

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

SIZE APPEAL OF:

Aerosage, LLC,

Appellant,

Appealed From
Size Determination No. 3-2017-010

SBA No. SIZ-5820

Decided: March 23, 2017

APPEARANCES

David M. Snyder, President, Aerosage, LLC, Tampa, FL.

Sam Q. Le, Esq., for the Small Business Administration, Washington, D.C.

Kathryn M. Kelley, Esq., for the Defense Logistics Agency, Ft. Belvoir, VA.

DECISION

I. Introduction and Jurisdiction

On February 2, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 03-2017-010 finding Aerosage, LLC (Appellant) is not a small business concern.

Appellant contends the size determination is erroneous, and requests that the size determination be reversed. 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. RFP and Protest

On April 1, 2016, the Defense Logistics Agency (DLA) issued Request for Proposal No. SP0600-16-R-023 (RFP) seeking a contractor to provide red dyed ultra-low sulfur #2 diesel fuel.

The RFP was issued under FAR Part 12 as an acquisition of commercial items. (RFP, at 4.) The RFP contained 638 line items. DLA set 48 of the line items aside for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs), under North American Industry Classification System (NAICS) code 324110, Petroleum Refineries, with a corresponding size standard of 1,500 employees and 125,000 barrels per day capacity. 13 C.F.R. § 121.201 & n.4. Final proposal revisions were submitted on August 4, 2016.

On January 17, 2017, the Contracting Officer (CO) filed a protest with the Area Office, alleging that Appellant was not in compliance with the nonmanufacturer rule because it was not supplying the product of a small business refinery.

On January 23, 2017, Appellant responded to the protest. Appellant argued that under 13 C.F.R. § 121.406(d) the nonmanufacturer rule does not apply to small business set aside acquisitions with an estimated value between \$3,500 and \$150,000. (Letter, D. Snyder to I. Bascumbe, January 23, 2017, at 4.) Appellant further maintains this procurement was conducted under FAR Part 13 Simplified Acquisition Procedures (SAP) through 48 separate blanket purchase agreements (BPAs). (*Id.* at 1.)

The CO informed the Area Office that the procurement was not conducted under SAP. The solicitation had 638 line items, 48 of which were set aside for SDVO SBCs. These line items were not individual delivery orders; rather, the CO explained, multiple delivery orders may be placed against each line item. The resulting contracts will be awarded as requirements contracts. Neither the line items nor the orders placed under them are themselves contracts. (Email, D. Nibbs to I. Bascumbe, January 17, 2017.)

B. Size Determination

On February 2, 2017, the Area Office issued Size Determination No. 03-2017-010, finding that Appellant was other than small for this procurement, because it does not meet the requirements of the nonmanufacturer rule.

The Area Office determined Appellant's argument that 13 C.F.R. § 121.406(d) exempted this procurement from the nonmanufacturer rule to be incorrect, because the regulation became effective on June 30, 2016, and the instant RFP was issued on April 1, 2016. (Size Determination, at 2.) Additionally, the regulation Appellant relies upon applies to small business set aside procurements, and the procurement at issue here is set aside for SDVO SBCs. The Area Office accepted the CO's assertion that the RFP was not issued under SAP, despite Appellant's contention.

The Area Office found that Appellant is 100% owned by David M. Snyder, who also owns SageCare, Inc., AeroSage Holdings Group, LLC, and AeroSage Innovations, LLC. All three additional entities, as well as Appellant, have only one full-time employee, Mr. Snyder, and are all affiliated with each other. (*Id.* at 3.)

Next, the Area Office examined whether Appellant meets the requirements of the nonmanufacturer rule. The Area Office explains that a concern may qualify as a

nonmanufacturer in order to provide manufactured products if it meets the four requirements of 13 C.F.R. § 121.406(b)(1). Here, Appellant meets the first requirement as it is a concern with less than 500 employees. The second requirement is met as Appellant does provide retail/wholesale broker services in ground fuel petroleum products. Appellant also takes ownership and possession, via a transportation company, of the item in question that is consistent with the industry practice, thus meeting the third requirement. Lastly, the CO notified the Area Office that there is no waiver for this RFP, and thus the contractor will be responsible for providing the product of a small business manufacturer, processor, or producer made in the United States. The Area Office found that Appellant does not meet this requirement. (*Id.* at 3-4.)

