

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

SIZE APPEAL OF:

Coyol International Group

Appellant

RE: Airgas National Welder Supply, Inc.

Appealed from
Size Determination No. 3-2011-82

SBA No. SIZ-5261

Decided: July 20, 2011

DECISION

HYDE, Administrative Judge:

I. Background

On January 26, 2011, the U.S. Department of the Army, Army Medical Command, Southeast Regional Contracting Office issued Solicitation No. W91YTV-11-T-0079 (RFQ) for bulk oxygen. The Contracting Officer (CO) solicited the RFQ on an unrestricted basis and designated North American Industry Classification System (NAICS) code 325120, Industrial Gas Manufacturing. Quotes were due on February 26, 2011.

On April 26, 2011, the CO notified competing firms that Airgas National Welder Supply, Inc. (ANWS) was the successful offeror. On April 27, 2011, Coyol International Group (Appellant) filed a protest alleging that ANWS exceeds the 1000 employee size standard associated with NAICS code 325120.

On June 1, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) dismissed Appellant's protest. The Area Office determined that the protest was non-specific because the procurement was not restricted to small businesses, and ANWS did not claim to be a small business under NAICS code 325120. The Area Office thus reasoned that there was no dispute to be decided and dismissed the protest.

On June 16, 2011, Appellant appealed the dismissal of its protest. Appellant maintains that ANWS is not a small business for the instant procurement because ANWS and its affiliates employ many more than 1000 people. Appellant claims that the CO intended to contract to a small business because the 1000 employee size standard was listed in the RFQ. Appellant also explains that it is the incumbent Historically Underutilized Business Zone (HUBZone) contractor and asserts the CO has improperly terminated Appellant's service and awarded the instant

contract to ANWS. Appellant argues the procurement should have been set aside for small businesses because there is a sufficient number of small business offerors in this industry to warrant a set-aside. Appellant also cites 13 C.F.R. § 124.504, which governs SBA's ability to accept a procurement for award to participants in the 8(a) Business Development (BD) program, in support of its assertion that award to ANWS will harm Appellant. Finally, Appellant disputes the Area Office's determination that its protest was insufficiently specific.

II. Discussion

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.

OHA reviews a size determination issued by an SBA area office to determine whether it is "based on clear error of fact or law." 13 C.F.R. § 134.314. It is Appellant's burden to prove, by a preponderance of the evidence, that the Area Office committed an error. 13 C.F.R. § 134.314. Thus, the administrative judge may overturn a size determination only if Appellant establishes the Area Office made a patent error based upon the record before it.

In this case, the RFQ at issue was solicited as an unrestricted procurement. As a result, the procurement was open to all interested vendors regardless of size, and offerors were not required to certify as small businesses in order to compete. In an unrestricted procurement, an unsuccessful offeror may file a size protest when the apparently successful offeror has represented itself as a small business concern. 13 C.F.R. § 121.1001(a)(7). Here, though, the Area Office correctly observed that ANWS did not represent itself as a small business concern. The Area Office also correctly determined there is no dispute that ANWS is not a small business for NAICS code 325120.

Appellant contends ANWS is not eligible for award under the solicitation because ANWS does not meet the size standard associated with NAICS code 325120. Appellant misunderstands the use and applicability of NAICS codes and size standards. SBA's size standards determine whether a business entity is small and, thus, whether it is eligible for contracts that are *set-aside or reserved for small business concerns*. 13 C.F.R. § 121.101(a). The contract at issue was not set-aside for small businesses. Instead, competition was unrestricted. Accordingly, ANWS was not required to, and did not, represent itself as a small business.

Appellant takes issue with the fact that the RFQ was not set aside for small businesses. Such matters are not within the scope of OHA's review and will not be discussed here. *E.g., NAICS Appeal of McKissack & McKissack*, SBA No. NAICS-5154, at 2 (2010) ("[I]t is settled law that OHA has no jurisdiction to review a contracting officer's decision not to set aside a procurement for small business.") Additionally, Appellant's reliance on 13 C.F.R. § 124.504 is misplaced. 13 C.F.R. § 124.504 governs the SBA's ability to accept a procurement for award as an 8(a) BD contract. The contract at issue was not an 8(a) set-aside, and this regulation does not

apply here.

Finally, Appellant challenges the Area Office's finding that its protest was non-specific. The Area Office determined that Appellant failed to sufficiently specify the grounds upon which it challenged ANWS's size and eligibility for the RFQ. In fact, specificity was not the problem with Appellant's protest. Rather, Appellant failed to state any valid grounds to protest ANWS's size because ANWS was not required to be a small business to be eligible for the RFQ, and ANWS did not represent itself as a small business concern. 13 C.F.R. § 121.1001(a)(7). Thus, regardless of any questions of specificity, Appellant's protest was fatally flawed, and the Area Office properly dismissed it.

III. Conclusion

For the above reasons, the appeal is DENIED, and the Area Office's dismissal 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