

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

SIZE APPEAL OF:

Vista Engineering Technologies, LLC

Appellant

Appealed from
Size Determination No. 6-2009-037

SBA No. SIZ-5041

Decided: June 5, 2009

APPEARANCES

John E. Jensen and Orest J. Jowyk, Pillsbury Winthrop Shaw Pittman, LLP, McLean, Virginia for Vista Engineering Technologies, LLC.

Charles A. Comaty, Contracting Officer, Department of the Army, U.S. Army Research, Development and Engineering Command Contracting Center, Edgewood Contracting Division, Aberdeen Proving Ground, Maryland.

DECISION

I. Introduction and Jurisdiction

On November 25, 2008, the Department of the Army (Army), U.S. Army Research, Development and Engineering Command Contracting Center, Edgewood Contracting Division, Aberdeen Proving Ground, Maryland, issued Solicitation No. W911SR-09-R-0002 (solicitation) for Resource Conservation and Recovery Act (RCRA) Program Support to Umatilla Chemical Depot. The solicitation was a total small business set-aside; however, the solicitation was not assigned a North American Industry Classification System (NAICS) code or size standard.

On December 12, 2008, the Contracting Officer (CO) issued Amendment 1, which assigned NAICS code 562910, Remediation Services (RS), to the solicitation.

On February 25, 2009, the CO awarded the contract to Vista Engineering Technologies, LLC (Appellant). On March 3, 2009, South Wind Environmental Services, LLC (South Wind) protested Appellant's size status. South Wind alleged that Appellant was not a small business due to its growth and affiliations.

On March 25, 2009, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2009-037 (size determination) finding Appellant other than small for NAICS code 562910, RS, with a \$14 million annual receipts size standard. On April 9, 2009, Appellant appealed the size determination to the SBA Office of Hearings and Appeals (OHA). For the reasons discussed below, the size determination is reversed.

OHA has jurisdiction to decide 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's action in clarifying the NAICS code and size standard for this procurement as NAICS code 562910, Remediation Services, with a corresponding \$14 million annual receipts size standard, is a clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Size Determination

The Area Office's size determination found Appellant exceeds the \$14 million annual receipts size standard.

The size determination notes that the Army failed to identify a NAICS code and size standard in the solicitation. The size determination states Amendment 1 to the solicitation identified NAICS code 562910, RS, but a size standard was not indicated. The size determination explains that NAICS code 562910 has two size standards, an annual receipts size standard of \$14 million for RS with a second 500 employee size standard for Environmental Remediation Services (ERS). *See* 13 C.F.R. § 121.201, fn. 14.

The size determination recounts that SBA asked the CO to comment on the choice of size standards, "but [the CO] failed to respond." Size Determination, at 2. The size determination notes the presolicitation notice for this procurement assigned NAICS code 541620, Environmental Consulting Services, with a size standard of average annual receipts not to exceed \$7 million. The size determination also notes that Appellant relied on NAICS code 562910, ERS, with a 500 employee size standard, in self-certifying for this procurement.

Because the solicitation's size standard is unclear, the Area Office supplied the size standard in the size determination in accordance with 13 C.F.R. § 121.402(d). The size determination notes use of the size standard for the exception, ERS, requires "multiples activities associated with restoring a contaminated environment" and requires the CO to meet a high threshold. Size Determination, at 3, *quoting In the Matter of SVL Analytical, Inc.*, SBA No. NAICS-4721 (2005).

After a review of the statement of work, the size determination concludes that the primary purpose of the solicitation is not to restore a contaminated environment or for environmental remediation, but to provide support services, primarily of an advisory and consulting nature. Additionally, the size determination notes that the solicitation does not include services from three or more NAICS codes, which is required for a procurement to be classified under ERS. The size determination suggests the presolicitation NAICS code 541620, Environmental Consulting Services, may have been appropriate, but since the Army designated NAICS code 562910, RS, the size determination concludes that the size standard of average annual receipts not to exceed \$14 million is applicable.

The size determination then calculates Appellant's size as of December 29, 2008, the date Appellant self-certified as a small business for this solicitation. The size determination notes that Appellant's sole member and owner is Vista Applied Technologies Group, Inc. (Vista Applied) and that Appellant is affiliated with Vista Applied under 13 C.F.R. § 121.103(c)(1), based on ownership, and 13 C.F.R. § 121.103(e), due to common management. The size determination states Vista Applied also owns and has the same board of directors as Vista Research, Inc. (Vista Research) making Vista Applied and Vista Research affiliated, pursuant to 13 C.F.R. § 121.103(c)(1), regarding ownership, and 13 C.F.R. § 121.103(e), due to common management. Accordingly, Appellant is also affiliated with Vista Research. Finally, the size determination notes the two primary stockholders in Vista Applied are the two primary stockholders in Vista Leak Detection, Inc. (Vista Leak) making Vista Applied affiliated with Vista Leak based on ownership, under 13 C.F.R. § 121.103(c)(2), which makes Appellant affiliated with Vista Leak.

The size determination then calculates Appellant's size with its affiliates, Vista Applied, Vista Research, and Vista Leak. The size determination states Appellant's receipts, with its affiliates' receipts, are well above the \$14 million size standard for NAICS code 562910, RS.

B. The Appeal

Appellant argues the size determination failed to consider the judgment of the Army and assigned the incorrect size standard. Appellant asserts the appropriate size standard for this solicitation is 500 employees, ERS.

Appellant argues that the procuring agency described this procurement as an ERS effort. Appellant further asserts the Area Office erred in not considering the views of the procuring agency and in not obtaining the attachments the CO attempted to electronically transmit to the Area Office. The Area Office asserts the CO's statement supports an ERS NAICS code designation.

Appellant asserts its proposal is for cleanup of Hazardous Waste Management Units (HWMU) at the Army's Umatilla Chemical Depot (UMCD), and its proposal includes work spread over five NAICS codes, 562910, RS; 541330, Engineering Services; 541380, Testing Laboratories; 541620, Environmental Consulting Services; and 541712, Research and Development in the Physical, Engineering, and Life Sciences. Therefore, the Area Office erred in applying the \$14 million size standard to this determination and should have applied the 500-employee size standard.

C. CO's Response

On April 16, 2009, the CO filed a complete copy of his March 20th transmission to the Area Office. The CO asserts that the requirement is to prepare the UMCD for closure, which requires the closure of 109 HWMUs managed by UMCD's permit for storage of hazardous waste. The CO asserts that the work for the contract will require work from three different NAICS codes, 541330, Engineering Services; 541620, Environmental Consulting Services; and 562910, RS.

The CO states that Subtask 1, Planning and Development of Closure Plan Program, will require Engineering Services, 541330, and Environmental Consulting Services, 541620. This task requires development of plans and tests for closure and will require expertise from these two NAICS codes.

Subtask 2, Closure Work Package, will require Engineering Services, 541330, and Environmental Consulting Services, 541620. This subtask will involve incorporating comments from Oregon's Department of Environmental Quality into the closure plans. Engineers will be engaged in scheduling activities.

Subtask 3, Closure Activities, will require RS, 562910, Engineering Services, 541330, and Environmental Consulting Services, 541620. This task will require the sampling of the HWMUs, and chemists, engineers and environmental professionals will be needed to ensure this task is properly conducted. The professionals will be needed to ensure sampling activities meet plan requirements, perform records management and manage work changes, as required.

Subtask 4, Closure Certification, will require Engineering Services, 541330. Subtask 5, Toxic Substance Control Act Closure and Subtask 6, Contaminated Igloos, will both require RS, 562910.

D. South Wind's Response

1. April 28 Filing

On April 28, 2009, South Wind filed a response to the appeal. South Wind asserts that the NAICS code in Amendment 1 is clearly RS, despite the CO's failure to state a size standard. South Wind argues the Army should be charged with knowledge of the differences between RS and ERS and to understand which designation it made.

Further, South Wind asserts the solicitation does not meet the criteria for ERS. South Wind states this solicitation is for the closure of contaminated buildings and thus falls squarely within the description covering RS. South Wind asserts for a procurement to fall within the coverage of ERS, its purpose must be to restore a contaminated environment. South Wind states this procurement's purpose is to close a facility. South Wind asserts that the activities described in the regulatory definition of ERS track the activities required by the Comprehensive

Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 USC §§9601 *et seq.* South Wind further argues that a CERCLA clean-up differs from a RCRA cleanup and therefore ERS is an incorrect designation.

South Wind further states that any information provided by the CO that contradicts the clear statement in the solicitation must be disregarded. South Wind asserts the Army cannot be permitted to justify its selection of Appellant by attempting to argue after the fact that the ERS NAICS code applies.

2. May 19 Filing

Upon learning that the CO had failed to serve South Wind with a copy of the CO's March 20th transmission to SBA, I ordered him to do so and reopened the record for the limited purpose of giving South Wind an opportunity to respond to it.

On May 19, 2009, South Wind responded. South Wind submits an affidavit from a North Wind, Inc. (North Wind) employee, John von Reis. Mr. von Reis states that when this solicitation was issued he approached the Army and requested the NAICS and size standard designation be changed to that for ERS and the CO refused to do so.

South Wind argues that the March 20th letter to SBA contains information that would not have been available to the Army when it issued the solicitation and therefore should be disregarded. South Wind asserts the Army is attempting to set a size standard after the receipt of offers, which damages the integrity of the procurement process.

South Wind further argues that the actual work to be performed here is for consulting and engineering services in support of remediation and not for remediation itself.

E. The Statement of Work

The Statement of Work (SOW) is for environmental engineering support services to insure compliance with the requirements promulgated under federal, state, and Army regulations for the closures of 109 HWMUs managed by the UMCD permit for the storage of hazardous waste. The primary requirement for this contract is to provide specific technical support tasks associated with operational history development, assessment of risks, closure specifications and planning, field execution, data assessment, and certification necessary to achieve a clean closure of the HWMUs.

There are six subtasks. The first is Planning and Development of Closure Plan Program. The contractor must develop a closure plan for the facility. The second subtask is Closure Work Package; the contractor must schedule igloo closure activities and revise the closure plan. The third subtask is HWMU Closure Activities, which requires the contractor to develop specific work instructions and tasks necessary to execute the sampling outlined in the approved Closure Plan Program. The contractor is to ensure sampling equipment and supplies are identified and available, coordinate sampling activities with regulators, ensure the documentation requirements are met, conduct sampling activities, and develop specific work closure packages for each

HWMU. The fourth subtask is Closure Certification. The contractor will prepare the final HWMU closure report. The fifth subtask is Toxic Substances Control Act Closure, which requires the contractor to develop and perform closure activities as required by 40 C.F.R. § 761. Finally, subtask six is Contaminated Igloos. The contractor will conduct physical sampling of contaminated igloos and develop a corrective action plan.

IV. Discussion

A. Timeliness

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

B. Standard of Review

The standard of review for this appeal 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). Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

C. New Evidence on Appeal

OHA's procedural regulations establish a clear rule: 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. 13 C.F.R. § 134.308(a). 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).

The CO's email and attached documents have been submitted as new evidence. Appellant alleges the Area Office failed to acknowledge the CO's input in determining the appropriate size standard for the solicitation. The CO introduces this evidence, submitted to the Area Office before the size determination was issued, to clarify the appropriate size standard. I am admitting this evidence, which was submitted to the Area Office.

South Wind presents an affidavit from a North Wind employee, Mr. von Reis, as new evidence. South Wind introduces the affidavit to support its contention that the CO considered and rejected changing the NAICS code to ERS before the solicitation closed. South Wind's arguments for the new evidence are unpersuasive. The affidavit offers nothing to assist in evaluating whether the Area Office made a clear error in designating a \$14 million annual receipts size standard. Accordingly, South Wind's submission of new evidence is denied.

D. Size Standard

It is clear here that Appellant is small under the ERS size standard, and other than small under the RS size standard. Accordingly, the question is which is the applicable standard.

