

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

SIZE APPEAL OF:

B GSE Group, LLC,

Appellant,

Appealed From

Size Determination No. 3-2015-086

SBA No. SIZ-5685

Decided: October 1, 2015

APPEARANCE

Adam T. Duke, Esq., Bell, Davis & Pitt, P.A., Winston-Salem, North Carolina, for Appellant.

DECISION

I. Introduction and Jurisdiction

On August 25, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2015-086, finding that B GSE Group, LLC (Appellant) is not an eligible small business for the procurement at issue.

Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant to be eligible for the instant procurement. For the reasons discussed *infra*, the appeal is granted, and the size determination is remanded to the Area Office for further consideration.

OHA decides appeals of size determinations 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 May 29, 2015, the United States Coast Guard (Coast Guard) issued Request for Quotations (RFQ) No. HSCG38-15-Q-500021 for two portable 400 Hz frequency converters.

The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 335312, Motor and Generator Manufacturing, with a corresponding size standard of 1,000 employees.¹ The RFQ was structured as a simplified acquisition of commercial items pursuant to Federal Acquisition Regulation (FAR) parts 12 and 13. The RFQ did not characterize the frequency converters as a kit.

On August 6, 2015, the CO awarded Purchase Order No. HSCG38-15-P-500090 to Appellant. On August 11, 2015, Unitron, LP (Unitron) protested Appellant's eligibility as a small business. Unitron alleged that Appellant is in violation of the nonmanufacturer rule and therefore is ineligible for award. Unitron further asserted that Appellant has been supplying the products of large manufacturers, such as Piller USA, Inc. (Piller).

B. Protest Response

On August 19, 2015, Appellant responded to the protest. Appellant stated that Piller produces part of the converters, “and the remaining parts are additional subassemblies made from other companies.” (Response at 1.) Appellant elaborated:

The finished product is produced with [Appellant's] logo and from [Appellant's] design utilizing an arrangement with multiple suppliers and specialized manufacturers. Products that are partially assembled are supplied to [Appellant] for final assembly, adjustments, and testing, which are directly performed by [Appellant] at a rental location facility.

(*Id.*) Appellant concluded that the majority of the work would be performed by small businesses and that Appellant is a kit producer. Accordingly, the Area Office should analyze whether Appellant is eligible for award as a kit assembler under 13 C.F.R. § 121.406(c). (*Id.* at 1-2.)

Attached to its protest response, Appellant submitted a document purporting to show the respective costs of Appellant, Piller, and other suppliers. (*Id.* at 3.) Appellant acknowledged that Piller is a large business. (*Id.*)

C. Size Determination

On August 25, 2015, the Area Office issued Size Determination No. 3-2015-086 finding that Appellant is not eligible 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 requirements for a nonmanufacturer, kit assembler, or supplier under simplified acquisition procedures. 13 C.F.R. § 121.406(a). The Area Office determined

¹ The CO originally assigned NAICS code 336413, Other Aircraft Part and Auxiliary Equipment Manufacturing, but later changed the NAICS code to 335312. The two NAICS codes have the same size standard.

that Appellant is not the manufacturer of the end item being procured. According to the Area Office, the most important part of the acquisition is the converter, which Piller will produce. Appellant, by contrast, is performing only minimal operations on the item being procured. As a result, Piller, not Appellant, is the manufacturer of the end item in question. (Size Determination at 4.)

The Area Office considered whether Appellant meets the requirements of 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;
- (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 found that Appellant meets the first three requirements, but not the fourth. Piller, the manufacturer of the end item, has more than 4,000 employees, and therefore exceeds the size standard associated with the NAICS code for this procurement. There is no waiver in place. As a result, Appellant does not meet the fourth element of the nonmanufacturer rule and is ineligible for award of the subject contract. (Size Determination at 3-4.)

The Area Office rejected Appellant's contention that the exception for kit assemblers should apply. In reaching this conclusion, the Area Office cited an earlier size determination in which a different CO had advised the Area Office that “the frequency converter is considered a commercial off the shelf product[;] . . . it is a piece of hardware that is delivered assembled and in full working condition meeting the specification of the solicitation. The government does not specify anything regarding a ‘kit’ or how assembly should be accomplished.” (*Id.* at 4, quoting Size Determination No. 3-2015-079.)

D. Appeal

On September 9, 2015, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the Area Office committed errors of fact and law, so OHA should reverse the size determination.

Appellant argues that the Area Office should have determined whether Appellant is eligible for award under the exception for kit assemblers, 13 C.F.R. § 121.406(c)(1), rather than as a nonmanufacturer, 13 C.F.R. § 121.406(b). Appellant asserts that it is a small business

concern because Appellant “does not exceed 500 employees, purchases items and packages them into a kit, and more than 50 percent of the total value of the kit and its contents is accounted for by small business.” (Appeal at 2.) Appellant asserts that the frequency converter is a kit because Appellant “packages the subject 400 Hz frequency converter from parts obtained from Stanley E. Smith Co., Inc., Laux/Arnold, Incorporated, Northco Corp., Skyko International, LLC, and Piller USA, Inc.” (*Id.*) Appellant represents that, with the exception of Piller, each of these companies is a small business. The proportion of total value attributable to small businesses, Appellant claims, is more than half of the price of the frequency converters, after subtracting profit. (*Id.* at 2-3.) Therefore, Appellant should be eligible for award under the exception for kit assemblers.

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 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's contention that the Area Office should have reviewed its eligibility under the exception for kit assemblers is wholly without merit. Contrary to Appellant's suggestions, the Area Office did examine this issue, and determined that Appellant is not a kit assembler. Section II.C, *supra*. Moreover, Appellant has not pointed to any evidence whatsoever that the Coast Guard sought to acquire a kit rather than a manufactured end item. OHA has previously explained, in a case with highly similar facts, that a frequency converter is not a kit, because it is “one end item” rather than “a collection of separate items.” *Size Appeal of B GSE Group, LLC*, SBA No. SIZ-5679, at 6 (2015). Further, the RFQ here did not describe the frequency converters as a kit, and OHA has recognized that “it is the procuring agency, not an offeror, which determines whether a ‘kit’ is being acquired.” *Id.*

Nevertheless, although the exception for kit assemblers is not applicable, the instant case does present a question as to whether Appellant qualifies under the exception for simplified acquisitions. This exception provides:

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.

13 C.F.R. § 121.406(d); *see also Size Appeal of Jamaica Bearings Co.*, SBA No. SIZ-5677 (2015) (for a procurement conducted under simplified acquisition procedures, offeror need not supply the end item of a small business).

The RFQ here indicated that the procurement was being conducted under simplified acquisition procedures, but the Area Office did not consider whether the exception for simplified acquisitions is applicable. It is therefore appropriate to remand this issue for further review.

IV. Conclusion

On remand, the Area Office should determine whether Appellant qualifies under the exception for simplified acquisitions at 13 C.F.R. § 121.406(d). The appeal is GRANTED to this extent, and the matter is REMANDED to the Area Office for further review consistent with this decision.

KENNETH M. HYDE
Administrative Judge