

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

SIZE APPEAL OF:

Jamaica Bearings Company,

Appellant,

RE: Electrical & Electronic Suppliers, Inc.

Appealed From

Size Determination No. 1-SD-2015-37

SBA No. SIZ-5677

Decided: September 3, 2015

APPEARANCE

Richard A. Muri, Jr.. Jamaica Bearings Company, New Hyde Park, New York

DECISION

I. Introduction and Jurisdiction

On July 20, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 1-SD-2015-37 finding that Electrical & Electronic Suppliers, Inc. (E&E) is an eligible small business for the subject procurement. Jamaica Bearings Company (Appellant), which had protested E&E's size, 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 April 3, 2015, the Defense Logistics Agency (DLA) issued Request for Quotations (RFQ) No. SPE4A6-15-T-V891 for bearing, roller, and tape. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 332991, Ball and Roller Manufacturing, with a

corresponding size standard of 750 employees. The RFQ stated that the procurement would be conducted under the simplified acquisition procedures set forth in Federal Acquisition Regulation (FAR) part 13.

On May 18, 2015, the CO announced that E&E had been selected for award. On May 20, 2015, Appellant, a disappointed offeror, protested E&E's eligibility as a small business. Appellant alleged that E&E is ineligible for award because E&E would not manufacture the items being procured or comply with the nonmanufacturer rule's requirement to take physical ownership or possession of the end item.

B. Size Determination

On July 20, 2015, the Area Office issued Size Determination No. 1-SD-2015-37, concluding that E&E is eligible for the instant procurement.

The Area Office stated 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 nonmanufacturer rule 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;
- (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.

Id. § 121.406(b)(1). Further:

Where the procurement of supplies or manufactured items is processed under Simplified Acquisition Procedures as defined in FAR 13.101 (48 CFR 13.101) . . ., and the anticipated cost will not exceed \$25,000, the offeror does not have to supply the end product of a small business concern. However, the product acquired must be manufactured or produced in the United States, and the small business offeror must meet the requirements of paragraph (b)(1)(i) through (b)(1)(iv) of this section. The offeror need not itself be the manufacturer of any of the items acquired.

Id. § 121.406(d).

The Area Office explained that E&E is wholly owned by Mr. Jose Dieppa, who holds no ownership interest or managerial position in any other company. (Size Determination at 2.) As a result, E&E is not affiliated with other concerns.

The Area Office next considered whether E&E complies with the nonmanufacturer rule for simplified acquisitions. E&E's total employees are fewer than 500, and E&E has no affiliates, so E&E satisfies the first requirement. (*Id.*) The second requirement is met because E&E reported that 90% of its business is in NAICS code 423610, Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers. (*Id.* at 2-3.) E&E is also an authorized dealer for Timken Bearings (Timken), the manufacturer of the end item that E&E will supply to DLA. Next, E&E will take ownership and possession of the end item at its facility, so E&E meets the third requirement. Fourth, although Timken is a large business based in Venezuela, this is an acquisition under the simplified acquisition procedures, so E&E need not supply the end item of a small business. Timken will manufacture the end item in Canton, Ohio, so the requirement that the end product be produced in the United States is met. (*Id.*) Accordingly, E&E satisfies the nonmanufacturer rule for this simplified acquisition.

C. Appeal

On July 30, 2015, Appellant filed the instant appeal. Appellant maintains that the size determination is in error and should be reversed. Specifically, Appellant argues that the Area Office erred in finding that E&E is compliant with the second and third elements of the nonmanufacturer rule.

Appellant argues that the Area Office's determination that E&E meets the second requirement is wrong on its face. The Area Office found that approximately 90% of E&E's sales are of electrical apparatus and equipment, wiring supplies, and related equipment. This finding, though, is inconsistent with E&E normally selling bearing, roller, and tape because “[b]earings are not an electric component.” (Appeal at 2.)

As for the third element, Appellant states that “E&E will need to take physical and financial ownership” of the end items. Appellant argues that E&E is not taking ownership in a manner consistent with industry practice because E&E lacks permission from Timken to sell the end item to the Government. (*Id.*)

E&E did not respond to the appeal.

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 argues unpersuasively that E&E does not meet the second and third elements of the nonmanufacturer rule, 13 C.F.R. § 121.406(b)(1).

With regard to the second element, Appellant maintains that E&E does not normally sell bearing, roller, and tape, because E&E's primary industry is in NAICS code 423610, Electrical Apparatus and Equipment, Wiring Supplies, and Related Equipment Merchant Wholesalers. The record, however, contains a letter from Timken confirming that E&E has been “an authorized distributor of Timken Bearings” since 2013. (Letter from N. Santos, at 1 (April 3, 2013).) Thus, it appears that E&E does normally sell the end items in question, and I cannot find that the Area Office clearly erred in determining that E&E meets the second requirement. Further, SBA has opined in the *Federal Register* that “a firm would not need to have a track record of selling the exact item, but only items of the same type.” 67 Fed. Reg. 70,339, 70,344 (Nov. 22, 2002). Thus, even assuming that the specific end items here are not a large portion of E&E's business, E&E could still comply with the rule by selling similar types of items.

The third element of the test requires that the nonmanufacturer “[t]ake[] ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice.” 13 C.F.R. § 121.406(b)(1)(iii). The Area Office determined that E&E will accept the end items from Timken at E&E's facility, thereby taking ownership and possession of the end items. Section II.B, *supra*. Thus, E&E meets the third element of the test. Appellant maintains, however, that E&E's approach is inconsistent with industry practice because E&E does not have specific authorization from Timken to sell bearings to the Government. This argument fails for two reasons. First, as noted above, Timken has authorized E&E to distribute Timken bearings. There is no indication in the record that E&E is barred from selling to Government customers, and Appellant offers no specific evidence to support this contention. Second, the regulation in question pertains to the nonmanufacturer's acceptance of the end item from the manufacturer. The regulation does not impose subsequent limits on the nonmanufacturer's distribution of the end item. Thus, even assuming that E&E were not authorized to sell to the Government, Appellant has not demonstrated that this would contravene 13 C.F.R. § 121.406(b)(1)(iii).

It is worth noting that this case also presents an issue of regulatory interpretation. In particular, 13 C.F.R. § 121.406(d) provides that, for procurements processed under simplified acquisition procedures, “the offeror does not have to supply the end product of a small business concern.” The regulation goes on to state, however, that the offeror must comply with 13 C.F.R. § 121.406(b)(1)(iv), which in turn requires that the offeror “supply the end item of a small business manufacturer.” Thus, an ambiguity exists as to whether a small business must produce the end item under 13 C.F.R. § 121.406(d). The issue is potentially significant here because the Area Office found that Timken is not a small business. Section II.B, *supra*.

To resolve the ambiguity, it is appropriate to consider the regulatory history. Prior to 2014, 13 C.F.R. § 121.406(d) stated that “the offeror need not supply the end product of a small business concern as long as the product acquired is manufactured in the United States, and the offeror does not exceed 500 employees.” 13 C.F.R. § 121.406(d) (2013). SBA then amended § 121.406(d) to address the new requirement that the nonmanufacturer take ownership or possession of the end item. Rather than recite each of the nonmanufacturer rule's requirements, SBA added language referring the reader to 13 C.F.R. § 121.406(b)(1). Notably, there is no indication in the commentary accompanying the proposed or final rules that SBA intended to substantively change the nonmanufacturer rule for simplified acquisitions. 77 Fed. Reg. 29,130 (May 16, 2012); 78 Fed. Reg. 61,114 (Oct. 2, 2013). I conclude, therefore, that the reference to § 121.406(b)(1)(iv) in § 121.406(d) was an administrative error, and does not require an offeror to supply the end item of a small business for a procurement conducted under simplified acquisition procedures.

IV. Conclusion

Appellant has not shown clear error in the size determination. Accordingly, 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