

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

SIZE APPEAL OF:

Sea Box, Inc.,

Appellant,

RE: Reagent World, Inc.

Appealed From

Size Determination No. 6-2015-087

SBA No. SIZ-5699

Decided: December 15, 2015

APPEARANCE

Robert A. Farber, Esq., Director of Contracts and Counsel, Sea Box, Inc., East Riverton, New Jersey

DECISION

I. Introduction and Jurisdiction

On October 28, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2015-087, denying a size protest filed by Sea Box, Inc. (Appellant) against Reagent World, Inc. (RWI). In its protest, Appellant alleged that RWI is not an eligible small business under the size standard associated with the subject procurement, because RWI would not manufacture the end items or comply with the nonmanufacturer rule, 13 C.F.R. § 121.406(b).

On appeal, Appellant maintains that the Area Office improperly denied the protest, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied. Nevertheless, the size determination is remanded to the Area Office for further consideration consistent with this decision.

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 September 3, 2015, the U.S. Department of the Army, National Guard — Indiana (Army) issued Solicitation No. W912L9-15-T-0072 (IFB) for twelve QuadCons, which are metal containers that provide the same footprint as a standard 20' container when four are connected. The IFB was conducted as an online competitive reverse auction facilitated by FedBid, Inc. (FedBid), a third-party reverse auction provider, and was structured as an acquisition of commercial items under Federal Acquisition Regulations (FAR) Part 12.3. The IFB specified:

The QuadCons shall have the following characteristics:

- a. Steel construction
- b. DOD Standard size, approximately 8'Wx7'Hx4.75'L
- c. Payload rating of at least 8000 lbs
- d. Include internal devices for securing loads, such as shelving and lash points
- e. Doors on both ends of container
- f. Securable to each other during transit with external locking mechanisms.

(IFB, CLIN 001). The Contracting Officer (CO) set the procurement aside entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 332312, Fabricated Structural Metal Manufacturing, with a corresponding 500-employee size standard. The IFB incorporated FAR clause 52.219-6, which states in pertinent part: “A small business concern submitting an offer in its own name shall furnish, in performing the contract, only end items manufactured or produced by small business concerns in the United States or its outlying areas.” 48 C.F.R. § 52.219-6(d). The IFB did not require offerors to identify the manufacturer of the QuadCons they would supply.

Bids were due September 11, 2015. Appellant, RWI, and four other offerors submitted timely bids. In its bid, Appellant provided pricing data and certified that it complies with FAR clause 52.219-6.

On September 18, 2015, FedBid notified offerors that RWI was the apparent awardee. On September 21, 2015, Appellant filed a size protest contending that RWI would not manufacture the containers. Appellant also alleged that RWI does not qualify as a nonmanufacturer. Appellant offered three reasons to support this charge. First, RWI neither normally sells, nor is it primarily engaged in selling QuadCons. On this point, Appellant maintained, and offered evidence to support, that RWI's primary NAICS code is 424690, Other Chemical and Allied Products Merchant Wholesalers. Appellant also argued that RWI has made no prior sales of the QuadCons. Second, RWI does not qualify as a nonmanufacturer because it will not take ownership or possession of the QuadCons. Rather, “RWI will subcontract the manufacture of this cargo container, ordering it from source ‘A,’ having it delivered to destination ‘B,’ and pocketing the difference between its costs and the selling price. . . . RWI neither owns nor maintains any inventory of containers whatsoever.” (Protest at 4.) Third, Appellant contended it

was doubtful that RWI would supply the product of a small business because it is “impossible for any solicitation participant to determine where the actual manufacturing would be performed or by whom.” (*Id.*)

B. Size Investigation

On September 14, 2015, RWI submitted a completed SBA Form 355. In the Form 355, Appellant represented that 20% of its receipts for the most recently completed fiscal year were derived from sales of metal containers, under NAICS code 332439, Other Metal Container Manufacturing. Another 20% of sales are derived from instruments and furniture, under NAICS code 337127, Institutional Furniture Manufacturing. The remaining 60% derived from chemicals, under NAICS codes 325180 and 325194. (SBA Form 355 at 3.)

On September 30, 2015, the Area Office informed RWI that “[t]he firm that you subcontract to provide the Quadcons will be required to submit an SBA Form 355 and payroll records . . . and fully explain their manufacturing process of the Quadcons.” (Letter from S. Owens to D. Shen (Sept. 30, 2015).)

