

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

SIZE APPEAL OF:

Novex Enterprises,

Appellant,

Appealed From
Size Determination No. 3-2015-022

SBA No. SIZ-5637

Decided: February 9, 2015

APPEARANCE

Vahe Penbe, Owner, Novex Enterprises, Fort Lauderdale, Florida

DECISION

I. Introduction and Jurisdiction

On January 2, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2015-022 finding that Novex Enterprises (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.

II. Background

A. Solicitation and Protest

On February 11, 2014, the U.S. Army Contracting Command (Army) issued Request for Proposals (RFP) No. W56HZV-13-R-0343 for the acquisition of M3 heaters. The RFP stated that the Army planned to award a single Indefinite Delivery/Indefinite Quantity (IDIQ) contract with a guaranteed minimum quantity of 5,040 units and a maximum quantity of 41,306 units. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned

North American Industry Classification System (NAICS) code 334419, Other Electronic Component Manufacturing, with a corresponding size standard of 500 employees.

Appellant submitted its offer on March 14, 2014, self-certifying as a small business. In its proposal, Appellant stated that it would partner with Menatek Yedek Parca International (Menatek), a manufacturer located in Istanbul, Turkey. After receipt of proposals, the Army determined that Appellant was non-responsible and requested that SBA perform a Certificate of Competency (COC) review.

B. Size Investigation

On December 12, 2014, the Area Office notified Appellant that a size determination would be conducted in conjunction with the COC. On December 18, 2014, Appellant submitted its initial response package. The response, however, lacked specific requested information with regard to Menatek, so the Area Office restated its request for this missing information. On December 22, 2014, Appellant responded. Appellant asserted that the “[r]elationship between [Appellant] and Menatek is no other than Customer/Vendor relationship for many years.” (Letter from V. Penbe to G. Holman (Dec. 22, 2014), at 2.) In response to the Area Office's request for financial statements and tax returns for Menatek, Appellant provided the Area Office with Menatek's contact information and stated that “[s]ince Menatek is not an affiliate of ours there is no such information can be provided by [Appellant].” (*Id.*, emphasis in original.)

C. Size Determination

On January 2, 2015, the Area Office issued Size Determination No. 3-2015-022, concluding that Appellant is not an eligible small business for the instant procurement.

The Area Office explained that to qualify for a small business set-aside to provide manufactured products, the prime contractor either 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 Menatek would manufacture the M3 heaters based on Appellant's statements to the Area Office, Appellant's proposal, and a pre-award survey which found that “[Appellant] is a distributor and is relying on the subcontractor to complete all manufacturing phases.” (Size Determination at 3.)

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 stated that Appellant did not provide sufficient information on Menatek for the Area Office to ascertain whether Menatek is a small business. Nevertheless, the Area Office determined, Appellant does not comply with the nonmanufacturer rule because it clearly does not meet the fourth element of the test. According to the pre-award survey, Menatek, a foreign company, will manufacture the M3 heaters outside of the United States. (Size Determination at 3.)

D. Appellant's Response to the Size Determination

By letter of January 8, 2015, Appellant responded to the size determination. In its letter, Appellant asked the Area Office, “If [Appellant] is other than small, what is it? Please be specific.” (Letter from V. Penbe to J. Thurmond (Jan. 8, 2015), at 1.) Appellant then inquired if it had been found not to be an eligible small business because it is not a small disadvantaged business, woman-owned small business, veteran-owned small business, or small business located in a historically underutilized business zone. Appellant went on to assert that NAICS code 334419 “has no relationship with the item in question.” (*Id.*) Lastly, Appellant charged that the Area Office made a “nonfactual statement” in stating that Appellant did not submit any information about Menatek. Appellant stated that it is not affiliated with Menatek, so it could not provide any more detailed information, and emphasized that it made available Menatek's contact information. (*Id.* at 1-2.)

On January 14, 2015, the Area Office replied to Appellant's letter. The Area Office elaborated that Appellant is not an eligible small business because it is not the manufacturer of the M3 heaters and it is not supplying the end item of a small business manufacturer made in the United States. (Letter from G. Holman to V. Penby (Jan. 14, 2015).)

E. Appeal

On January 16, 2015, Appellant filed the instant appeal with OHA. Appellant contends that the size determination is in error. The appeal, in its entirety, reads as follows:

On January 2, 2015 [the Area Office] issued copy attached Size Determination Letter (marked as Exhibit “A”) along with Size Determination Memorandum (marked as Exhibit G) stating that [Appellant] cannot be considered as a Small Business. I as sole owner of [Appellant] allege that SBA office was in error with their determination.

