Appeal, after Appellant reviewed the Appeal to ensure it did not contain proprietary information. Appellant argues the two-day delay did not prejudice Hardie's ability to prepare a comprehensive response. Appellant distinguishes the two-day delay in this case from *Size Appeal of AQW, Inc.*, SBA No. SIZ-4359 (1999), where the other party was not served prior to the close of record even after receiving explicit instructions from OHA to serve the other party.

Moreover, Appellant asserts Hardie's has mischaracterized its arguments. Appellant states that it is not arguing that an area office is bound by an earlier decision, but Appellant is questioning whether an area office may issue contradictory size determinations based on the same facts without explaining the discrepancy in outcomes. Appellant also disputes Hardie's depiction of Appellant's dependence on Sysco. Appellant asserts it has been supplying

produce to customers for seven years and has numerous delivery sources. Appellant maintains it will be performing most of the primary and vital functions of the procurement and it is a legitimate wholesaler.

To clarify the facts relevant to the case, Appellant moved to submit four documents in support of its Reply to Hardie's Response: (1) an email to the contracting specialist; (2) two teaming agreements with small businesses; (3) a letter from a small business regarding this contract; and (4) Appellant's listing in the Blue Book Services list of active firms in the wholesale fresh fruit and vegetable industry.

IV. Discussion

A. Timeliness

Appellant filed its appeal within 15 days of receiving the size determination and, therefore, the appeal is timely. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office 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 Area Office's size determination only if the administrative 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).

C. New Evidence

In accordance with 13 C.F.R. § 134.308(a), new evidence may not be submitted on appeal unless the judge orders it *sua sponte* or a motion is filed and served establishing good cause for the submission of the new evidence. OHA has found good cause when the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal. *Size Appeal of Pointe Precision, LLC*, SBA No. SIZ-4434 (2001).

Appellant submitted three documents with its Appeal which are a part of the record because they are included in the Area Office file: (1) the February 23, 2008 size determination; (2) the April 17, 2008 size determination; and (3) Appellant's United States Department of Agriculture license to be a fresh and frozen produce wholesale dealer. Appellant pleads for the submission of four additional documents: (1) an email to the contracting specialist; (2) two teaming agreements with small businesses; (3) a letter from a small business regarding this contract; and (4) Appellant's listing in the Blue Book Services list of active firms in the wholesale fresh fruit and vegetable industry.

Appellant's arguments for inclusion of new evidence in support of its Reply to Hardie's Response are unpersuasive. A party is responsible for presenting all evidence to the Area Office. 13 C.F.R. 121.1009(b). A party cannot submit evidence on appeal it neglected to submit at the protest stage. *Size Appeal of Carriage Abstract, Inc.*, SBA No. SIZ-4430 (2001). Appellant has not established good cause to enlarge the record to incorporate the proffered documents. Therefore, the motion for submission of new evidence is DENIED and I EXCLUDE Appellant's additional information from the record.

D. The Nonmanufacture Rule

The nonmanufacturer rule, 13 C.F.R. § 121.406(b), allows a small business to provide goods under a manufacturing contract if: (1) it has less than 500 employees; (2) is primarily engaged in wholesale or retail trade; and (3) provides the end item of a small business manufacturer or processor. However, when no small business can provide a product meeting the specifications of a solicitation, the SBA Associate Administrator for Government Contracting can grant an individual waiver of the nonmanufacture rule. The waiver allows a small business to be compliant without enforcing the third prong of the nonmanufacture rule, i.e. without providing the end item of a small business manufacturer or processor.

E. Waiver of the Nonmanufacture Rule

In this case, an individual waiver, 13 C.F.R. § 121.406(b)(3)(i), for this procurement was granted on March 16, 2006. The individual waiver is based on information that no small businesses "can supply the depth and breadth of products required" and covers the purchase of items for the duration of the contract. Waiver for SPM300-06-R-0008, dated March 16, 2008.

It is undisputed that Appellant, with seven employees, meets the first prong of the nonmanufacturer rule and, despite Hardie's arguments to the contrary, the record supports that Appellant is a wholesale dealer of fresh and frozen produce. Thus, the critical question for this case is what is the extent of the waiver of the nonmanufacture rule for this procurement; specifically, does the waiver include warehousing and delivery.

In investigating the extent of the waiver, I am mindful that this is an individual waiver specific to this procurement. An individual waiver is more comprehensive in scope than a less specific class waiver because SBA has already completed a review of the precise requirements of the product and supply chain before granting a waiver for the solicitation. The language of the waiver states: "A waiver of the Nonmanufacture Rule is hereby established for the purchase to cover the line of various fresh fruits and vegetables in the [Produce Prime Vendor], under contract number SMP300-06-R-0008." Waiver for SPM300-06-R-0008, dated March 16, 2008. The waiver does not exclude warehousing and deliveries of the perishable produce. The waiver applies to the whole procurement.

The solicitation also acknowledges a waiver of the nonmanufacture rule was issued by SBA to allow small businesses "to procure products from large businesses." The solicitation does not limit the extent of the waiver of the nonmanufacture rule. The solicitation does indicate that the four primary evaluation criteria for the procurement are the business's: (1) food safety,

inventory turnover, product freshness, and temperature and humidity controls in maintaining fresh produce; (2) experience on contracts similar in size and scope; (3) distribution plan; and (4) use of DLA Mentoring Businesses Agreements, with the most comprehensive plans assisting new business ventures with small businesses receiving the highest ratings.

Based on the text of the waiver, the solicitation, and the unique temperature, food safety, and inventory requirements in buying, storing, and delivering fresh produce, it is clear the individual waiver applies to the entire procurement, including warehousing and delivery of the produce. SBA granted the CO's request for a waiver of the nonmanufacture rule for this procurement without limitations. SBA accepted the CO's determination that no small business manufacturers are capable of performing the contract in accordance the government's specifications. Therefore, it was clear error for the Area Office to attempt to constrain a waiver of the nonmanufacture rule specifically granted for this procurement and inappropriate for the Area Office to find Appellant other than small due to unusual reliance on a subcontractor.

The Area Office had an opportunity to examine the waiver of the nonmanufacture rule for a February 23, 2007 size determination for a predecessor contract. At that time, SBA did not reveal limits on the extent on the waiver and, in fact, determined Appellant to be small for the procurement. The record before me does not explain why the Area Office has abruptly changed course from its earlier size determination. However, if the analysis in the size determination underlying this appeal is adhered to, the nonmanufacture rule waiver granted for this procurement would not serve its intended purpose.

Furthermore, the solicitation places significant importance on the successful awardee's customer service and support functions. The solicitation requires the successful awardee to: maintain an electronic catalog of items available; have a dedicated customer service representative; provide weekly produce market forecasts; interface with the government's web-based ordering tool; insure produce availability; invoice transactions; create electronic reports; and direct appropriate quantities of produce to the proper locations at the best price. These are all requirements Appellant is responsible for performing without reliance on City. Moreover, in addition to quality assurance, DLA placed considerable weight on a business's experience on contracts similar in size and scope when evaluating proposals and DLA also placed significance on a business's distribution plan. The record establishes that Appellant has seven years experience supplying to multiple sites in the southern United States. Thus, even if SBA did not grant a waiver of the nonmanufacture rule, the record does not support the Area Office's determination that City is performing the primary and vital requirements of the contract.

Since the SBA did issue an individual waiver of the nonmanufacture rule, the Area Office committed a clear error of law when it determined Appellant was unusually reliant upon City and thus affiliated with them under the ostensible subcontractor rule. 13 C.F.R. § 121.103(h)(4). Accordingly, Appellant is small concern for the instant procurement.

V. Conclusion

For the above reasons, I REVERSE the Area Office's size determination and find Appellant M&S Foods Ltd. Co., is a small business for the instant DLA procurement.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge