

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

SIZE APPEAL OF:

Encore Analytics, LLC,

Appellant,

RE: SNA Software, LLC

Appealed From
Size Determination No. 3-2017-001

SBA No. SIZ-5796

Decided: December 8, 2016

APPEARANCES

David B. Abel, Esq., Law Office of David B. Abel, Manhattan Beach, California, for Appellant

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Candace M. Shields, Esq., Matthew P. Moriarty, Esq., Ian P. Patterson, Esq., Koprince Law LLC, Lawrence, Kansas, for SNA Software, LLC.

DECISION

I. Introduction and Jurisdiction

On October 27, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2017-001 dismissing a protest filed by Encore Analytics, LLC (Appellant) against SNA Software, LLC (SNA). Appellant maintains that the Area Office improperly dismissed its protest. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

SBA's Office of Hearings and Appeals (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 June 7, 2016, the Defense Contract Management Agency (DCMA) issued Request for Quotations (RFQ) No. S5121A-16-T-0013 seeking Earned Value Management Solution software and training for its Earned Value Analytics System. The RFQ contemplated the award of a single blanket purchase agreement with a minimum value of \$37,000 and a maximum value of \$1 million. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 511210, Software Publishers, with a corresponding size standard of \$38.5 million average annual receipts. Quotations were due July 13, 2016. (RFQ, Amendment P00002.) On September 20, 2016, DCMA announced that SNA was the awardee.

On September 21, 2016, Appellant filed a size protest against SNA, alleging that the software SNA would provide was produced by a Norwegian company. (Protest at 2.) Appellant argued that agencies may not purchase foreign-made supplies through procurements that are set aside for small businesses. (*Id.* at 15, citing 48 C.F.R. § 19.102(f)(1); *TRS Research*, B-283342, Nov. 4, 1999, 99-2 CPD ¶ 85; *Kaysam Worldwide, Inc.*, B-247743, June 8, 1992, 92-1 CPD ¶ 500; and *General Metals, Inc.*, B-247560, May 29 1992, 92-1 CPD ¶ 486.) Appellant further complained that the CO did not notify Appellant that SNA was the apparent awardee prior to award, as the Federal Acquisition Regulation (FAR) instructs. (*Id.* at 1, citing 48 C.F.R. § 15.503(a)(2).)

B. Size Determination

On October 25, 2016, the Area Office issued Size Determination No. 3-2017-001, dismissing Appellant's protest because “the procured product is not classified as a manufactured item, and therefore is not regulated by the Non-Manufacturer Rule.” (Size Determination at 1, citing 13 C.F.R. § 121.406(b)(3).)

On October 27, 2016, the Area Office issued an amendment to the size determination. The Area Office stated:

The decision letter issued on October 25, 2016 inadvertently omitted the following statement:

13 C.F.R. § 121.1007(b) requires that a protest must be sufficiently specific to provide reasonable notice as to the grounds on which the size of the protested concern is being questioned. 13 C.F.R. § 121.1007(c) states “Non-specific protests will be dismissed. Protests which do not contain sufficient specificity will be dismissed by SBA.” In [Appellant's] protest letter dated September 26, 2016 it was communicated that [Appellant] protests that the software being procured under the subject solicitation was “manufactured by a foreign owned business[.]” This allegation is non-specific in that whether the software is produced

domestically or not is irrelevant as the non-manufacturer rule under 13 C.F.R. § 121.406 does not apply in this case.

(Size Determination, Amendment 1, at 1.) In a footnote, the Area Office continued, “For an offeror to be considered a small business under this rule, one of the requirements is that the manufactured item be produced by a small domestic business.” (*Id.* at 1 n.1, citing 13 C.F.R. § 121.406(b)(1)(4).) “However, as the procurement is not classified under a manufacturing NAICS code, the nonmanufacturer rule does not apply.” (*Id.*)

C. Appeal

On November 8, 2016, Appellant filed the instant appeal. Appellant argues that the Area Office improperly dismissed its protest, and urges OHA to remand the matter.

Appellant maintains that, under 13 C.F.R. § 121.406, the prime contractor must be the manufacturer of the end item being acquired, or must qualify as a nonmanufacturer or kit assembler, or the procurement must be excepted because it is conducted under Simplified Acquisition Procedures. (Appeal at 5-6.) Appellant reiterates the argument from its protest that agencies may not purchase foreign-made supplies through procurements set aside for small businesses. (*Id.*)

The Area Office's dismissal of the protest is inconsistent with case law from OHA and the U.S. Court of Federal Claims, Appellant argues. OHA's decision in *Size Appeal of Forterra Systems, Inc.*, SBA No. SIZ-5029 (2009) involved a procurement of software that was also assigned NAICS code 511210. In that case, the area office issued an adverse size determination, and OHA upheld it. Similarly, the Court has stated “that it is a plain and unambiguous statutory requirement that the [nonmanufacturer rule] be applied to all contracts involving the provision of supplies, regardless of the NAICS code. . . .” (*Id.* at 7, quoting *Rotech Healthcare Inc. v. United States*, 118 Fed. Cl. 408, 416 (2014).)