On October 9, 2015, RWI responded that its “subcontractor has declined to cooperate in the submission of SBA Form 355 and supporting documentation.” (Letter from R. Bourche to S. Owens (Oct. 9, 2015).) As such, RWI “w[ould] not object to offering the contract . . . to the next closest bidder.” (*Id.*) The record does not identify the subcontractor who refused to submit a Form 355.

On October 14, 2015, the Area Office and RWI conversed by telephone, and the Area Office memorialized the conversation in an email. The Area Office stated, “it is my understanding from our telephone conversation a moment ago that RWI ha[s] decided to submit the required information to challenge the size protest filed against them.” (Letter from S. Owens to R. Tash (Oct. 14, 2015).) The Area Office then notified the Army that “RWI has done an about face. They now want to proceed with the size determination rather than withdrawing their bid.” (Letter from S. Owens to E. Sweatt (Oct. 14, 2015).)

On October 16, 2015, RWI provided the Area Office with a “quotation on the Quadcon from [its] vendor Countywide [M]etal from San Diego region, California.” (Letter from D. Shen to S. Owens (Oct. 16, 2015).) RWI explained that “the quote requires us to pay them 50% upfront before the work starts, and also pay them 50% upon completion of the job. Similar to the case before, this requirement establish[es] the ownership and possession of this project.” (*Id.*) The record contains a quotation provided from Countywide Metal (Countywide) of El Cajon, California, dated October 14, 2015.

On October 27, 2015, the Area Office corresponded with RWI. The Area Office represented:

Ron, you had previously advised me that your original supplier of choice for this instant procurement had declined to submit the SBA Form 355 and supporting

data based upon the slim profit margin etc. At that time you selected a different supplier, Countywide Metals.

Questions: When you submitted your proposal on this specific procurement did you have any type of an agreement with your original supplier of choice? If so, what type of an agreement was made with them, in other words how firm was your agreement? Please explain at what time in the procurement process you actually select your supplier. Do you wait until notified by the government that you are the apparent awardee before you select your supplier? Please explain your process on this specific procurement.

(Letter from S. Owens to R. Tash (Oct. 27, 2015).) RWI responded the same day, “We select one vendor for the project from a pool of our vendors, after we win the award or contract.” (Letter from R. Tash to S. Owens (Oct 27, 2015).)

C. Size Determination

On October 28, 2015, the Area Office denied Appellant's protest and determined that RWI is an eligible small business for the subject procurement. The Area Office determined Appellant's size and compliance with the nonmanufacturer rule as of September 11, 2015, the date Appellant submitted its bid. 13 C.F.R. § 121.404(d).

The Area Office found that Countywide is the manufacturer of the QuadCons and RWI complies with the nonmanufacturer rule. 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.

13 C.F.R. § 121.406(b)(1).

The Area Office determined RWI satisfies all four requirements. The first requirement is met because, when RWI's employees are combined with those of its affiliate, Dannier Chemical, Inc., the number of employees does not exceed 500. (Size Determination at 4.)

The second requirement is met because, although RWI's primary NAICS codes are in chemical manufacturing, “a significant amount” of RWI's revenue is generated from metal container, instrument, and furniture manufacturing. Further, RWI normally sells metal

containers. The Area Office noted that RWI provided evidence to substantiate this point. Appellant submitted a California Seller's Permit and one purchase order with the Federal Government. (*Id.*)

RWI meets the third requirement because it takes ownership of the QuadCons when it issues a purchase order and pays the subcontractor. The Area Office observed that “there is no one method used in the industry for taking possession or ownership of modified containers,” and some “companies out-source the manufacturing and never take physical possession but rather have the out-sourcing firm drop-ship the items to the customer.” (*Id.*) The fact that RWI does not take physical possession of the QuadCons is immaterial because the regulation does not require the prime contractor to take possession in addition to taking ownership.

The fourth requirement is met because RWI would supply the end product of Countywide, and Countywide is a small business manufacturer. In concluding that Countywide would manufacture the QuadCons, the Area Office noted that Countywide would cut and resize 20' containers to the dimensions required by the IFB; strip the containers to bare metal; weld heavy duty steel floor; fabricate, form, and weld doors; weld vertical E-Track sections, weld wall tie-down steel lashing rings; connect coupler storage bracket; grind and prep for primer; prime; and paint. Excluding overhead, quality control, testing and profit, Countywide's transformation of the containers accounts for more than 60% of the total cost. The Area Office determined these improvements were more than “minimal operations.” (*Id.* at 6, citing *Size Appeal of SeaBox, Inc.*, SBA No. SIZ-5613 (2014).) Countywide has no affiliates and fewer than 500 employees. Because Countywide does not exceed the size standard associated with the NAICS code designated to the subject procurement, Countywide qualifies as a small business manufacturer.

D. Appeal

On November 12, 2015, Appellant filed the instant appeal with OHA. Appellant maintains that the size determination is clearly erroneous and should be reversed.

Appellant argues the Area Office's conclusion that RWI satisfies the second requirement of the nonmanufacturer rule is flawed for several reasons. First, in reaching this conclusion the Area Office included revenue derived from sales of instrument and furniture manufacturing, items plainly dissimilar to the end item in question. Second, according to usaspending.gov, only 1.6% of RWI's revenues derive from the sale of shipping containers, and none derives from the sale of QuadCons. The purchase order the Area Office pointed to was for a relatively small amount—\$9,826.20, and the Area Office did not cite evidence of any retail or wholesale commercial sales of shipping containers. RWI's sparse sales of shipping containers, then, are “the absolute exception, not the norm.” (Appeal at 7.) Accordingly, RWI does not “normally sell” shipping containers, and the Area Office erred in finding to the contrary.

Next, Appellant contends the Area Office did not consider Countywide's technical capabilities in determining that Countywide is the manufacturer of the QuadCons, as 13 C.F.R. § 121.406(b)(2)(i)(C) requires. Appellant argues that Countywide is not accredited under the International Organization for Standardization (ISO), an international body that sets requirements for shipping containers. As such, Countywide's containers are not certified under

the ISO's Convention for Safe Containers (CSC). To support this claim, Appellant notes that Countywide is not listed on the website for the *Bureau International des Containers et du Transport Intermodal* (BIC) and therefore lacks a BIC code. Without a BIC code and its associated ISO/CSC approval and certification, Countywide cannot furnish the QuadCons. (*Id.* at 8.)

E. New Evidence

With its appeal, Appellant included six attachments. These attachments include (1) the IFB; (2) an excerpt on cargo containers from Marine Corps Technical Manual 12359A-OD/C; (3) an informational brochure on the CSC; (4) the size determination being appealed; (5) the purchase order for \$9,820; and (6) a spreadsheet compilation of data from usaspending.gov detailing previous government contracts awarded to RWI. Appellant did not state whether it was including this information as evidence, whether any such evidence is new, or whether there is good cause to admit it.

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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. 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). OHA “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).

In this case, some of Appellant's submissions, such as the IFB and the size determination, are already part of the record, so they need not be admitted. As for the other information, though, Appellant has not established good cause for its submission because Appellant did not file a

motion arguing as much. Accordingly, the information Appellant submits that is not already included in the record is EXCLUDED and will not be considered.

C. Analysis

Appellant takes issue with the Area Office's findings that RWI satisfies the second and fourth requirements of the nonmanufacturer rule. Both arguments lack merit. Nevertheless, for reasons unstated in the appeal, the Area Office clearly erred in its analysis of Appellant's compliance with the fourth requirement of the nonmanufacturer rule. Specifically, the Area Office erred in considering Countywide as the manufacturer of the QuadCons.

According to the second requirement of the nonmanufacturer rule, the challenged firm must be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied. RWI's Form 355 states that 20% of its sales are derived from the sale of metal containers, under NAICS code 332439, Other Metal Container Manufacturing. Another 20% of sales are derived from instruments and furniture, under NAICS code 337127, Institutional Furniture Manufacturing. RWI submitted a copy of California Seller's Permit, licensing it to sell tangible personal property, and an invoice for a sale of metal containers to the Bureau of Land Management. The Area Office relied upon this evidence to determine that RWI meets the requirements of 13 C.F.R. § 121.406(b)(1)(ii).

Appellant argues that, in reaching this conclusion, the Area Office relied on RWI's instrument and manufacturing sales. I disagree. The fact that metal containers make up 20% of RWI's revenue is more than enough to establish that it "normally sells" this type of metal container. The sales from instruments and furniture are not necessary to support this conclusion. The fact that RWI claims a different NAICS code for these sales than is designated for the instant procurement is not fatal to its claim to normally sell these items. A firm need not have a track record of selling the exact item to meet this standard, but only items of the same type. *Size Appeal of Jamaica Bearings Co.*, SBA No. SIZ-5677 (2015) (citing 67 Fed. Reg. 70,339, 70,344 (Nov. 22, 2002) (proposed rule).) Further, it was not clear error for the Area Office to rely on RWI's signed, sworn statements in reaching its conclusion that RWI normally sells metal containers. *E.g.*, *Size Appeal of Westcott Electric Co.*, SBA No. SIZ-5691 (2015) (upon considering the protester's allegation, the area office gave greater weight to the challenged firm's sworn statements). While there is only one invoice in the record, this is merely an example to establish RWI does sell these items.

Appellant argues the Area Office failed to consider Countywide's technical capabilities as required by regulation. The regulation requires that the manufacturer be 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. 13 C.F.R. § 121.406(b)(2). SBA will consider a concern's technical capabilities in determining whether a concern is the manufacturer of an item. 13 C.F.R. § 121.406(b)(2)(i)(C). Appellant argues Countywide lacks the proper approval and certification necessary to manufacture these containers. However, Appellant's argument does not bear on whether Countywide, or some other firm, is the manufacturer of the containers, which is the issue when SBA determines whether a firm is the manufacturer of an end item. *Size Appeal of NMC/Wollard, Inc.*, SBA No. SIZ-5668

(2015). Rather, Appellant is attacking Countywide's qualifications and the quality of its work. Appellant is really questioning, not whether Countywide is performing the work, but whether Countywide is responsible to perform. OHA has consistently held this is not the province of a size determination, but rather that of a CO:

[T]he determination of what capabilities are necessary to perform a contract, or whether the awardee has such capabilities, are matters of contractor responsibility. *See generally* FAR 9.104-1 (to be determined responsible, contractor must “[h]ave the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them.”) As OHA has previously and repeatedly explained, a responsibility determination lies firmly within the CO's purview.

Size Appeal of Spiral Techs., Inc., SBA No. SIZ-5279, at 11 (2011). Accordingly, Appellant's contentions regarding BIC codes and ISO/CSC approval and certification do not demonstrate clear error in the size determination.

Nevertheless, although Appellant has not demonstrated that the Area Office committed clear errors of fact or law, I find it necessary to remand this matter on alternate grounds. SBA regulations provide that, “[s]ize status for purposes of compliance with the nonmanufacturer rule set forth in § 121.406(b)(1) and the ostensible subcontractor rule set forth in § 121.103(h)(4) is determined as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding.” 13 C.F.R. § 121.404(d). OHA has specifically stated that for purposes of 13 C.F.R. § 121.404(d), once a firm has submitted its final bid or final proposal revision, “any subsequent changes in approach . . . would be irrelevant to assessing [the challenged firm's] size.” *Size Appeal of Onopa Mgmt. Corp.*, SBA No. SIZ-5302, at 15 n.6 (2011); *see also Size Appeal of Rich Chicks, LLC*, SBA No. SIZ-5556 (2014) (finding information in the proposal pertaining to the manufacturing of the end item was controlling even though the challenged firm changed its production strategy after the date of final proposal revisions). In this case, RWI submitted its bid on September 11, 2015. The record makes clear, though, that Countywide was not Appellant's subcontractor as of this date. Significantly, Countywide did not provide a quotation for the QuadCons until October 14, 2015, well after the contract had been awarded to Appellant. The Area Office recognized, moreover, that Countywide was “a different supplier” than RWI's “original supplier,” who is not identified in the record. Section II.B., *supra*. As a result, because Countywide was not RWI's supplier as of the date Appellant submitted its final bid, the Area Office erred in considering whether Countywide was the manufacturer or the QuadCons and whether RWI complies with the fourth requirement of the nonmanufacturer rule. Instead of considering Countywide, the Area Office should have based its decision on the subcontractor whose pricing RWI relied on in submitting its bid to the Area Office. If RWI could not provide that information, instead of permitting Appellant to change its procurement strategy, the Area Office should have inferred that such information would demonstrate that RWI is not a small business. *E.g., Rich Chicks, LLC*, SBA No. SIZ-5556 (2014) (citing 13 C.F.R. § 121.1008(d).)

D. Remand

The Area Office properly determined that RWI normally sells the type of item being procured and thus satisfies the second requirement of the nonmanufacturer rule. However, as discussed *supra*, the Area Office erred in determining that Countywide is the manufacturer. On remand, the Area Office is instructed to consider Appellant's compliance with the fourth requirement of the nonmanufacturer rule based on the original supplier, whose pricing RWI relied on in submitting its bid on September 11, 2015.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous, so the appeal is DENIED. The finding that Appellant satisfies the second criterion of the nonmanufacturer rule does not contain clear errors of fact or law and is therefore AFFIRMED. Nevertheless, because the determination that Appellant satisfies the fourth requirement of the nonmanufacturer rule is clearly erroneous for reasons not argued in the appeal, this issue is REMANDED to the Area Office for further consideration.

CHRISTOPHER HOLLEMAN
Administrative Judge