

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

SIZE APPEAL OF:

Unitron, LP

Appellant

RE: INET, Inc.

Appealed from
Size Determination No. 6-2010-001
Solicitation No. FA8533-09-R-20210

SBA No. SIZ-5084

Decided: November 4, 2009

ORDER REMANDING PROTEST

I. Background

On April 9, 2009, the Contracting Officer (CO) for the Department of the Air Force, Robins Air Force Base, issued Solicitation No. FA8533-09-R-20210 (RFP) to acquire solid state frequency converters. The RFP was a total small business set-aside, and the CO designated North American Industry Classification Code (NAICS) code 335312, Motor and Generator Manufacturing, with a corresponding size standard of 1,000 employees. Initial offers were due on May 18, 2009, and final proposal revisions were due on September 8, 2009. On September 28, 2009, the CO notified unsuccessful offerors, including Unitron, LP (Appellant), that the contract had been awarded to INET, Inc. (INET).

On October 1, 2009, Appellant filed its protest of INET's size with the Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office). Appellant alleges that INET is not eligible to receive the contract under the instant procurement due to a violation of the nonmanufacturer rule (13 C.F.R. § 121.406). Specifically, Appellant argues that INET does not manufacture the solid state frequency converters required by the RFP, but rather resells frequency converters manufactured by another off-shore company.

On October 2, 2009, INET filed its response to Appellant's protest. INET disputes Appellant's allegations, claims it is a manufacturer of the solid state frequency converters required by the RFP, and denies ever using an off-shore manufacturer. INET contends it is an eligible small business for the instant procurement and concludes that Appellant's protest is without merit.

On October 8, 2009, the Area Office dismissed Appellant's protest on the basis that it lacks specificity pursuant to 13 C.F.R. § 121.1007(c). The Area Office found:

[Appellant's] protest does not indicate from whom [it] believe[s] INET will be purchasing these frequency converters, but only allege[s] that INET is not a manufacturer and that the firm is known to purchase these items from off-shore manufacturers. . . . [Appellant] merely question[s] INET's ability to manufacture frequency converters and further allege[s] that INET will supply the product of an unnamed off-shore source.

Thus, the Area Office concluded that Appellant had not provided sufficient grounds for its challenge of INET's size.

On October 16, 2009, Appellant filed the instant appeal with the SBA Office of Hearings and Appeals (OHA) challenging the Area Office's dismissal and claiming its protest is specific. On October 29, Appellant filed a supplement to its appeal regarding the "business character and ethics of INET."

II. Discussion

Appellant filed the instant appeal within fifteen days of receiving the dismissal, so the appeal is timely. 13 C.F.R. § 134.304(a)(1). 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. Thus, this matter is properly before OHA. The standard of review for this appeal is whether the Area Office's dismissal was based upon clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

Pursuant to 13 C.F.R. § 121.1007(b), "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 must be given." The purpose of this provision is to ensure that a protested concern receives adequate due process so it may craft a meaningful response to the protest. "In determining the sufficiency of protests, OHA has focused on (1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protestor was contesting the challenged firm's size; and (2) whether the protest included factual allegations as a basis for these grounds." *Size Appeal of Alutiiq International Solutions, LLC*, SBA No. SIZ-5069, at 4 (2009) (citing *Size Appeal of Carriage Abstract, Inc.*, SBA No. SIZ-4430, at 6 (2001)).

In its protest, Appellant contends INET is a nonmanufacturer. As a basis for this allegation, Appellant offers a conversation its Chairman, Raymond L. Beutel, had with the Vice President and Co-Founder of INET, Mr. Marty Becker. Appellant offers the specific time and place of this conversation—March 2009 Aviation Industry Expo in Las Vegas—along with a signed statement of Mr. Beutel memorializing the conversation. According to Mr. Beutel, Mr. Becker confirmed that INET does not manufacture solid state frequency converters.

After concluding INET is a nonmanufacturer, the protest sets forth the nonmanufacturer rule, which provides that a nonmanufacturer may qualify as a small business concern 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.” 13 C.F.R. § 121.406(b). Appellant contends that INET is a nonmanufacturer and cannot meet the requirements of this rule, specifically the third requirement. Appellant claims “it is a well known fact that INET, Inc. has the 400 Hz frequency converters they supply manufactured off-shore.” Mr. Beutel, in his signed statement, provides that “there is a market understanding that INET acquires their 400 Hz frequency converters off-shore, possible from a Taiwan or Thailand manufacturer in which they have a vested interest.”

I conclude that this protest gives INET adequate notice of the grounds of Appellant’s protest and includes sufficient factual allegations to provide a basis for those grounds. Although Appellant does not name the off-shore concern, a deficiency on which the Area Office apparently placed great weight, it does specifically delineate how it contends INET has violated the rule. First, Appellant offers a specific factual basis for its assertion that INET is a nonmanufacturer—the conversation between Mr. Beutel and Mr. Becker.¹ Second, although Appellant’s assertion that “there is a market understanding” that INET acquires its frequency converters from an international source is not the most solid factual basis on which to rest an allegation, I find it is sufficient under the circumstances. If the allegation is true, it would be difficult for Appellant to discover the name of the non-domestic concern manufacturing INET’s solid state frequency converters. Conversely, if the allegation is false, it would be easy for INET to prove that it is a manufacturer or that it is supplying the product of a small domestic manufacturer. Either way, the protest includes ample facts to give INET adequate notice of the grounds on which it rests, and it is specific enough to allow INET to draft a response that protects its interests. Therefore, Appellant’s protest is sufficiently specific pursuant to 13 C.F.R. § 121.1007(b).

III. Conclusion

Appellant’s protest was specific. Accordingly, this appeal is GRANTED, the dismissal is VACATED, and this case is REMANDED to the Area Office for a size determination.

CHRISTOPHER HOLLEMAN
Administrative Judge

¹ In its response, INET asserts that this conversation upon which Appellant’s protest is based never took place. The merits of this matter are not before OHA at this time. The Area Office should receive and consider evidence on this issue.