The dismissal of Appellant's protest contravenes SBA policy, too. Appellant highlights that, effective June 30, 2016, SBA added a footnote to the size standards table stating “NAICS code 511210 — For purposes of Government procurement, the purchase of software subject to potential waiver of the nonmanufacturer rule pursuant to § 121.1203(d) should be classified under this NAICS code.” (*Id.* at 8, citing 13 C.F.R. § 121.201 n.20.) In adding this footnote, SBA commented that “**this is the proper NAICS code to use when the government is purchasing software that is eligible for a waiver of the [nonmanufacturer rule].**” (*Id.*, quoting 81 Fed. Reg. 34,243, 34,255 (May 31, 2016) (emphasis Appellant's).) SBA also remarked that, in the proposed rule, “**SBA proposed that the procurement of this type of software would be treated by SBA as a supply requirement, and therefore the [nonmanufacturer rule] would apply, as long as the acquisition meets all of the requirements of the rule.**” (*Id.* (emphasis Appellant's).) Section 121.1203(d), which was created through the same final rule that promulgated 13 C.F.R. § 121.201 n.20, provides that SBA may waive the nonmanufacturer rule on a procurement for commercial software that has not been customized. (*Id.* at 9.)

Appellant contends that footnote 20 applies to this procurement because quotations were due after the effective date of the amended regulations, and the RFQ required offerors to certify that their representations and certifications were current, accurate, and complete. Because footnote 20 applies, Appellant argues, the nonmanufacturer rule does too. As such, SNA “could not have validly asserted that its submission qualified as a submission by a small business,” because a majority of the software it would provide was made by a foreign company. (*Id.* at 10.)

Appellant also takes issue with the date for determining SNA's size, pointing out that the Area Office did not identify which date it was using. (*Id.*)

D. SNA's Response

On November 28, 2016, SNA responded to the appeal. The Area Office correctly dismissed the protest, SNA maintains, so OHA should affirm the size determination.

SNA notes that the CO assigned a services NAICS code to the instant RFQ. The nonmanufacturer rule, though, applies “only to procurements that have been assigned a manufacturing or supply NAICS code.” (Response at 9, quoting 13 C.F.R. § 121.406(b)(3).) The regulations specifically state that the rule “does not apply to contracts that have been assigned a service . . . NAICS code.” (*Id.*, quoting 13 C.F.R. § 121.406(b)(3).) SNA argues that because the CO designated a services NAICS code to the instant RFQ, the nonmanufacturer rule is inapplicable.

Appellant's reliance on *Rotech* is misplaced, SNA asserts. *Rotech* is no longer good law because it has been superseded by statute. (*Id.* at 10-11, citing 15 U.S.C. § 637(a)(17)(C) and H.R. Rep. No. 114-102, Part I, § 834 (2015).)

Next, SNA points out that although the regulatory amendments Appellant cites became effective before offers were due, the CO did not amend the RFQ to incorporate these changes. As a result, the amended regulations do not apply. (*Id.* at 12-13, citing 13 C.F.R. § 121.402(a).) Further, since the regulatory amendments apply only to commercial software and not to modified software, even if the CO had amended the RFQ, the nonmanufacturer rule still would not apply in this case. According to SNA, the “[t]he software DCMA seeks to procure under the [RFQ] meets none of the requirements set forth in 13 C.F.R. § 121.1203(d).” (*Id.* at 16.)

Lastly, SNA argues, even assuming the nonmanufacturer rule did apply and the procurement called for commercial software, SNA not need qualify as a nonmanufacturer because it is the software's manufacturer. SNA maintains that it is importing only the basic shell of the software and then customizing it for DCMA. Under similar circumstances, OHA has held that such customization renders the offeror the manufacturer. (*Id.* at 18, citing *Size Appeal of RG Software Sys., Inc.*, SBA No. SIZ-4113 (1995).)

E. Reply

On December 7, 2016, nine days after the record closed in this matter, Appellant moved to reply to SNA's response and included an affidavit as supporting evidence. Appellant argues

that there is good cause to admit the reply because the response introduces new facts and raises issues that are significant to the procurement community. Under applicable regulations governing size appeals, a reply to a response is not permitted unless OHA so directs. 13 C.F.R. § 134.309(d). No such direction occurred here. Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Accordingly, Appellant's motion to reply is DENIED, and the reply is EXCLUDED from the record.

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 argues that SNA is not an eligible small business for the instant RFQ because SNA will provide a product made in Norway. The requirement that a small business prime contractor must provide a domestic end item is found in the nonmanufacturer rule, 13 C.F.R. § 121.406(b)(1)(iv). The Area Office determined, however, that the nonmanufacturer rule does not apply in this case, and Appellant has not established that this determination is clearly erroneous. Therefore, the appeal must be denied.

SBA regulations state:

The nonmanufacturer rule applies only to procurements that have been assigned a manufacturing or supply NAICS code, or the Information Technology Value Added Resellers (ITVAR) exception to NAICS code 541519. The nonmanufacturer rule does not apply to contracts that have been assigned a service (except for the ITVAR exception to NAICS code 541519), construction, or specialty trade construction NAICS code.

13 C.F.R. § 121.406(b)(3). Similarly, 13 C.F.R. § 121.402(b)(2) instructs that the nonmanufacturer rule is applicable “where the NAICS code assigned to the contract, order, or subcontract is one for supplies”. In the instant case, the CO assigned a services NAICS code, 511210, Software Publishers, to the RFQ. Section II.A, *supra*. NAICS codes for manufacturing and supplies, on the other hand, fall under NAICS sectors 31-33. Accordingly, because NAICS code 511210 is a services NAICS code, the Area Office appropriately found that the nonmanufacturer rule does not apply in this case.

Appellant bases its contention that SNA may not offer a foreign-made product on FAR 19.102(f), which summarizes key aspects of the nonmanufacturer rule. Like SBA's regulations,

though, FAR 19.102(f) stipulates that the nonmanufacturer rule does not apply to “construction or service” contracts. Further, in defining the nonmanufacturer rule, the FAR directs the reader to SBA regulations at 13 C.F.R. § 121.406. *See* FAR 19.001. I therefore perceive no inconsistency between the FAR and SBA regulations, at least with regard to notion that the nonmanufacturer rule applies only to manufacturing and supply procurements.

Appellant's strongest argument for applying the nonmanufacturer rule stems from 13 C.F.R. § 121.201 n.20 and SBA's accompanying commentary in the *Federal Register* that a procurement of non-customized software under NAICS code 511210 should be treated as a supply procurement, subject to the nonmanufacturer rule. 81 Fed. Reg. 34,243, 34,255 (May 31, 2016). As SNA emphasizes in its response to the appeal, though, footnote 20 and its related changes essentially introduced a new size standard for unmodified software acquired under NAICS code 511210, because prior to these regulatory changes, NAICS code 511210 was merely an ordinary services NAICS code to which nonmanufacturer rule, and its corresponding 500-employee size standard, would not apply. Moreover, footnote 20 became effective June 30, 2016, after the instant RFQ was issued but before quotations were due. Section II.A, *supra*. When SBA revises a size standard after issuance of a solicitation, SBA regulations permit — but do not require — the CO to amend the solicitation to incorporate that revision. 13 C.F.R. § 121.402(a); *Size Appeal of Orion Constr. Corp.*, SBA No. SIZ-5694, at 7-8 (2015); *Size Appeal of Dawson Tech., LLC*, SBA No. SIZ-5476 (2013). Similarly, OHA has recognized that revisions of the footnotes in 13 C.F.R. § 121.201 that occur after a solicitation is issued will not apply to that procurement unless the solicitation is amended. *Size Appeal of Pacific Power, LLC*, SBA No. SIZ-5572, at 5-6 (2014). Here, Appellant does not argue, and the record does not demonstrate, that any such solicitation amendment occurred. As a result, I agree with SNA that footnote 20 is not applicable to the instant RFQ.

Appellant's arguments based on *Forterra Systems* and *Rotech* are unavailing. *Forterra Systems* is wholly inapposite. Although that case involved the same NAICS code at issue here, it did not deal with the nonmanufacturer rule. *Rotech* is no longer good law, as the Small Business Act has since been amended to make clear that the nonmanufacturer rule does not apply to “a contract that has as its principal purpose the acquisition of services or construction.” 15 U.S.C. § 637(a)(17)(C).

Appellant also complains that the Area Office did not state which date it used to determine SNA's size. It is true that the size determination was silent on this point. However, because the Area Office dismissed the protest, the Area Office did not actually render a determination of SNA's size. Accordingly, there was no date for determining size.

IV. Conclusion

Appellant has not proven clear error of law or fact in the Area Office's determination. Therefore, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge