

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

SIZE APPEAL OF:

Fuel Cell Energy, Inc.,

Appellant,

RE: Argo Systems, LLC

Appealed From
Size Determination No. 2-2012-59

SBA No. SIZ-5330

Decided: March 19, 2012

APPEARANCES

Ross M. Levine, Esq., Vice President, Fuel Cell Energy Inc., Danbury, Connecticut,
for Appellant

Dirk D. Haire, Esq., Fox Rothschild LLP, Washington, D.C., for Argo Systems, LLC

DECISION

I. Introduction and Jurisdiction

On January 12, 2012, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2012-59 dismissing a protest filed by Fuel Cell Energy, Inc. (Appellant) as insufficiently specific. Appellant now appeals the dismissal. For the reasons discussed *infra*, the appeal is denied.

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 timely filed the instant appeal on January 30, 2012.¹ Accordingly, this matter is properly before OHA for decision.

¹ Ordinarily, an appeal petition must be filed within fifteen calendar days of receipt of the size determination. 13 C.F.R. § 134.304(a). In this case, the record demonstrates that Appellant received the size determination via facsimile on January 13, 2012. Fifteen calendar days after January 13, 2012 was January 28, 2012. Because January 28, 2012 was a Saturday, the appeal petition was due on the next business day: Monday, 30, 2012. 13 C.F.R. § 134.202(d).

II. Background

A. Solicitation and Protest

On August 9, 2011, the National Security Agency (NSA) issued Solicitation No. H98230-11-R-1775 (RFP) seeking a contractor to deliver, install, and evaluate power-generating fuel cell plants in a mission critical environment at the NSA campus at Fort Meade, Maryland. The procurement was set aside exclusively for small businesses. Two different North American Industry Classification System (NAICS) codes and size standards were included in the RFP: NAICS code 335999, All Other Miscellaneous Electrical Equipment and Component Manufacturing, with a corresponding size standard of 500 employees, and NAICS code 541330 Engineering Services, with a corresponding size standard of \$4.5 million in average annual receipts. (RFP at §§ K.6 and K.8.) In correspondence with the Area Office, the Contracting Officer (CO) stated that the agency intended only to use NAICS code 335999, and that the assignment of two NAICS codes was inadvertent. (CO's Email dated December 20, 2011.)

On December 12, 2011, NSA notified offerors, including Appellant, that Argo Systems LLC (Argo) was the apparent successful offeror. On December 15, 2011, Appellant protested Argo's size, claiming that Argo is not a small business concern, that Argo's average annual receipts exceeded \$4.5 million, that over 70% of performance cost would belong to an Argo subcontractor, Bloom Energy (Bloom), and that Bloom is not a small business. The protest alleged as follows:

Clause K.8 [of the RFP] states that the NAICS code for this acquisition is 335999 (All Other Miscellaneous Electrical Equipment and Component Manufacturing), with a small business size standard of 500 employees. On information and belief, Argo Systems LLC intends to provide fuel cells for this acquisition to be manufactured by Bloom Energy, a large business. The cost of the fuel cell to be delivered in performance of the contract is conservatively estimated to be over \$17 million. Upon information and belief, the cost of the fuel cell represents well over 50% ... of the anticipated contract price award to Argo Systems. As such, Argo Systems' purchase of the fuel cell equipment from a large business disqualifies Argo Systems for consideration as a small business under the NAICS code 335999.

...

Furthermore, Clause K.6 [of the RFP] states that the NAICS code for this acquisition is 541330 (Engineering Services), with a small business size standard of \$4.5 million in annual receipts. On information and belief, Argo Systems['] annual receipts are in excess of \$4.5 million, disqualifying their small business eligibility under the NAICS code 541330.

(Protest at 1-2.) Appellant attached no documentation or evidence to support its protest contentions.

B. Size Determination

On January 12, 2012, the Area Office dismissed Appellant's protest on the ground that the protest was insufficiently specific. The Area Office stated that Appellant's protest failed to provide specific information to substantiate the claim that Argo was other than a small business concern.

In support of its conclusion, the Area Office explained that it had recently performed a size determination on Argo and determined that Argo's average annual receipts fell below \$ 4.5 million. Additionally, the Area Office stated that Bloom was listed as a small business in the Central Contractor Registration (CCR), and that Appellant did not provide specific information or evidence demonstrating that Bloom was not a small business.

C. Appeal Petition

On January 30, 2012, Appellant filed the instant appeal. Appellant maintains that Argo is affiliated with Bloom under the “ostensible subcontractor” rule, 13 C.F.R. § 121.103(h)(4), and that the size determination “is in error as it did not address this affiliation.” (Appeal at 1.) Appellant claims that, due to affiliation with Bloom, Argo exceeds the procurement's small business size limitation. As attachments to its appeal, Appellant offers three new exhibits pertaining to Bloom's size. (*Id.* at Exhibits 6, 7, and 8). According to Appellant, the exhibits consist of “[p]ublic information found on the internet.” (*Id.* at 2.)

D. Argo's Motion to Dismiss

On February 15, 2012, Argo moved to dismiss the appeal. Argo maintains that Appellant improperly attempts to introduce new substantive issues for the first time on appeal. Argo complains that “[i]nstead of showing how the Area Office erred in finding the Size Protest nonspecific, [Appellant] attempts to supplement its initial Size Protest by arguing, for the first time, that Argo and [Bloom] are affiliated based on the ostensible subcontractor rule.” (Motion at 3.) Argo further argues that Appellant has not shown good cause to admit new evidence.

E. Appellant's Response

On February 28, 2012, Appellant responded to Argo's motion. Appellant contends that its ostensible subcontractor allegations are a “clear outgrowth” of the protest, although Appellant acknowledges that the protest did not contain “the specific words ‘ostensible subcontractor’” or make reference to the applicable regulation. (Response at 2.)

F. Argo's Motion to Reply

On March 6, 2012, Argo moved to reply to Appellant's response. Appellant opposes Argo's request, but seeks leave to file a sur-reply if Argo's request is granted. Upon review, I find that Argo's reply merely reiterates arguments previously presented. Accordingly, Argo's motion to reply is denied.

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 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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “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 Vista Engineering Technologies, LLC*, SBA No. SIZ-5041, at 6 (2009) (citation omitted).

I conclude, after reviewing the record, that Appellant has not shown good cause to admit Exhibits 6, 7, and 8. Appellant did not file the motion contemplated by 13 C.F.R. § 134.308(a), and OHA has found that such an omission may be “fatal” to an attempt to introduce new evidence. *Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5267, at 4 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR). Moreover, Appellant acknowledges that Exhibits 6, 7 and 8 consist of information that is publicly available on the internet. Because Appellant could have submitted this information to the Area Office at the time of its protest, I find that Appellant has not shown good cause to admit the information at this late stage. *Size Appeal of Cummings Construction, LLC*, SBA No. SIZ-5022, at 4 (2009) (“Appellant cannot submit evidence on appeal it neglected to submit at the protest stage.”); *Size Appeals of Baldt, Inc.*, SBA No. SIZ-4987, at 7 (2008) (excluding evidence presented on appeal that was publicly available at the time the protest was filed). Accordingly, Exhibits 6, 7, and 8 to the appeal petition are stricken from the record, and were not considered in deciding this appeal.

C. Analysis

Appellant devotes its appeal to arguing that the relationship between Argo and Bloom violates the ostensible subcontractor rule. The problem for Appellant is that this allegation was never raised in the underlying protest. Indeed, the protest made no mention of the ostensible subcontractor rule, and did not assert that Argo is affiliated with Bloom or with any other entity. Nor did the protest address the substantive requirements of the ostensible subcontractor

rule.² Rather, Appellant's protest made two other allegations: (1) for NAICS code 335999 (a manufacturing code), the protest alleged that Bloom (not Argo) was the manufacturer of the end items to be produced under the contract, in contravention of the non-manufacturer rule; and (2) for NAICS code 541330 (a services code), the protest alleged that Argo's own revenues exceeded the applicable size standard.

SBA regulation makes clear that it is the protester's responsibility to file a timely and complete protest. *See* 13 C.F.R. §§ 121.1004(a), 121.1007(b), 121.1009(b). An area office has no obligation to investigate issues beyond those raised in the protest. *Size Appeal of Perry Management, Inc.*, SBA No. SIZ-5100, at 3-4 (2009) (“Contrary to [the protester's] assertion, it was not the responsibility of the Area Office to investigate all of [the challenged firm's] possible affiliations. It was the Area Office's responsibility to investigate those allegations presented to it by [the] protest.”). Furthermore, OHA may not consider new substantive issues raised for the first time on appeal. 13 C.F.R. § 134.316(c); *Size Appeal of David Boland, Inc.*, SBA No. SIZ-5189 (2011); *Size Appeal of Lanzen Fabricating North, Inc.*, SBA No. SIZ-4723 (2005). Because Appellant's allegations regarding the ostensible subcontractor rule were not included in Appellant's protest, and are raised for the first time in this appeal, those allegations are not properly before OHA.

An additional question is whether the Area Office properly dismissed Appellant's protest as non-specific. Pursuant to SBA regulation, “[a] protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned.” 13 C.F.R. § 121.1007(b). The protest must give some basis for the allegation that the challenged concern is other than small. *Id.* A protest that merely alleges that the challenged concern is not small is not sufficiently specific. *Id.*

Appellant here has made no persuasive showing that the Area Office erred in dismissing the protest as non-specific. The protest contention that Argo's receipts exceed the size standard for NAICS code 541330 based upon Appellant's “information and belief” amounts to nothing more than unsupported speculation that Argo is not a small business, and therefore is not adequately specific. Appellant's protest allegations with regard to NAICS code 335999 were somewhat more detailed, stating that Argo was not the manufacturer of the end items to be produced, that the actual manufacturer was Bloom, and that Bloom is not a small business concern. As Argo observes, however, SBA has issued a class waiver of the non-manufacturer rule for products under this particular NAICS code. 69 Fed. Reg. 61,429 (Oct. 18, 2004). The protest did not explain, or allege, how Argo would have violated the non-manufacturer rule in light of the class waiver. Accordingly, Appellant has not established that the Area Office erred in dismissing the protest as non-specific.

² *See* 13 C.F.R. § 121.103(h)(4). The rule provides that when a subcontractor is actually performing the primary and vital requirements of the contract, or the prime contractor is unusually reliant upon the subcontractor, the two firms are affiliated for purposes of the procurement at issue.

IV. Conclusion

Appellant's allegations concerning the ostensible subcontractor rule are raised for the first time on appeal, and therefore are not properly before OHA. The allegations that Appellant did include in its protest were not adequately specific. For these reasons, the 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