

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

SIZE APPEAL OF:

Star Poly Bag, Inc.,

Appellant,

RE: M-Pak, Inc.

Appealed From
Size Determination No. 05-2014-041

SBA No. SIZ-5584

Decided: August 19, 2014

APPEARANCES

Chaya Greenfield, Marketing Director, and Rachel Posen, President, for Star Poly Bag, Inc., Brooklyn, New York

James S. Phillips, Esq., Kevin P. Joyce, Esq., Fed Nexus Law, Vienna, Virginia
for M-Pak, Inc.

DECISION¹

I. Introduction and Jurisdiction

On July 14, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 05-2014-041 denying a size protest filed by Star Poly Bag, Inc. (Appellant) against M-Pak, Inc. (M-Pak). On appeal, Appellant questions the evidence M-Pak submitted to the Area Office and “requests that the SBA open a new investigation to verify the integrity of the information [M-Pak] provided [to the] Area Office.” (Appeal at 3.) For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

The 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

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. 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.

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 and Protest

On May 30, 2014, the U.S. Department of Veterans Affairs (VA) issued Request for Quotation (RFQ) No. VA255-14-Q-1158 for poly mailer bags, which the VA's Consolidated Mail Output Pharmacy (CMOP) would use to send prescription pharmaceuticals to customers. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 326111, Plastics Bag and Pouch Manufacturing, with a corresponding size standard of 500 employees. Quotations were due June 4, 2014. Appellant and M-Pak submitted timely quotes, self-certifying as eligible small businesses.

On June 9, 2014, the CO announced that M-Pak was the apparent awardee. The next day, Appellant protested the award, alleging that M-Pak is not an eligible small business due to failure to comply with the nonmanufacturer rule, 13 C.F.R. § 121.406(b). Appellant asserted that PAC Worldwide (PAC) is the manufacturer of the poly mailer bags, and according to PAC's website, PAC has more than 500 employees at five locations, including Malaysia and Mexico City. Thus, M-Pak would supply the product of a large multinational business, contravening the nonmanufacturer rule.

B. Size Determination

On July 14, 2014, the Area Office issued Size Determination No. 05-2014-041 finding that M-Pak is not in violation of the nonmanufacturer rule and is therefore an eligible small business for the instant procurement. The Area Office determined that the manufacturer of the poly mailer bags is [[Manufacturer], which in turn is owned by [XXXXXX]. The Area Office found that [[Manufacturer] is a small business.²

The Area Office recited the nonmanufacturer rule, which provides:

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;

² The Area Office determined that, due to [XXXXXX]'s ownership of [Manufacturer], those firms are affiliated. [XXXXXX]'s owners also own [XXXXXX]. As a result of this common ownership, [XXXXXX] is also affiliated with [XXXXXX] and [Manufacturer]. In aggregate, [Manufacturer and its affiliates] have fewer than 500 employees, so [Manufacturer] is a small business. (Size Determination at 3.)

- (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.

(Size Determination at 2, quoting 13 C.F.R. § 121.406(b).)

The Area Office determined M-Pak meets each of the elements of 13 C.F.R. § 121.406(b). The first two elements are satisfied because M-Pak has fewer than 500 employees, is engaged in the retail and wholesale trade of packaging products, and normally sells this type of packaging item. (*Id.* at 3.) As for the third element, the Area Office explained that M-Pak's terms and conditions of its purchase order with [Manufacturer] require M-Pak to arrange and pay for shipment of the poly mailer bags via a third-party carrier at [Manufacturer]'s loading dock in [XXXXX]. Once the carrier takes possession of the poly mailer bags, M-Pak owns the poly mailer bags and is liable for loss. “Thus, M-Pak takes ownership of the mailer bags when they leave [Manufacturer]'s loading dock.” (*Id.*) The fourth element is met because [Manufacturer] is a small business. (*Id.*)

C. Appeal

On July 28, 2014, Appellant filed its appeal of the size determination. Appellant does not assert that the Area Office committed any error of fact or law. Rather, Appellant attempts to cast doubt upon the evidence that M-Pak submitted to the Area Office.

Appellant questions whether the manufacturer of the poly mailer bags is in fact [Manufacturer], and not PAC as Appellant's protest alleged. Specifically, Appellant “suspect[s] that M-Pak Inc. may have intentionally misrepresented facts and . . . provided falsely made up documents.” (Appeal at 1.) According to Appellant, it is unusual for a third party to arrange and pay for shipments. (*Id.* at 3.) Appellant also argues that a firm could easily generate false purchase orders and invoices, but not electronic payment records, cleared checks, and credit card transactions. (*Id.*) Appellant argues that M-Pak should be required to furnish such payment documents.

Appellant requests that the Area Office conduct a new investigation to resolve the following questions:

1. Why did M-Pak Inc. feel the need to describe to [the Area Office] its payment terms with [Manufacturer] when all that was asked from them was to identify who the ultimate supplier is?
2. If M-Pak Inc. does indeed place orders from [Manufacturer] why don't they pay [Manufacturer] direct, as is the standard practice in regular business transactions?
3. Whose mailer bags has CMOP received on M-Pak's orders?

(*Id.*).

Appellant proceeds to make the following accusation:

We speculate that the declaration [of an M-Pak official] was included in M-Pak Inc.'s response as part of a planned strategy to mask the misrepresentation. M-Pak Inc. has never purchased or intended to purchase any mailer bags from [Manufacturer] for its CMOP orders but has teamed up with them for the sole purpose of being able to provide the documents to satisfy the requirement. M-Pak, Inc. was afraid that should the [the Area Office] ask for proof of payment for the orders they placed with [Manufacturer], they will have non[e] to provide because those transaction[s] never occurred, so M-Pak Inc. covered up by maintaining that its purchase order terms with [Manufacturer] is such that M-Pak pays a third party.

(*Id.*). Appellant asks whether M-Pak can provide bank records to support its orders from [Manufacturer] and whether CMOP can confirm which firm's poly mailer bags it receives on M-Pak's orders.

D. M-Pak's Response

On August 13, 2014, M-Pak responded to the appeal. M-Pak asserts that the appeal does not identify clear errors of fact or law. Instead, it “only allege[s] unfounded concern about the size determination by relying upon mere speculation.” (Response at 1.)

M-Pak addresses the three questions posed in the appeal petition. M-Pak explains that the payment terms were discussed in conjunction with the requirement that a nonmanufacturer take ownership or possession of the manufactured items. This requirement is met because the payment terms show that title to the items formally transfers once M-Pak assumes the risk of loss. In response to Appellant's second question, M-Pak explains that it elected to pay a third party carrier so that shipment occurs directly from [Manufacturer]'s facilities to the end customer, a practice that is standard in the industry. *E.g.*, *Size Appeal of Wear Mark, Inc.*, SBA No. SIZ-5402, at 7 (2012) (direct shipment from the manufacturer evidences transfer in title by risk of loss “as part of the normal course of business”). As for the third question, M-Pak argues that compliance with the nonmanufacturer rule is determined as of the date an offeror submits its final proposal revision. 13 C.F.R. § 121.404(d). Therefore, developments occurring after that date are not relevant. M-Pak emphasizes that, for the instant procurement, M-Pak will supply [Manufacturer]'s poly mailer bags. (Response at 3-4.)

M-Pak complains that Appellant “makes several blanket statements regarding its displeasure with the decision, [but] provided no credible evidence to substantiate any of its concerns.” (*Id.* at 4.) Such unsupported allegations, M-Pak contends, should be given less weight than the sworn statements and evidence M-Pak submitted to the Area Office.

Lastly, M-Pak argues that OHA should deny the request for a new investigation because OHA's review is based upon the evidence in the record at the time the Area Office made its

determination. The Area Office did not request that M-Pak produce payment documents and banking records, nor has Appellant shown good cause to review such information. As a result, a new investigation would not clarify any facts at issue on appeal.

III. Discussion

Appellant in this case does not allege any error on the part of the Area Office. Rather, Appellant merely speculates that M-Pak may have submitted false or misleading information, and challenges M-Pak to produce more proof that [Manufacturer] is actually the manufacturer of the poly mailer bags. As M-Pak correctly observes in response to the appeal, however, M-Pak already provided the Area Office with considerable evidence concerning its compliance with the nonmanufacturer rule—including sworn SBA Form 355s for both M-Pak and [Manufacturer] and an affidavit from [XXXXX]—and SBA regulations stipulate that “specific, signed, factual evidence” is given greater evidentiary weight than “general, unsupported allegations or opinions.” 13 C.F.R. § 121.1009(d); *see also Size Appeal of Standard Communications, Inc.*, SBA No. SIZ-5322 (2012). Accordingly, I cannot conclude that the Area Office erred in crediting the evidence submitted by M-Pak.

Appellant's demands for further investigation or more evidence are also unavailing. It is true that M-Pak, as the challenged firm, initially was responsible for persuading the Area Office that M-Pak is a small business. 13 C.F.R. § 121.1009(c). On appeal, though, Appellant bears the burden of proving, by a preponderance of the evidence, that the size determination is clearly erroneous. 13 C.F.R. § 134.314; *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). In this regard, Appellant provides no evidence or argument to support the notion that [Manufacturer] is not the manufacturer of the poly mailer bags, or that M-Pak is not compliant with the nonmanufacturer rule. Appellant therefore has not carried its burden of proving error in the size determination.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, 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