

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

SIZE APPEAL OF:

Mali, Inc.,

Appellant,

Appealed From
Size Determination No. 1-SD-2013-51

SBA No. SIZ-5506

Decided: October 18, 2013

APPEARANCES

Francine E. Tajfel, Esq., General Counsel, Mali, Inc., East Windsor, New Jersey

Jonathan T. Williams, Esq., Grant D.P. Madden, Esq., PilieroMazza PLLC, Washington, D.C., for DMC Management Services, LLC

DECISION

I. Introduction and Jurisdiction

On August 1, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 1-SD-2013-51 concluding that Mali, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. The Area Office specifically found that Appellant is affiliated with Hotels Unlimited, Inc. (Hotels Unlimited) and other concerns through common management, 13 C.F.R. § 121.103(e) and identity of interest, 13 C.F.R. § 121.103(f).

Appellant maintains that the Area Office lacked authority to render a size determination because the underlying solicitation contemplated award of a blanket purchase agreement (BPA), rather than a contract. For the reasons discussed *infra*, 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 Area Office Proceedings

On February 19, 2013, the U.S. Department of the Navy, Military Sealift Command (MSC) issued Request for Proposals (RFP) No. N32205-13-R-6005 seeking a contractor to provide lodging and transportation for Navy personnel attending training at the MSC Training Center in East Freehold, New Jersey. The RFP estimated that the contractor would lodge 65 to 120 Navy personnel each day, and would transport approximately 60 people daily to and from the training center. (RFP at 3-7.) According to the RFP, “[t]he Government contemplates award of an Indefinite Delivery-Requirements Type contract resulting from this solicitation”, and the RFP included the full text of Federal Acquisition Regulation (FAR) clause 52.216-21, “Requirements (Oct 1995)”. (*Id.* at 36-38.) The clause pertinently states that “[t]his is a requirements contract for the supplies or services specified, and effective for the period stated, in the Schedule.” (*Id.* at 37.)

The Contracting Officer (CO) set aside the procurement entirely for small businesses and assigned North American Industry Classification System (NAICS) code 721110, Hotels (except Casino Hotels) and Motels, with a corresponding size standard of \$30 million average annual receipts. Appellant submitted its initial offer, including price, on March 20, 2013, self-certifying as a small business. (Size Determination at 2.) On July 2, 2013, the CO announced that Appellant was the apparent awardee.

On July 10, 2013, DMC Management Services, LLC (DMC), an unsuccessful offeror, filed a size protest with the CO. The protest alleged that Appellant is affiliated with Hotels Unlimited and other concerns in which members of the Tajfel family have business interests. In addition, DMC asserted, Appellant may be affiliated with large hotel chains through franchise agreements. The CO forwarded the protest to the Area Office for consideration.

On July 16, 2013, Appellant responded to the protest and provided its SBA Form 355 and other information requested by the Area Office. Appellant denied the protest allegations, but did not assert that the RFP contemplated award of a BPA. Nor did Appellant contend that the Area Office lacked authority to conduct a size determination.

On August 1, 2013, the Area Office issued Size Determination No. 1-SD-2013-51 concluding that Appellant is affiliated with Hotels Unlimited and other concerns. Appellant's average annual receipts, when aggregated with those of its affiliates, exceed \$30 million, so Appellant does not qualify as a small business. (*Id.* at 8-9.)

B. Appeal

On August 14, 2013, Appellant filed the instant appeal. Appellant does not challenge the merits of the size determination. Rather, Appellant asserts that “the size determination is fundamentally flawed because it was issued in response to a solicitation for a BPA.” (Appeal at 4.) Appellant emphasizes that, according to 13 C.F.R. § 121.404(g)(3)(vi), a BPA is not a

contract, so it is improper to assess a concern's size at the time of a response to a solicitation for a BPA. (*Id.*)

Appellant allows that the RFP here “did not use the term ‘Blanket Purchase Agreement’.” (*Id.* at 5.) Nevertheless, in Appellant's view, “it is evident that the MSC sought to establish a BPA.” (*Id.*) Appellant states that, under the FAR, a BPA is defined as “a simplified method of filling anticipated repetitive needs for supplies or services by establishing ‘charge accounts’ with qualified sources of supply.” (*Id.* quoting FAR 13.301-1(a).) Further, a significant feature of a BPA is that the procuring agency is legally obligated only to the extent of purchases actually made. (*Id.* at 4-5.) Appellant concludes that, because the instant procurement shares such similarities to a BPA, the Area Office was precluded from issuing a size determination. Appellant asks that the size determination be vacated.