The question is made difficult by the fact that NAICS code 562910 has two size standards, RS, with a \$14 million size standard, and ERS, with a 500 employee size standard. 13 C.F.R. § 121.201, fn. 14. A clear designation by the Army in its solicitation, identifying both the full name and size standard of the NAICS code designated for the procurement would have been dispositive here. However, the CO failed to do so. Prospective bidders also bear the onus of clarifying the size standard if it is unclear. Unfortunately, no prospective bidders filed a timely NAICS code appeal for this procurement. Thus, the Area Office was obligated to use its authority to clarify an incomplete NAICS code under 13 C.F.R. § 121.402(d). The issue is whether this clarification is clear error.

In considering a NAICS code designation, 13 C.F.R. § 121.402(b) requires designating the NAICS code which best describes the principal purpose of the product being acquired in light of the industry description in the NAICS MANUAL,¹ the description in the solicitation, and the relative weight of each element in the solicitation. To overcome a designation of a NAICS code, an appellant must establish the NAICS code designation is based on a clear error of fact or law. 13 C.F.R. § 134.314. Some NAICS codes are further defined in SBA's size regulations, which provide additional criteria for classifying procurements under those NAICS codes.

A procurement must meet two tests before it may be classified under ERS. First, the purpose of the procurement must be to restore a contaminated environment. Second, the procurement must be composed of activities in three or more separate industries identified with separate NAICS codes, none of which constitutes 50% or more of the contract's value. 13 C.F.R. § 121.201, fn. 14(b); *NAICS Appeal of SVL Analytical, Inc.*, SBA No. NAICS-4721, at 6. Conversely, an RS designation merely requires technical and engineering support for closure activities.

Therefore, in determining whether the Area Office was in error, we must review the SOW.

Here, the work required by the SOW is to restore a contaminated environment for release from government ownership under the Army's Base Realignment and Closure plan. Solicitation, Section C.1.2.2. The UCMD "must be decontaminated to a specific vapor screening level" prior to its release. *Id.* Accordingly, the procurement meets the first test to be classified under ERS.

A review of the SOW demonstrates that the procurement requires the contractor to plan for the closure of the facility, develop tests, sampling techniques, develop specific work packages, coordinate with regulators, and perform work for the actual closure of the facility. These tasks encompass activities in at least three separate NAICS codes: RS, 562910,

¹ EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM-UNITED STATES (2007), *available at* <http://www.census.gov>.

Engineering Services, 541330, and Environmental Consulting Services, 541620. Not one of the NAICS codes appears to constitute 50% of the contract's value.

Thus, the Area Office erred in determining the primary purpose of the contract is to provide support services, not to restore a contaminated environment, and in concluding that the solicitation does not include services from three or more NAICS codes, as the regulation requires for ERS. Based on these erroneous conclusions, the Area Office incorrectly identified an annual receipts size standard of \$14 million for RS for this solicitation.

Although Appellant argues the Area Office erred in not including the information submitted from the CO supporting the ERS size standard in the size determination, and I agree that the Area Office should consider information from the CO, it is the SOW, not the CO's statement that is the basis of my decision. The CO's March 20th statement was not part of the solicitation, or any amendment to it. Rather, the CO's statement is a *post hoc* argument that ERS was the correct designation, issued after Appellant's selection. Therefore, it is not dispositive and is only entitled to the weight of any other argument.

The question of what is the appropriate NAICS code and size standard for a procurement can only be determined by analysis of the solicitation itself. Here that analysis supports an ERS designation; the procurement restores a contaminated environment and includes activities in at least three separate industries identified with separate NAICS codes. 13 C.F.R. § 121.201, fn. 14(b). Even Appellant asserts that North Wind inquired with the CO if the 500 employee size standard for EMS would be used. Response to Information from Army Contracting Officer, at 2.

Accordingly, I conclude the Area Office made errors of fact and law in concluding that the RS designation was the appropriate designation, based upon the SOW, and, for that reason, I reverse the Area Office size determination. The record before me is sufficiently complete to determine that Appellant with its affiliates, Vista Applied, Vista Research, and Vista Leak, is small for the 500 employee size standard for EMS and is therefore small for this procurement.

V. Conclusion

For the above reasons, I GRANT Appellant's size appeal. The Area Office's size determination is REVERSED and VACATED. Appellant is small for this procurement under the 500 employee size standard for EMS .

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

CHRISTOPHER HOLLEMAN
Administrative Judge