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

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| SIZE APPEAL OF:<br><br>Rich Chicks, LLC,<br><br>Appellant,<br><br>Appealed From<br>Size Determination No. 6-2014-050 | SBA No. SIZ-5556<br><br>Decided: May 12, 2014 |

## APPEARANCES

Michael J. Gardner, Esq., Erik M. Ideta, Esq., Troutman Sanders LLP, Norfolk, Virginia, for Appellant

## DECISION[1]

### I. Introduction and Jurisdiction

On March 28, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2014-050 finding that Rich Chicks, LLC (Appellant) is not an eligible small business for the subject procurement. Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

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.

[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, I afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

## II. Background

### A. Solicitation and Protest

On February 14, 2013, the U.S. Defense Logistics Agency, Troop Support, Philadelphia, Pennsylvania, issued Request for Proposals (RFP) No. SPM300-13-R-0014 for the acquisition of chicken wings, chicken parts, and other food items. The Contracting Officer (CO) set aside the chicken wings portion of the procurement for small businesses, and assigned North American Industry Classification System (NAICS) code 311999, All Other Miscellaneous Food Manufacturing, with a corresponding size standard of 500 employees.

Appellant submitted its initial offer on June 11, 2013, self-certifying as a small business. In its proposal, Appellant stated that the contract would be performed at "USDA Plant No. [XXX]" in Gainesville, Georgia. (Proposal at 6.) Appellant submitted its final proposal revisions on January 8, 2014.

On February 21, 2014, the CO announced that Appellant was the apparent awardee for set-aside portion of the contract. On February 25, 2014, N'Genuity Food Exports, LLC (NFE), an unsuccessful offeror, protested Appellant's size and compliance with the nonmanufacturer rule, 13 C.F.R. § 121.406. The CO forwarded NFE's protest to the Area Office for consideration.

### B. Size Investigation

On March 4, 2014, the Area Office notified Appellant of NFE's protest and requested a response to the allegations. Appellant responded on March 7, 2014, contending that Appellant qualified under the nonmanufacturer rule because Appellant "will utilize the services of a qualified small business as a place of performance such as [XXXX]." (Protest Response at 2.)

On March 11, 2014, the Area Office informed Appellant that, because Appellant was supplying the product of another manufacturer, Appellant must submit an SBA Form 355 for that manufacturer. Three days later, Appellant explained that it had provided a copy of the Form 355 to [Manufacturer], which, Appellant stated, was the manufacturer identified in Appellant's proposal as Appellant's place of performance. Appellant explained that, at the time Appellant submitted its final proposal revisions, Appellant "did not have the necessary equipment in its own facilities to be able to fully self-perform the manufacturing requirements of the [RFP]." (Letter at 1.) As a result, Appellant "arranged to have that further processing work performed by [Manufacturer]." (*Id.*) In December 2013, however, Appellant installed suitable equipment at an [XXXX] facility in Tracy, California. For this reason, Appellant "decided in February [2014] to self-perform the work originally intended for [Manufacturer]," and "[Manufacturer] will have no role in the performance of this contract." (*Id.*)

On March 18, 2014, the Area Office advised Appellant that a completed SBA Form 355 for [Manufacturer] was still required. If Appellant failed to submit the SBA Form 355 for [Manufacturer], the Area Office would infer that [Manufacturer] was not a small business under the adverse inference rule, 13 C.F.R. §§ 121.1008(d) and 121.1009(d). At Appellant's request,

the Area Office granted a five-day time extension, such that Appellant was to submit the completed SBA Form 355 of [Manufacturer] no later than 10:00 a.m. on March 24, 2014. Appellant never submitted the requested form.

On March 20, 2014, Appellant, through legal counsel, argued that it would be improper to draw an adverse inference against Appellant because the information requested was not relevant to the size determination, as there was no longer any connection between Appellant and [Manufacturer]. Appellant acknowledged that "[Manufacturer's] facility remained the place of performance in [Appellant's] final proposal," but stressed that Appellant now planned to self-perform the contract without any [Manufacturer] involvement. (Letter at 2.) Instead, Appellant would perform the contract at the [XXXX] facility in Tracy, California.

C. Size Determination

On March 28, 2014, the Area Office issued Size Determination No. 6-2014-050, concluding that Appellant and its acknowledged affiliates do not exceed the applicable 500-employee size standard. (Size Determination at 3.) Nevertheless, Appellant is ineligible for the instant procurement because Appellant did not furnish sufficient evidence that it complied with the nonmanufacturer rule as of January 8, 2014, the date of Appellant's final proposal revision. (*Id.* at 6.)

The Area Office explained that to qualify for a small business set-aside to provide manufactured products, the prime contractor must manufacture the end item being procured or comply with the nonmanufacturer rule. 13 C.F.R. § 121.406(a). The Area Office determined that Appellant would not produce the requested chicken wings, because according to Appellant's initial and final proposals, [Manufacturer] was the manufacturer. (Size Determination at 4.)

The Area Office went on to consider the nonmanufacturer rule, which states:

> A firm may qualify as a small business concern for a requirement to provide manufactured products or other supply items as a nonmanufacturer 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;
> (iii) Takes ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice; and
> (iv) Will supply the end item of a small business manufacturer, processor or producer made in the United States, or obtains a waiver of such requirement pursuant to paragraph (b)(5) of this section.

13 C.F.R. § 121.406(b)(1). The Area Office found that Appellant complied with paragraphs (i)-(iii) of this regulation, but that there was insufficient evidence to conclude that the chicken wings would be produced by a small business. (Size Determination at 3-4.)

The Area Office explained that Appellant's compliance with the nonmanufacturer rule is assessed of January 8, 2014, the date Appellant submitted its final proposal revisions. 13 C.F.R. § 121.404(d). As of January 8, 2014, Appellant proposed that [Manufacturer] would produce the chicken wings. The Area Office therefore instructed Appellant to submit a completed SBA Form 355 for [Manufacturer], which Appellant did not submit. Because Appellant did not provide this requested information, the Area Office assumed that [Manufacturer] was not a small business. Accordingly, the Area Office determined, Appellant did not comply with the nonmanufacturer rule. (Size Determination at 6.)

The Area Office also addressed Appellant's contentions that Appellant planned to perform the contract using its own equipment at [XXXX] facilities in Tracy, California, and not with [Manufacturer's] equipment at [Manufacturer's] facilities in Gainesville, Georgia. The Area Office found that it could not consider any changes Appellant made to its proposed manufacturing approach after January 8, 2014, because that is the date used for determining Appellant's compliance with the nonmanufacturer rule. (*Id.* at 5.)

D. Appeal

On April 7, 2014, Appellant filed the instant appeal with OHA. Appellant contends that the Area Office improperly applied the adverse inference. Accordingly, OHA should reverse the size determination.

Appellant argues that the Area Office erred in applying the adverse inference rule because the SBA Form 355 for [Manufacturer] is not relevant, and there is no connection between Appellant and [Manufacturer]. Appellant stresses that it will not use [Manufacturer's] facilities, so [Manufacturer] is no longer involved in this procurement. Rather, "[Appellant] will now fully self-perform the contract at [XXXX] facilities in Tracy, California." (Appeal at 7.)

Appellant asserts that application of the adverse inference rule here contravenes public policy. The purpose of the adverse inference rule, Appellant maintains, is "to *punish* concerns [that] fail to comply with requests for information." (*Id.* at 6, emphasis in original and citing *Size Appeal of Log In Sys., Inc.*, SBA No. SIZ-5130 (2010).) Applying the rule here is "wholly inequitable," because Appellant "made every effort to obtain the completed form from [Manufacturer], but because [Manufacturer] is not involved in this contract, [Manufacturer] was not willing to provide one." (*Id.*)

Next, Appellant argues that application of the adverse inference rule in this case is unduly burdensome because it effectively requires a prime contractor to obtain an SBA Form 355 from all proposed subcontractors, vendors, or lessors prior to any size protest. Appellant argues this requirement contravenes Federal Acquisition Regulation (FAR) 19.703, which permits a prime contractor to rely upon its subcontractor's representation that the subcontractor is a small business. Appellant argues such a result could not have been SBA's intent in promulgating the adverse inference rule. (*Id.* at 7-8.)

Appellant then contends that, according to Appellant's proposal, Appellant, not [Manufacturer], is the chicken wings manufacturer. Appellant argues its proposal identified Appellant as the manufacturer when it stated ""[XXXXXXXXXXXXXXXXX]." (*Id.* at 9, quoting Proposal at 2.) The proposal also made plain that "[XXXXXXXXXXXXX]." (*Id.*, quoting Proposal at 5.) Appellant then argues that, although the proposal identified [Manufacturer's] facility as the place of performance, the proposal does not specifically identify [Manufacturer] as the manufacturer. This is because Appellant would structure, oversee, and direct the manufacturing process. (*Id.* at 9-10.) Appellant seeks to introduce a declaration from its President and Managing Member, Mr. Neil Kinney, in which Mr. Kinney attests that [Manufacturer] was never intended to be the manufacturer for this procurement.

## 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 that 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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). 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 Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

In this case, Appellant has not established good cause to admit Mr. Kinney's declaration. Appellant offers the declaration in an effort to demonstrate that Appellant did not intend [Manufacturer] to be the manufacturer for this procurement. Based on NFE's protest and the Area Office's subsequent inquiries, however, Appellant was well-aware that the Area Office would be determining Appellant's compliance with the nonmanufacturer rule, and that the Area Office therefore would be reviewing which firm would produce the chicken wings for this procurement. Thus, if Appellant wished to have Mr. Kinney's declaration considered, Appellant could, and should, have submitted it to the Area Office during the course of the size investigation. *See, e.g., Size Appeal of ISC8, Inc.*, SBA No. SIZ-5414, at 4 (2012) (rejecting new

evidence because it pertained to a matter that the proponent "knew was at issue before the Area Office"); *Size Appeal of Prof'l Project Servs., Inc.*, SBA No. SIZ-5411, at 7 (2012) ("OHA has repeatedly declined to accept new evidence when the proponent did not first submit the material to the Area Office during the size review.").

Appellant asserts that "[a]t the time [of the size review], there would have been no reason to clarify that [Manufacturer] was not the manufacturer [because Manufacturer] was no longer involved in the procurement." (Appeal at 11.) This argument is unconvincing, because compliance with the nonmanufacturer rule is assessed as of the date of final proposal revisions. 13 C.F.R. § 121.404(d). Thus, Appellant knew, or should have known, that the Area Office would give heavy weight to Appellant's final proposal, irrespective of any subsequent changes in manufacturing approach.

For these reasons, Appellant's motion to supplement the record is DENIED.

C. Analysis

OHA has established a three-part test for assessing whether an adverse inference is appropriate. First, the requested information must be relevant; that is, it must logically relate to an issue in the size determination. Second, there must be a level of connection between the protested concern and the concern about which the information is requested. Third and finally, the request for information must be specific. If all three criteria are met, the challenged concern must produce the requested information or suffer the consequences of an adverse inference. *See, e.g., Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477, at 10 (2013), *recons. denied*, SBA No. SIZ-5493 (2013) (PFR).

In the instant case, Appellant contends that the Area Office improperly drew an adverse inference for failure to provide an SBA Form 355 for [Manufacturer], because Appellant now plans to self-perform the contract without any [Manufacturer] involvement. As a result, Appellant reasons, whether or not [Manufacturer] is a small business is irrelevant to the size determination. The problem with this argument is that compliance with the nonmanufacturer rule is determined as of the date the challenged firm submits its final proposal revisions. 13 C.F.R. § 121.404(d). As of that date — January 8, 2014 — Appellant's proposal represented that Appellant would use [Manufacturer's] facilities in Gainesville, Georgia to perform the contract. *See* Sections II.A and II.B, *supra*. Contrary to Appellant's arguments, then, there was a level of connection between Appellant and [Manufacturer] as of the date for determining compliance with the nonmanufacturing rule, and the Area Office's request for an SBA Form 355 from [Manufacturer] therefore was proper.

Appellant also argues that, based on Appellant's final proposal, Appellant is the manufacturer of the chicken wings because Appellant would structure, oversee, and direct the manufacturing process, although the work would be performed at [Manufacturer's] facilities. This argument fails for several reasons. First, Appellant did not argue to the Area Office that Appellant would produce the chicken wings, and OHA is unable to consider new substantive issues advanced for the first time on appeal. 13 C.F.R. § 134.316(c). Second, while it may be true

that Appellant's proposal did not specifically state that [Manufacturer] would produce the chicken wings, the proposal likewise did not indicate that Appellant would perform this work. Broad generalities, such as a pronouncement that Appellant is "[XXXXXXXXXXXXXXX]" do not establish what role, if any, Appellant would play in the manufacturing process for this particular procurement. Third, the notion that Appellant never intended [Manufacturer] to be the manufacturer appears to be at odds with other evidence in the record, such as Appellant's March 11, 2014 letter, which remarked that Appellant would now "self-perform the work originally intended for [Manufacturer]." *See* Section II.B, *supra*. Fourth, SBA regulations instruct that for a firm to be deemed the manufacturer, and thus not be subject to the nonmanufacturer rule, the firm must use "its own facilities." 13 C.F.R. § 121.406(b)(2). Appellant here makes no such claim, but rather concedes that, according to its final proposal, Appellant would use [Manufacturer's] facilities. Accordingly, the Area Office properly concluded that Appellant is subject to the nonmanufacturer rule.

Appellant also objects more generally to the adverse inference rule, contending that the regulations are contrary to public policy and unduly burdensome. These complaints should be directed to SBA policy officials, not to OHA. It is well-settled that OHA "has no authority to determine the validity of the size regulations and can entertain no challenge to them." *Size Appeal of ADVENT Envtl., Inc.*, SBA No. SIZ-5325, at 9 (2012) (quoting *Size Appeal of Condor Reliability Servs., Inc.*, SBA No. SIZ-5116, at 6 (2010).)

## 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