[The Area Office] with their copy attached letter (marked as Exhibit F) tried to make a Size Determination by using NAICS Code 334419 (marked as Exhibit “B”). The referenced NAICS code has nothing to do with the item in question at all.

[The Area Office] in their copy attached information request email dated December 18, 2014 (marked as Exhibit “C”) tried to establish an “affiliation” between [Appellant] and its sub- contractor [Menatek] located in Istanbul - TURKEY and requested “proprietary” information about our vendor Menatek. Answers to the questions listed in the email were delivered with my copy attached letter dated December 22, 2014 (marked as Exhibit “D”).

[The Area Office] did not respond to my below referenced questions submitted with my copy attached letter dated of January 8, 2015 (marked as Exhibit “E”)

Having stated the above I believe and hope that the decision made by SBA office will be overturned.

(Appeal at 1.)

F. Appeal Supplement

On February 5, 2015, the date of the close of record, Appellant supplemented its appeal. Appellant repeats its arguments that the designated NAICS code is erroneous, and that the Area Office unfairly faulted Appellant for not providing proprietary information belonging to Menatek. (Appeal Supplement at 1.)

Appellant also takes issue with the Area Office's January 14, 2015 letter. Appellant maintains that, since 2012, Appellant has had “only one or two employees” and thus is far below the 500-employee size standard referenced by the Area Office. (*Id.*)

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. Analysis

Appellant in this case has not demonstrated any significant error of fact or law in the size determination. Indeed, Appellant does not even attempt to dispute the Area Office's key finding that Menatek, a foreign company, will manufacture the end items called for in this procurement, the M3 heaters. As a result, the appeal must be denied and the size determination affirmed.

Appellant argues that the Area Office incorrectly utilized NAICS code 334419, which, in Appellant's view “has nothing to do with the item in question at all.” Section II.E, *supra*. This

argument fails because NAICS code 334419 was identified in the underlying RFP, and it is too late for Appellant to challenge the assigned NAICS code at this stage. By regulation, NAICS code appeals must be made to OHA within ten calendar days of the issuance of the solicitation. Federal Acquisition Regulation (FAR) 19.303(c); 13 C.F.R. §§ 121.1103(b)(1), 134.304(b). The instant RFP was issued almost a year ago, on February 11, 2014, so any NAICS code appeal is now untimely. OHA has no discretion to accept an untimely appeal. 13 C.F.R. §§ 134.202(d)(2)(i)(A) and 134.304(c). Accordingly, Appellant's disagreement with the assigned NAICS code is not properly before OHA for decision.

Appellant also renews its contention that Appellant could not have provided more detailed information about Menatek because such information is proprietary. This argument is meritless for two reasons. First, under 13 C.F.R. § 121.1008(d), it is the challenged firm's responsibility to "furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality." Thus, the fact that Menatek may consider the requested information proprietary does not excuse Appellant from producing that information. Second, the Area Office did not base its decision on Appellant's failure to provide the requested information about Menatek. Rather, the Area Office found that Menatek, a Turkish company, would manufacture the end items called for in this procurement in Turkey, so that Appellant is not the "manufacturer" of the end items nor can Appellant qualify under the nonmanufacturer rule. 13 C.F.R. § 121.406. Appellant does not attempt to challenge these key findings. Accordingly, Appellant's failure to produce the requested information simply is not material to the outcome of this case.

Appellant complains, in the appeal and in the supplemental appeal, that the Area Office ignored Appellant's January 8, 2015 letter submitted in response to the size determination. I see no validity to this argument. Contrary to Appellant's allegation, the Area Office directly responded to Appellant in its January 14, 2015 letter. *See* Section II.D, *supra*.

Lastly, Appellant asks how the Area Office could determine that Appellant is ineligible for this procurement, given that Appellant has only "one or two" employees. To be an eligible small business for a manufacturing or supply contract that is set aside for small businesses, though, the prime contractor either must be the manufacturer of the end item being acquired, or must comply with the nonmanufacturer rule. 15 U.S.C. § 637(a)(17); FAR 19.102(f); 13 C.F.R. § 121.406; *Size Appeal of Sea Box, Inc.*, SBA No. SIZ-5613 (2014). Here, the Area Office found - and Appellant does not dispute - that Menatek, and not Appellant, would manufacture the M3 heaters. The Area Office also found - and Appellant again does not dispute - that Appellant does not meet the fourth element of the nonmanufacturer rule test, *i.e.*, the requirement to supply the end item of a small business manufacturer made in the United States. Thus, although Appellant itself is apparently a small business, Appellant is not eligible for this procurement because Appellant does not manufacture the end item or comply with the nonmanufacturer rule.

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