The Area Office found Appellant is a fuel dealer and retail/wholesale broker, yet it is not the manufacturer of the fuel it proposes to provide. Thus, Appellant would need to meet the requirement that the end item it supplies as a nonmanufacturer must be made by a small business in the United States. (*Id.* at 4.) The Area Office noted that Appellant's proposal did not contain commitments that Appellant will be providing “the product of a small business nor did the letters specify the name of the small business refinery” from which Appellant would be acquiring the fuel. Rather, Appellant submitted with its proposal letters from its proposed suppliers, who merely undertook to use their “best efforts” to ensure they would acquire and supply fuel from small businesses. (Letters, C. Almond to D. Snyder, May 29, 2016; T. Switzer to D. Snyder, May 31, 2016; W. Frick to D. Snyder, June 1, 2016; C. Burton to D. Snyder, May 31, 2016; K. Marshall to D. Snyder, May 1, 2016; and R. Lapine to D. Snyder, May 31, 2016.) Appellant's proposal therefore did not meet the final requirement of the nonmanufacturer rule at 13 C.F.R. § 121.406(b)(1)(iv). (*Id.*)

Finally, the Area Office explains that Appellant's reliance on 13 C.F.R. § 121.406(d) is misplaced because the RFP was not conducted under SAP. The line items contained in the RFP are not individual delivery orders, and, according to the CO, the procurement exceeds \$25,000, despite Appellant's allegations to the contrary. Therefore, this procurement was not conducted under SAP and so the exception to the nonmanufacturer rule applicable to SAP is irrelevant here. (*Id.* at 5.)

C. Appeal

On February 17, 2017, Appellant filed the instant appeal. Appellant argues the Area Office erred in finding Appellant other than small, and requests that OHA reverse the decision. Appellant contends that DLA erred when it stated to the Area Office that SAP were not used in this procurement. Appellant explains that because this solicitation is a BPA under FAR Part 13, SAP apply. Appellant argues that a memorandum issued to the “Directors of Defense Agencies” on December 24, 2014, allows DLA to use BPAs and SAP for the acquisitions such as the one at issue here. (Appeal, at 4.)

Appellant further argues the Area Office erred in failing to apply FAR 19.102(f)(7)(i)(B), which provides for an exception to the nonmanufacturer rule for SAP procurements. Appellant also contends that the \$25,000 threshold where the nonmanufacturer rule does not apply can be found here and the Area Office erred when it stated that the monetary threshold does not apply to individual CLIN items, arising from a BPA. (*Id.* at 5.) Specifically, Appellant states that “[t]here

are several provisions in FAR identifying the [nonmanufacturer rule] exclusion applies to individual discrete categories, such as CLIN, for purchase orders resulting from BPA requirements contracts.” (*Id.*) Appellant goes on to assert that DLA issues these purchase orders against individual CLINs, and because a concern's size cannot be determined at the time it responded to the BPA, Appellant's size cannot be determined until the individual order was issued. (*Id.* at 6-7; citing 13 C.F.R. § 121.404.) Therefore, because size is not determined until the individual order is issued, and because price is only determined after the delivery is made, the Area Office erred in finding Appellant other than small.

On February 22, 2017, Appellant filed an amended appeal. In it, Appellant argues that DLA withheld CLIN information regarding the values of the CLINs, in a bad faith attempt to avoid complying with the Small Business Act. (Amended Appeal, at 9.) Appellant goes on to cite different sections of FAR Part 13, 15, and 16 in support of its contention that the instant procurement is a BPA. (*Id.* at 9-10.) Further, the solicitation excluded certain FAR clauses that are normally excluded when the solicitation is a BPA.¹ (*Id.* at 11.) Appellant lastly adds that the CO was under a duty to seek a waiver to the nonmanufacturer rule when VA Acquisition Regulation (VAAR) applies, such as it does here. (*Id.* at 14-15.)

