

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

SIZE APPEAL OF:

Phoenix Environmental Design, Inc.,

Appellant,

RE: Thornwell Warehouse Association,
Inc.

Appealed From
Size Determination No. 05-2014-045

SBA No. SIZ-5591

Decided: September 10, 2014

APPEARANCES

Chad Gill, President, Phoenix Environmental Design, Inc., Newman Lake, Washington.

DECISION

I. Introduction and Jurisdiction

On July 3, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 05-2014-045 dismissing a size protest lodged by Phoenix Environmental Design, Inc. (Appellant) against Thornwell Warehouse Association, Inc. (Thornwell). The Area Office found that Appellant's protest was not sufficiently specific. Appellant maintains that the dismissal was improper, and requests that the matter be remanded for further investigation. For the reasons discussed *infra*, the appeal is denied, and the dismissal 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 Size Determination

On June 11, 2014, the U.S. Fish and Wildlife Service issued Request for Quotations (RFQ) No. 40150010 for bulk herbicides and surfactants. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 325320, Pesticide and Other Agricultural Chemical Manufacturing, with a corresponding size standard of 500 employees. The procurement was conducted under the simplified acquisition procedures of Federal Acquisition Regulation (FAR) part 13. On June 26, 2014, the CO announced that Thornwell was the apparent awardee.

On June 30, 2014, Appellant filed a size protest, alleging that Thornwell is not a small business. The protest asserted that, although Thornwell purports to be a small agricultural cooperative, “[Appellant] believes that [Thornwell] cannot be a small agricultural cooperative by [virtue] that some if not all of their members comply with their SBA size standard requirements for corn, soybean, wheat or rice NAICS code which is \$750,000.00.” (Protest at 1.) The protest quoted from 13 C.F.R. § 121.105(a)(2) and 12 U.S.C. § 1141j, and attached a 14-page “Special Supplement of the *Jennings Daily News*,” which contained a short article about Thornwell and an advertisement for Thornwell. Referencing the supplement, Appellant continued:

[Thornwell] states that they are now 180 Shareholder strong and supply hardware, tires, batteries, irrigation pipes oil feed and fencing to customers. . . . An ad place[d] by [Thornwell] states they have 3 locations . . . [Appellant] believes that once [Thornwell] sends in a completed SBA Form 355, completed IRS Form 4506-T, copies of the Articles of Incorporation and bylaws, along with all amendments, the firm's last annual statement to shareholders, copy of the firm's most recent Federal business tax return including all schedules and attachments, completed Employee Calculation Sheet and payroll records (such as IRS Form 941s), and all applicable evidence that it is a small agricultural cooperative ... SBA will determine that [Thornwell] will be “other than small” because their members are not small businesses. The tax returns will clearly show that the members, who are farmers, do not meet the SBA requirements to be consider[ed] small under their NAICS code for farming.

(*Id.* at 2-3.) On pages 3 and 4 of the protest, Appellant provided copies of e-mail messages notifying the CO that Appellant planned to file a size protest. Appellant concluded:

I believe I have shown that when all the evidence is submitted by [Thornwell] in accordance with SBA regulations and reviewed by SBA then there will be a preponderance of evidence showing that [Thornwell] is not a small agricultural cooperative.

(*Id.* at 4.) The CO forwarded Appellant's protest to the Area Office for review.

On July 3, 2014, the Area Office dismissed Appellant's protest as non-specific. The Area Office explained:

[The] size protest against [Thornwell] for the subject procurement is dismissed because [the] protest is not specific in accordance with 13 CFR 121.1007. [The] protest references NAICS codes from Sector 11, *Agriculture, Forestry, Fishing and Hunting*, with size standards of \$750,000, which are not germane to the requirement. The procurement was for bulk delivery of herbicides and surfactants. The contract was awarded under NAICS code of 325320, *Pesticide and Other Agricultural Chemical Manufacturing*, with a corresponding size standard of 500 employees. [The] protest does not contain any specific facts which bring into question [Thornwell]'s ability to qualify as small for the 500 employee size standard.

(Size Determination at 1.)

B. Appeal

On July 14, 2014, Appellant filed the instant appeal. Appellant contends that, because Thornwell represents itself as a small agricultural cooperative, the Area Office should have explored whether each member of Thornwell is a small business under the size standard associated with that member's primary industry. In Appellant's view, SBA regulations require that “each individual business entity member of the self certified small agricultural cooperative shall individually comply with and meet the SBA NAICS code small business size standard of their primary NAICS code industry before each individual business entity can be considered a small business member of a self certified small agricultural cooperative.” (Appeal at 2.) Appellant also references a size determination (No. 06-2014-027) issued by a different area office which found that a challenged firm was not a small agricultural cooperative. The challenged firm in the earlier determination is not related to Thornwell, but Appellant maintains that the prior size determination is “legal precedence” and binding in the instant case. (*Id.*)

Accompanying its appeal, Appellant attached various materials that were not part of its protest and were not previously submitted to the Area Office. These include pages from bizapedia.com, agri-pulse.com, oryza.com, and a booklet entitled “2007 Rice Awards”. Appellant contends that these materials establish that one or more members of Thornwell are not small businesses under a \$750,000 size standard. (*Id.* at 3-4.)

III. Discussion

Appellant's protest in this case alleged that, in order for an agricultural cooperative to be considered a small business, each member of the cooperative must qualify as a small business under that member's own primary industry. *See* Section II.A, *supra*. Appellant also speculated that, if further investigation were conducted, some of Thornwell's members would not comply with this standard. *Id.* In dismissing the protest, the Area Office rejected the premise of Appellant's argument, explaining that the primary industries of Thornwell's members are “not germane,” and referencing instead the NAICS code and size standard assigned to the

solicitation. *Id.* In addition, Appellant's protest offered no specific facts to suggest that Thornwell's members are not small businesses. Rather, Appellant simply noted that Thornwell has 180 members, and posited that “the members, who are farmers, do not meet the SBA requirements to be consider[ed] small under their NAICS code for farming.” *Id.*

I find that Appellant has not established any error in the size determination. Under 13 C.F.R. § 121.402(a), the NAICS code and size standard specified in the solicitation are controlling for a Government procurement. The regulation pertaining to small agricultural cooperatives, 13 C.F.R. § 121.105(a)(2), provides that “a business concern or cooperative that does not qualify as small under this part may not be a member of a small agricultural cooperative”, but is silent as to which NAICS code and size standard should be used. Contrary to Appellant's arguments, then, the regulations do not indicate that, for purposes of determining size on a Government procurement, the members of an agricultural cooperative should be reviewed under a different size standard than the cooperative itself. Moreover, as the Area Office observed in the size determination, even assuming Appellant's interpretation of 13 C.F.R. § 121.105(a)(2) were correct, Appellant offered no evidence, or reason to believe, that any of Thornwell's members actually did exceed the size standards associated with their primary industries. Instead, Appellant's protest simply requested investigation of the issue, and was therefore non-specific. *See* 13 C.F.R. § 121.1007(b) (explaining that, to be specific, “[s]ome basis for the belief or allegation stated in the protest must be given.”); *Size Appeal of RELM Communications, Inc.*, SBA No. SIZ-5524, at 3 (2013) (protest amounting to “a request to investigate” the challenged firm was properly dismissed as non-specific).

Appellant claims that a different area office reached a conflicting result in Size Determination No. 06-2014-027. *See* Section II.B, *supra*. The size determination in question, however, was not based on the notion that individual members of a cooperative exceeded the size standards applicable to their primary industries, but instead merely drew an adverse inference because the challenged firm refused to provide information. Thus, Size Determination No. 06-2014-027 has no bearing on the instant case. Further, it is well-settled that “[s]ize determinations not appealed to OHA are not binding precedent, and are not controlling in any other case.” *Size Appeal of Alutiiq Education & Training, LLC*, SBA No. SIZ-5371, at 11 (2012).

Appellant also seeks to introduce new evidence that at least one member of Thornwell is not a small business under a \$750,000 size standard. *See* Section II.B, *supra*. This evidence cannot be accepted at this late stage. Even assuming it were relevant to consider whether Thornwell's members exceed a \$750,000 size standard, OHA has long recognized that “an insufficiently specific protest cannot be cured on appeal by the submission of new evidence.” *Size Appeal of Jenn-Kans Disposal Service*, SBA No. SIZ-5549, at 3 (2014). Thus, if Appellant wished for this evidence to be considered, Appellant could have, and should have, produced it to the Area Office with the protest.

IV. Conclusion

For the above reasons, I AFFIRM the Area Office's dismissal of the protest and DENY the instant appeal. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge