

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

SIZE APPEAL OF:

Camp Noble, Inc., dba 3-D Marketing,

Appellant,

Appealed From  
Size Determination No. 06-2015-011

SBA No. SIZ-5644

Decided: February 25, 2015

APPEARANCE

Dean Steeves, Vice President Sales & Marketing, Camp Noble, Inc. dba 3-D Marketing,  
Rancho Santa Fe, California.

DECISION

I. Introduction and Jurisdiction

On January 21, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2015-011 finding that Camp Noble, Inc. dba 3-D Marketing (Appellant) is not a small business. Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. 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 October 23, 2014, the Defense Logistics Agency (DLA) issued Request for Quotations (RFQ) No. SPE7MX-15-X-0001 for antennae. The Contracting Officer (CO) set aside the procurement entirely for small businesses. Appellant submitted its quotation on October 28, 2014, self-certifying as a small business. In its quotation, Appellant identified Antcom Corporation (Antcom) as the “actual manufacturer” of the antennae. (Quotation at 27.)

On November 18, 2014, the CO announced that Appellant was the apparent successful offeror. On November 21, 2014, Circle Prime MFG (CPM), a disappointed offeror, protested Appellant's size. CPM alleged that Appellant will purchase the antennae from Antcom, and that Antcom is a subsidiary of NovAtel, Inc., a large Canadian company. On November 25, 2014, the CO wrote to Appellant, noting that “[y]our offer states that Antcom Corporation is the actual manufacturer” of the antennae, and requesting that Appellant verify Antcom's address and Commercial and Government Entity (CAGE) code. (Email from S. Brubaker to D. Steeves (Nov. 25, 2014).) Appellant responded that same day, acknowledging that “we use Antcom as our sub[contractor].” (Email from D. Steeves to S. Brubaker (Nov. 25, 2014).) The CO forwarded CPM's protest to the Area Office for review.

### B. Size Investigation

On December 24, 2014, the Area Office notified Appellant of the protest and requested a response to the allegations, a completed SBA Form 355, payroll records, articles of incorporation, bylaws, and other supporting documentation. On January 5, 2015, Appellant emailed the Area Office claiming that Appellant's proposal had incorrectly identified Antcom, rather than Appellant, as the manufacturer of the antennae. Appellant asserted that Antcom instead would merely serve as the place of manufacture. “It was my mistake because on most of the DLA solicitations we respond to they usually have THE PLACE OF MANUFACTURE as the question and due to habit I responded thinking it was place of manufacture as opposed to actual.” (Email from D. Steeves to J. Nietes (Jan. 5, 2015) (emphasis in original).) Appellant also submitted a letter from an Antcom official “certif[ying] that [Antcom is] the place of manufacture for [Appellant].” (Letter from S. Huynh to J. Nietes (Jan. 5, 2015).)

The Area Office directed Appellant to provide the information sought in the December 24, 2014 notice, and to “ensure your response includes evidence to substantiate [that] your company is the manufacturer” of the antennae. (Email from J. Nietes to D. Steeves (Jan. 5, 2015).) Appellant responded that Appellant “has no employees” and therefore could not provide the requested payroll records. (Email from D. Steeves to J. Nietes (Jan. 5, 2015).) “Also, since all production costs are initially the responsibility of our place of manufacture (Antcom) and we simply pay for the product as ‘finished goods’ none of our tax returns show any evidence of our manufacturing status.” (*Id.*)

On January 6, 2015, the Area Office instructed Appellant that it must submit all previously requested information by January 8, 2015. (Email from J. Nietes to D. Steeves (Jan. 6, 2015), at 2.) The Area Office warned that the Area Office could draw an adverse inference if Appellant failed to produce the information. (*Id.*) The Area Office also stated that, because Antcom apparently would manufacture the antennae for this procurement, Appellant should explain how Appellant is compliant with the nonmanufacturer rule at 13 C.F.R. § 121.406(b). (*Id.* at 1-2.) Appellant responded that “the non-manufacturing rule does not apply” because “not only are we a small business we are also the MANUFACTURER and the product is built in the United States.” (Email from D. Steeves to J. Nietes (Jan. 6, 2015) (emphasis in original).) Appellant did not submit the information sought in the December 24, 2014 notice, or other documentation to support its argument that Appellant is the manufacturer of the antennae. On

January 7, 2015, Appellant advised the Area Office that no additional information would be provided. (Email from D. Steeves to J. Nietes (Jan. 7, 2015).)

### C. Size Determination

On January 21, 2015, the Area Office issued Size Determination No. 06-2015-011 concluding that Appellant is not a small business. The Area Office found that the RFQ did not specify a North American Industry Classification System (NAICS) code or size standard. The Area Office determined that the applicable NAICS code for this procurement is 333316, Photographic and Photocopying Equipment Manufacturing, with a corresponding size standard of 1,000 employees. (Size Determination at 1.)

The Area Office noted that Appellant had repeatedly failed to respond to the Area Office's requests for information, and did not produce even basic documentation such as a completed SBA Form 355. As a result, the Area Office could not ascertain whether Appellant qualifies as a small business or whether Appellant is affiliated with other concerns. (*Id.* at 5.) The Area Office applied an adverse inference that the missing information would have shown that Appellant is other than small. (*Id.* at 8-9.)

Next, 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). In this case, the Area Office found that Antcom would manufacture the antennae based on Appellant's proposal and the November 25, 2014 email exchange between Appellant and the CO. (Size Determination at 6-7.) Although Appellant asserted in various emails that Appellant would manufacture the antennae, Appellant did not produce any evidence whereby the Area Office could conclude that Appellant meets the criteria set forth at 13 C.F.R. § 121.406(b)(2) to be considered the manufacturer. (*Id.*) On the contrary, Appellant admitted to the Area Office that Antcom's facilities would be used to produce the antennae; that Appellant itself has no employees; and that Appellant's tax returns do not reflect any manufacturing activities. (*Id.*)

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 reiterated that Appellant did not provide information about itself or about Antcom, so the Area Office could not determine whether either company is a small business. (Size Determination at 7.) Nor did Appellant produce any evidence that Appellant meets the other elements of the test. (*Id.*)

#### D. Appeal

On February 3, 2015, Appellant filed the instant appeal with OHA. Appellant maintains that the Area Office erred in determining that Appellant is not the manufacturer of the antennae. Appellant offers nine arguments in support of its position:

- 1) We have no affiliation with Antcom as described under 13 C.F.R. § 121.103(a-f).
- 2) We brought the project to Antcom.
- 3) We gave Antcom the specifications and overall requirements for our antenna.
- 4) We financed (via amortization) the costs associated with producing our antenna.
- 5) We had our antenna fully tested and evaluated by the DoD at [Electronic Proving Ground (EPG)] in Arizona (test report attached #6).
- 6) We provided Antcom with the necessary changes required to comply with EPG's evaluation.
- 7) We spent over \$50,000.00 to have our antenna environmentally and otherwise tested as required by [DLA], in order to be [ ] approved to provide the antenna to the DLA (test reports attached #7).
- 8) It is [Appellant], not Antcom, who is listed as the approved source at the DLA (see approved sources on [the RFQ]).
- 9) Last, and perhaps most importantly, Rockwell Collins is and has been classified by DLA and SBA as a manufacturer of their version of this antenna (same NSN) from the inception of the [ ] program in the early 1990s and they do not build their antenna at their own facility either. Rockwell Collins has the exact same situation as [Appellant]. They use Aero Antenna as the place of manufacture of their antenna, just as [Appellant] uses Antcom as the place of manufacture of our antenna.

(Appeal at 2.)

Attached to its appeal, Appellant provided various new evidence, including test reports for the antenna and tax records purporting to demonstrate that Appellant has “no salaries, wages, retirement programs, or employee benefits declared because there are no employees.” (*Id.* at 1.)

On February 4, 2015, Appellant submitted an amended version of its appeal. Although substantively identical to the original appeal, the amended appeal includes a copy of the January 5, 2015 letter from Antcom asserting that Antcom is the place of manufacture for Appellant. In a separate email also on February 4, 2015, Appellant contended that the NAICS code referenced in the size determination, 333316, is incorrect. (Email from D. Steeves to OHA (Feb. 4, 2015).) According to Appellant, NAICS code 333316 pertains to photography equipment, and the more

appropriate NAICS code is 334220, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, with a size standard of 750 employees. (*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. 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 shown good cause to supplement the record. Appellant did not file the required motion, which OHA has found to be “fatal” to an attempt to introduce new evidence. *Size Appeal of Eagle Consulting Corp.*, SBA No. SIZ-5267, at 4 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR). Moreover, Appellant does not explain why the new information Appellant seeks to admit, such as tax records and test reports, could not have been provided to the Area Office in response to the protest. “OHA has long held that it will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). Accordingly, the attachments to the appeal are EXCLUDED and have not been considered in rendering this decision.

#### C. Analysis

Appellant's sole argument on appeal is that the Area Office should have determined that Appellant is the manufacturer of the antennae. As discussed below, this argument is meritless for several reasons. Consequently, the appeal must be denied.

First, although Appellant now claims that it is the manufacturer of the antennae, this argument is inconsistent with Appellant's proposal, which identified Antcom as the "actual manufacturer." *See* Section II.A, *supra*. By regulation, SBA determines a concern's size as of the date of self-certification, or for purposes of the nonmanufacturer rule, the date of final proposal revisions. 13 C.F.R. § 121.404(a) and (d). Thus, OHA has repeatedly held that documents created in response to a protest may not be used to contradict an offeror's proposal. *E.g.*, *Size Appeal of M1 Support Services, LP*, SBA No. SIZ-5297, at 11 (2011); *Size Appeals of CWU, Inc., et al.*, SBA No. SIZ-5118, at 16 (2010); *Size Appeal of Smart Data Solutions, LLC*, SBA No. SIZ-5071, at 20 (2009); *Size Appeal of Fernandez Enterprises, LLC*, SBA No. SIZ- 4863, at 7 (2007). Here, Appellant's claim that it is the manufacturer of the antennae is contradicted by Appellant's proposal, and is therefore unavailing.

Second, the record does not support the conclusion that Appellant is manufacturer of the antennae. Pursuant to 13 C.F.R. § 121.406(b)(2), the "manufacturer" is the concern "which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired." Appellant, though, admitted to the Area Office (and reiterates in the appeal petition) that the antennae will be manufactured at Antcom's facilities, and that Appellant has no employees to perform any production activities. Sections II.B and II.D, *supra*. It therefore is apparent that Appellant could have little, if any, involvement in the manufacturing process. The appeal petition emphasizes that Appellant participated in the initial design and testing of the antenna; that DLA recognizes Appellant as an approved source; and that other firms also engage subcontractors to perform manufacturing efforts. Even if true, though, these assertions are irrelevant, as they do not demonstrate that Appellant "with its own facilities, performs the primary activities in transforming inorganic or organic substances . . . into the end item being acquired." 13 C.F.R. § 121.406(b)(2). In short, the record does not support Appellant's claim that Appellant is the manufacturer of the antennae, within the meaning of 13 C.F.R. § 121.406(b)(2).

Third, Appellant ignores the fact that the Area Office found that Appellant is not a small business because Appellant failed to produce the requisite information, such as a completed SBA Form 355, despite several requests. Section II.C, *supra*. As a result, the Area Office could not properly investigate whether Appellant is a small business, or determine whether Appellant is affiliated with other concerns. The Area Office therefore drew an adverse inference that the missing information would have shown that Appellant is not a small business. Under 13 C.F.R. § 121.1008(d), if a concern whose size is at issue fails to submit a completed SBA Form 355, fails to respond to protest allegations, or fails to provide requested information within the time allowed by the area office, the area office may presume that the requested information would demonstrate that the concern is other than a small business. Further, "[i]n the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure." 13 C.F.R. § 121.1009(d). On appeal, Appellant does not attempt to argue that the Area Office wrongly applied the adverse inference, and the record reflects that Area Office reasonably found that Appellant had not shown itself to be a small business. Thus, even if Appellant could establish that it is the manufacturer of the antennae, no basis would exist to disturb the size determination, because Appellant still would not have demonstrated that the adverse inference was improper or that Appellant is a small business. *E.g.*, *Size Appeal of American Blanching Co.*, SBA No. SIZ-

5430, at 3 (2012) (finding adverse inference “dispositive” of the case because “[w]ithout any information from the protested concern, the Area Office was unable to conduct a size determination and had no choice but to apply the adverse inference rule.”).

Lastly, I find no merit to Appellant's suggestion that the Area Office utilized an improper NAICS code and size standard. By regulation, an area office is authorized to select the NAICS code and size standard in conjunction with a size review if they are “unclear, incomplete or missing” from the solicitation. 13 C.F.R. § 121.402(e). Moreover, even assuming that the Area Office's choice of NAICS code was faulty, Appellant has not demonstrated that it would have qualified as a small business under any other NAICS code. As a result, the Area Office's choice of NAICS code and size standard is immaterial to the outcome of this case. *Size Appeal of Alterity Management & Technology Solutions, Inc.*, SBA No. SIZ- 5514, at 7 (2013) (explaining that “because [the challenged firm] failed to produce all requisite information, [the challenged firm] would not have qualified as a small business, regardless of which NAICS code and size standard were selected. At most, then, the use of a potentially incorrect NAICS code and size standard constituted harmless error, and would provide no justification to overturn the size determination.”).

#### 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