C. DMC's Response

On August 30, 2013, the date of the close of record, DMC responded to the appeal. DMC urges OHA to deny or dismiss the appeal and uphold the size determination.

DMC observes that Appellant did not attempt to refute the Area Office's factual or legal findings, and asserts that Appellant has therefore “conceded it has many affiliates and is not a small business.” (DMC Response, at 1.) DMC adds that Appellant's contention that the Area Office lacked authority to issue a size determination should not be considered on appeal because this issue was never presented to the Area Office. (*Id.*) SBA regulations state that OHA will not adjudicate substantive issues raised for the first time on appeal. (*Id.* at 6 citing 13 C.F.R. § 134.316(c).)

Next, DMC argues that Appellant is incorrect that that the RFP contemplated award of a BPA. DMC observes that the RFP twice stated that MSC planned to award an Indefinite Delivery-Requirements Type contract, and that the word ““contract”” appears elsewhere throughout the RFP. (*Id.* at 6-7.) Furthermore, the solicitation made no mention of BPAs, and did not contain the mandatory terms and conditions associated with BPAs.

DMC also contends that, even if the solicitation were for a BPA, Appellant's appeal is still meritless. DMC asserts that “when an agency elects to set aside a solicitation for a BPA, it must follow applicable set aside rules.” (*Id.* at 8.) As a result, the rules governing small business set-asides would have authorized DMC's size protest. (*Id.* at 9.)

D. Reply and Surreply

On September 11, 2013, 12 days after the close of record, Appellant filed a reply. Appellant requested leave to reply to address the purported “flawed legal reasoning” set forth in DMC's response. (Motion at 1.) DMC opposed Appellant's request, but moved to surreply in the event that OHA accepted the reply. On September 30, 2013, Appellant moved to respond to DMC's surreply. Appellant maintains that “[b]ecause DMC's [surreply] is, in essence, a second Response, [Appellant] should be afforded the opportunity to reply.” (Motion to Respond to Surreply, at 1.)

In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, Appellant's reply was filed well after the close of record, and elaborates upon legal points raised in the appeal petition. Accordingly, Appellant's motion to reply is DENIED, and the reply is EXCLUDED from the record. Because I am excluding Appellant's reply, DMC's surreply and Appellant's response thereto are also EXCLUDED.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the 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 an 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's sole argument in its appeal is that, pursuant to 13 C.F.R. § 121.404(g)(3)(vi), the Area Office lacked authority to render a size determination because the RFP contemplated award of a BPA rather than a contract. Appellant's argument, however, is contradicted by the RFP itself, which twice states that MSC would be awarding a Requirements contract. *See* Section II.A, *supra*. Notably, the RFP contained all of the standard elements of a Requirements contract, such as FAR clause 52.216-21; an estimate of the quantities to be ordered; and a statement that the procurement agency would use the acquisition to fulfill any requirements within the scope of the contract. *See* FAR 16.503. Conversely, as Appellant itself acknowledges, the RFP did not mention BPAs or otherwise indicate that a BPA was intended. Appellant emphasizes that the underlying procurement is similar in nature to a BPA, because MSC retains the flexibility to decide what amounts, if any, will ultimately be ordered. Nevertheless, while it may be true that there are general similarities between BPAs and Requirements contracts, these procurement methods are not synonymous, and Appellant has not established that this particular RFP contemplated award of a BPA. Accordingly, I find no merit to Appellant's contention that the Area Office lacked authority to issue a size determination.

DMC also contends that Appellant is attempting to raise new substantive issues for the first time on appeal, and that the size determination would have been proper even if the underlying procurement had involved a BPA. *See* Section II.C, *supra*. Because I have determined that the instant RFP did not call for award of a BPA, the appeal fails on its merits, and I need not consider whether the appeal might also be rejected on alternate grounds.

IV. Conclusion

For the above reasons, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge