United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
OSC Solutions, Inc.	SBA No. SIZ-5253
Appellant	Decided: June 23, 2011
Appealed from Size Determination No. 3-2011-73	

APPEARANCES

Robert H. Koehler, Esq., and Elizabeth M. Gill, Esq., Patton Boggs LLP, McLean, Virginia, for Appellant.

William W. Goodrich, Esq., and Patrick R. Quigley, Esq., Arent Fox LLP, Washington, D.C., for Automation Precision Technology, LLC.

Kenneth W. Dodds, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency.

DECISION

HYDE, Administrative Judge:

I. Introduction & Jurisdiction

On April 29, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2011-73 finding OSC Solutions, Inc. (Appellant) other than small. On May 12, 2011, Appellant filed an appeal of the size determination. For the reasons discussed below, the appeal is denied, and the size determination is affirmed.

SBA's 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. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation, Protest, and Initial Size Determination

On August 19, 2009, the U.S. Department of the Navy, Fleet and Industrial Supply Center in Norfolk, Virginia issued Solicitation No. N00189-09-R-M001 (RFP) for supply chain management services. The RFP is a commercial items acquisition being conducted pursuant to Federal Acquisition Regulation (FAR) Part 12. The RFP calls for "a full line of maintenance, repair and operations supplies and materials." (RFP 64.) The successful contractor will provide "all labor, supplies, equipment, management, supervision and reports necessary to maintain an adequate supply of all parts, materials, and equipment needed" by the Naval Facilities Midwest Public Works Department in Great Lakes, Illinois. *Id.* Specifically, the contractor must provide all labor and materials necessary to accomplish repairs and maintenance of various transportation vehicles, non-real property, real property, industrial equipment, and specialty equipment. The commodity areas for which the contractor must provide supplies are electrical, plumbing, heating ventilation/air conditioning and refrigeration, building supplies, and material handling equipment. The contractor must satisfy these requirements through operation of a parts store and a distribution and delivery system. *Id.*

The Contracting Officer (CO) set aside the procurement for small businesses and designated North American Industry Classification System (NAICS) code 561210, Facilities Support Services. The RFP cover sheet (SF-1449) indentifies the applicable size standard as $32.5[1] million in average annual receipts. One of the FAR clauses incorporated by full text provides, in pertinent part:

> The NAICS code and small business size standard for this acquisition appear in Block 10 of the solicitation cover sheet (SF 1449). However, the small business size standard for a concern which submits an offer in its own name, but which proposes to furnish an item which it did not itself manufacture, is 500 employees.

FAR clause 52.212-1(a), Instructions to Offerors—Commercial Items (June 2008). Initial offers were due September 8, 2010, and final proposal revisions were due January 31, 2011.

On February 10, 2011, the CO notified unsuccessful offerors that Appellant was the apparent successful offeror. On February 17, 2011, Automation Precision Technology, LLC (APT) filed a protest challenging Appellant's size. On March 30, 2011, the Area Office issued Size Determination No. 3-2011-46 finding Appellant other than small based upon noncompliance with the nonmanufacturer rule. On April 7, 2011, Appellant filed an appeal of

[1] This was in error because in July, 2008, SBA changed the size standard accompanying NAICS code 561210 to $35.5 million. 73 Fed. Reg. 41,237, 41,249 (July 18, 2008). The mistake is immaterial to the outcome of this appeal because Appellant acknowledges that its average annual receipts exceed $35.5 million.

the initial size determination. On April 21, 2011, after discovering errors of law in the initial size determination, the SBA, with the consent of all parties, filed a motion for remand. OHA granted the motion and remanded the matter to the Area Office.

B. Revised Size Determination

On April 29, 2011, the Area Office issued the size determination currently at issue. The size determination identifies the applicable size standard as $35.5 million in average annual receipts. Appellant conceded that its average annual receipts exceed $35.5 million, but argued that the 500 employee size standard referenced in FAR clause 52.212-1(a) should govern, because Appellant is a nonmanufacturer of the items being acquired. The Area Office rejected this argument, explaining that the alternate size standard is used only when the nonmanufacturer rule—which pertains to procurements of supplies, not services—applies to the solicitation at issue. The Area Office reasoned that because the CO assigned a services NAICS code to the RFP, it is a services procurement, and neither the nonmanufacturer rule nor the 500 employee size standard in FAR clause 52.212-1(a) applies to this procurement. Accordingly, the Area Office concluded that Appellant is not a small business for the procurement in question.

C. Appeal Petition

On May 12, 2011, Appellant filed the instant appeal. Appellant contends that by including FAR clause 52.212-1(a) in the RFP, the CO assigned two separate size standards to the procurement. Appellant argues that because there was no appeal of the CO's NAICS code designation, the CO's choice of NAICS code and size standards is final.

Appellant explains that its proposal made clear that it met the 500 employee size standard, but not the $35.5 million receipts size standard, and the CO never questioned whether Appellant qualified as a small business. Appellant further explains that throughout the protest process, it acknowledged that its revenue exceeds the receipts size standard but claimed eligibility for award because it met the 500 employee size standard. Moreover, the initial size determination concluded that the nonmanufacturer rule did apply to this procurement.

Appellant contends the Area Office exceeded its authority when it determined that the 500 employee size standard could not be used for this solicitation. Appellant points out that, pursuant to FAR 19.303, the CO has exclusive authority to determine the NAICS code and size standard applicable to the RFP, and the CO's designations are not reviewable by the Area Office. Appellant argues that the Area Office should have confined its review to determining whether APT's protest was valid, and once the Area Office determined Appellant satisfied one of the size standards designated by the CO, the Area Office's review was complete.

Appellant next claims that the CO alone has the authority to interpret the terms and conditions of a pending solicitation. Furthermore, according to Appellant, the Area Office may not issue a binding interpretation of a FAR clause. Appellant goes on to assert that the Area Office failed to offer any legal authority for its view that the 500 employee size standard is used only when the nonmanufacturer rule applies to the solicitation. Instead, Appellant contends the language of the clause is unambiguous that there are two permissible size standards. Appellant

concludes it need not meet the requirements of the nonmanufacturer rule to be eligible for this procurement; it need only meet the 500 employee size standard because it will furnish items it will not manufacture.

Alternatively, Appellant argues the terms of the solicitation must govern the size determination process. Appellant claims the size standard in FAR clause 52.212-1(a) overrides the size standard listed on the SF 1449 based upon the plain language of the clause. Appellant also contends that to the extent there is a conflict between the size standards, FAR clause 52.212-4(s) dictates that solicitation provisions take precedence over the SF 1449. Appellant concludes the size determination is contrary to law and should be reversed.

D. Agency Comments

On May 31, 2011, the SBA filed comments in this matter. The SBA asserts that the 500 employee size standard contained in FAR clause 52.212-1(a) is applicable only to supply contracts that are set aside for small businesses. The SBA explains that when a supply contract is set aside for such businesses, an offeror must either manufacture the products it offers or meet the requirements of the nonmanufacturer rule. 13 C.F.R. § 121.406.

The SBA sets forth other FAR provisions to illustrate its argument that the nonmanufacturer rule applies only to supply contracts. FAR clause 52.219-6(c), Notice of Total Small Business Set-Aside (June 2003), provides that a small business may only offer products manufactured by domestic small businesses, but also indicates that the provision "does not apply to construction or service contracts." FAR 19.502-2(c) stipulates that for set-asides "other than for construction or services" an offeror must furnish either a product it manufactures or one manufactured by a small business. FAR clause 52.219-14(b)(2), Limitations on Subcontracting (December 1996), mandates that in set-aside contracts for supplies "other than procurement from a nonmanufacturer of such supplies," the prime contractor must bear at least fifty percent of the cost of manufacturing the supplies, not including the cost of materials.

The SBA claims that if OHA were to accept Appellant's argument, an alternative size standard of 500 employees would apply to every commercial item acquisition. The SBA contends that SBA alone has the authority to establish size standards, and the SBA has not created a 500 employee size standard for all commercial item procurements. 15 U.S.C. §632(a)(2)(C); 13 C.F.R. § 121.201. The SBA argues that the FAR Council had no authority to establish such a size standard and did not intend to do so. Instead, according to the SBA, FAR clause 52.212-1(a) should be read in conjunction with the above-mentioned FAR provisions, "which clearly indicate that the nonmanufacturer rule, and the corresponding 500 employee size standard, only applies to supply contracts." (Agency Comments 4.)

The SBA agrees with Appellant that the CO's designation of a service NAICS code is final because it was not appealed. The SBA explains that a contract cannot be both a service and supply contract. Because this is a service contract, the SBA emphasizes that the manufacturing requirement applicable to a supply contract does not apply; nor does the exception to that requirement, the nonmanufacturer rule. Instead, the prime contractor must meet the service contract requirement to perform at least fifty percent of the labor associated with the contract.

The SBA disagrees with Appellant's argument that the CO has the authority to select the size standard that applies to a procurement. Instead, the SBA explains, the CO must use the size standard (established by the SBA) associated with the NAICS code that the CO assigns to the procurement. The SBA also contends the CO was required to include FAR clause 52.212-1 because the RFP is a commercial items acquisition, and the CO therefore did not intend to assign an alternate 500 employee size standard to this procurement. The SBA asserts that FAR clause 52.212-1(a) must be read in the context of the other regulations concerning the nonmanufacturer rule and concludes the alternate size standard therein only applies to set-aside supply contracts. The SBA urges OHA to deny the appeal.

E. APT Response

On May 31, 2011, APT filed its response to the appeal petition. APT challenges Appellant's position that the 500 employee size standard contained in FAR clause 52.212-1(a) applies independently of the nonmanufacturer rule, and the 500 employee standard takes precedence over the size standard set forth on the SF 1449. APT asserts that Appellant's argument "is tantamount to arguing that the FAR Councils may establish their own size standards when they revise the FAR." (APT Response 4.)

APT claims that Appellant's position is contrary to law because only the SBA may determine the standards by which firms are judged to be small, and no other agency may impose size standards. 15 U.S.C. §§ 632(a)(2)(A), (a)(2)(C)(iii); FAR 19.102. Additionally, APT notes that statutory and regulatory language (as well as contract terms) must be read in the context of the entire statutory or regulatory scheme and should be read to avoid potential conflicts. Taking these principles into account, APT asserts the 500 employee size standard contained in FAR clause 52.212-1(a) cannot apply outside the nonmanufacturer rule. APT argues that the language in FAR clause 52.212-1(a) mirrors the language of the nonmanufacturer rule found elsewhere in the FAR because the clause seeks to apply the nonmanufacturer rule to commercial items acquisitions. APT also contends the plain language of the clause does not support Appellant's interpretation because the acquisition is for services and does not ask offerors *to furnish an item*.

Finally, APT contends OHA has already recognized that FAR clause 52.212-1(a) contains the nonmanufacturer rule in *Size Appeal of Pride International, LLC*, SBA No. SIZ-4648 (2004). APT concludes that neither the nonmanufacturer rule nor the 500 employee size standard can apply to this procurement for services. Accordingly, APT requests that OHA affirm the size determination.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the Area Office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that 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).

B. Analysis

Appellant contends that by including FAR clause 52.212-1(a) in the RFP, the CO assigned two separate size standards to the procurement: 500 employees and $35.5 million average annual receipts. The SBA and APT counter that the 500 employee size standard set forth in FAR clause 52.212-1(a) applies only to set-aside contracts for supplies. Because this is an acquisition of services, not supplies, SBA and APT insist that the 500 employee size standard is not applicable.[2]

Upon consideration of the clause in the context of the SBA regulations and FAR provisions concerning the nonmanufacturer rule, I find that FAR clause 52.212-1(a) does not create two separate size standards for the procurement. There are several factors that support this conclusion.

First, because this is a commercial items acquisition, FAR 12.301(b)(1) instructed the CO to include FAR clause 52.212-1 in the RFP. The routine inclusion of a standard FAR clause does not evidence any intent on the part of the CO to assign two size standards to the procurement.

Moreover, even supposing that the CO did intend to apply two size standards to the procurement, the CO lacked authority to do so. A CO must use the size standard that corresponds to the NAICS code designated for a procurement, and SBA alone is responsible for establishing the size standards for each NAICS code. *See* 15 U.S.C. § 632(a)(2); FAR 19.102. Further, under Appellant's reasoning, an alternative size standard of 500 employees would apply to every commercial item acquisition (*i.e*., to all procurements including FAR clause 52.212-1). However, SBA has not established a 500 employee size standard for all commercial item

[2] Pursuant to FAR 2.101, the term "commercial item" includes both supplies and services. Services are considered "commercial items" if they are "of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions." Thus, the fact that this procurement was conducted under "commercial items" authority does not establish that it is a procurement of supplies rather than services.

acquisitions. Thus, Appellant's argument would in effect create a new size standard for commercial items procurements that has not been sanctioned by SBA.

Appellant contends that the nonmanufacturer rule cannot be read into FAR clause 52.212-1(a) because the clause makes no specific mention of the rule. I see no merit to this argument. The FAR states that clause 52.212-1(a) "provides a single, streamlined set of instructions to be used when soliciting offers for commercial items." FAR 12.301(b)(1). Similarly, other FAR clauses intended for commercial items procurements contain abbreviated versions of standard FAR provisions, such as the clauses for disputes or termination for convenience. *E.g.*, FAR clause 52.212-4, Contract Terms and Conditions—Commercial Items (June 2010). Thus, FAR clause 52.212-1 is merely a simplified, or shorthand, version of standard FAR provisions for use with commercial items acquisitions. Viewed in that context, it is appropriate to consider the rules that ordinarily apply to Federal procurements in interpreting the meaning of the provisions in FAR Part 12.

Ordinarily in Government contracting, the nonmanufacturer rule applies to procurements of supplies that are set-aside for small businesses. In such procurements, offerors must either manufacture the items they intend to provide or meet the requirements of the nonmanufacturer rule. *See* 13 C.F.R. § 121.406; FAR 19.102(f) and 52.219-14(b)(2). The nonmanufacturer rule requires an offeror that does not itself manufacture the required products to provide items that the offeror normally sells and that are manufactured by a small business. The nonmanufacturer rule also specifies that a firm is an eligible nonmanufacturer only if it has fewer than 500 employees. 13 C.F.R. § 121.406(b)(1)(i).

Similarly, the second sentence in FAR clause 52.212-1(a) plainly pertains to procurements for supplies, since it refers to an offeror that "proposes to furnish an item which it did not itself manufacture." By including the alternate 500 employee size standard for such offerors, the clause tracks one of the key requirements of the nonmanufacturer rule. It strains credulity to believe that this language in FAR clause 52.212-1(a) is unrelated to the nonmanufacturer rule and that the FAR Council instead intended the alternate size standard to apply to all commercial items procurements. I rather conclude that FAR clause 52.212-1(a) merely reminds offerors that an alternate size standard applies for supply procurements when an offeror meets the requirements of the nonmanufacturer rule. The language in FAR clause 52.212-1(a) mirrors the language of the nonmanufacturer rule because the drafters intended that the alternate size standard should apply only where the nonmanufacturer rule applies.[3]

Appellant also argues that the solicitation's "order of precedence" provision (FAR clause 52.212-4(s)) indicates that the 500 employee size standard in FAR clause 52.212-1(a) is

[3] It is worth noting that OHA has previously, albeit obliquely, recognized that FAR clause 52.212-1 incorporates the nonmanufacturer rule. *See Size Appeal of Pride Int'l, LLC*, SBA No. SIZ-4648 (2004). In *Pride International*, the appellant claimed that the inclusion of FAR clause 52.212-1 mandated application of the nonmanufacturer rule to a procurement for aircraft leasing. In denying the appeal, OHA rejected the argument that the nonmanufacturer rule applied, explaining that the rule only applies to procurements of supplies. OHA thus implicitly found that FAR clause 52.212-1(a) does refer to the nonmanufacturer rule.

controlling over the size standard indentified on the SF 1449. This argument fails because the order of precedence provision is used only to resolve "inconsistencies" in a contract or solicitation. Here, there is no inconsistency because the 500 employee size standard in FAR clause 52.212-1(a) is merely a condensed version of the nonmanufacturer rule. Thus, the size standard listed on the SF 1449 is controlling, and the alternate size standard becomes relevant only in supply procurements and if an offeror meets the requirements of the nonmanufacturer rule.

The procurement at issue is for services, not manufactured products or supplies. As a result, the nonmanufacturer rule does not apply to the procurement, and the alternate 500 employee size standard contained in FAR clause 52.212-1(a) likewise does not apply to this RFP. Appellant would have to meet the $35.5 million average annual receipts size standard associated with NAICS code 561210 to be eligible for this procurement.

IV. Conclusion

Appellant failed to prove that the size determination was based upon clear error of fact or law. Accordingly, this appeal is DENIED, and the size determination is AFFIRMED.

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

KENNETH M. HYDE
Administrative Judge