On March 8, 2017, Appellant filed a motion to supplement the appeal. In its supplement, Appellant explains that after reviewing the Area Office file, it found further evidence that the size determination was contrary to law. (Supplemental Appeal, at 2.) Appellant contends the size determination erred in its application of the limitations on subcontracting and the nonmanufacturer rule, incorrectly finding that they do not apply to contracts valued between \$3,000 and \$150,000. Appellant suggests that the exception to the nonmanufacturer rule should apply fairly to all small business categories, not just total small business set-asides. (*Id.* at 3.) Appellant further argues the Area Office erred in interpreting the recently revised 13 C.F.R. § 121.406(d) as not applying to SDVO SBCs. Despite the fact that § 121.406(d) did not become effective until after the issuance of the procurement at issue, Appellant argues that the offers, including price, were submitted after § 121.406(d) became effective. (*Id.* at 5.)

Appellant requests that OHA orders 13 C.F.R. § 121.406(d) to be applied to all small business categories and that OHA “delete” the nonmanufacturer rule exception found in FAR 19.102(f). (*Id.* at 6.)

D. SBA Response

On March 8, 2017, SBA responded to the appeal. SBA argues Appellant failed to show the size determination contained clear errors of fact or law, and requested that OHA affirm the size determination.

SBA points out that Appellant failed to challenge the Area Office's conclusion it did not comply with the nonmanufacturer rule. Rather, Appellant incorrectly asserted that the nonmanufacturer rule does not apply to the instant procurement. SBA notes that the exception

¹ Appellant refers to FAR clauses 52.203-5, 52.203-6, 52.203-7, 52.215-2, 52.222-4, 52.223-6 and 52.223-9.

relied on by Appellant, 13 C.F.R. § 121.406(d), requires that the procurement in question be issued under SAP or that the order is set-aside against a full and openly competed multiple award contract, and anticipated cost does not exceed \$25,000. Here, neither is present. DLA did not process the procurement under SAP, but used an RFP to award a requirements-type contract utilizing lowest-priced technically acceptable evaluation procedures. The numerous references in the RFP of a “contract” being awarded disprove any argument that DLA used SAP for the instant procurement. (SBA Response, at 3-5.)

In addition, Appellant's claim that the procurement at issue is a BPA is also meritless. A BPA is not a contract, and the RFP is clear that this acquisition will result in a contract. This is supported by the CO's own statements. (*Id.*) Second, the anticipated cost far exceeds \$25,000. The RFP clearly anticipates the cost to exceed the \$25,000 threshold found in § 121.406(d), further refuting Appellant's argument. As OHA explained in *Size Appeal of Hardie's Fruit & Vegetable Company South, LP*, SBA No. SIZ-5347 (2012), the \$25,000 threshold applies to the procurement as a whole, not individual orders or contracts. (*Id.* at 5-6.) Here, the line items in which Appellant itself submitted offers on amounts to at least \$1.2 million. Therefore, any argument that § 121.406(d) applies is unfounded.

Next, SBA disputes Appellant's allegation that it meets the exception found in the new version of § 121.406(d). This revision was effective June 30, 2016, and this solicitation was issued April 1, 2016. Because the new version was not in effect at the time the RFP was issued, SBA argues it does not apply here. This rule only applies to small business set-asides, which is not applicable here as the RFP is an SDVO SBC set-aside. Lastly, the procurement here will exceed the new dollar threshold of \$150,000 found in the new version of § 121.406(d). Thus, any argument made by Appellant that § 121.406(d) applies, whether the old or new version, is meritless. (*Id.* at 7-8.)

E. DLA's Response

On March 8, 2017, DLA filed a response to the appeal. Like SBA, DLA argues Appellant has not shown the size determination contains clear errors of fact or law, and requests that the appeal be denied.

DLA contends the nonmanufacturer rule applies to the procurement at issue, and Appellant has clearly showed it fails to meet the rule. Here, in order to meet the nonmanufacturer rule, an offeror must show that it is providing fuel from a small refinery. (DLA Response, at 6.) The RFP required any offeror for the instant procurement to submit letters of commitment from suppliers, confirming that the fuel supplied would come from small refineries. DLA explains that “letters that [Appellant] submitted as part of its offeror submission package fell far short of establishing that [Appellant] would supply fuel from small refineries.” (*Id.*) The letters Appellant submitted simply stated that Appellant's suppliers would make their ‘best efforts’ to provide fuel from small refineries. Therefore, the Area Office correctly found Appellant did not show that it would be providing fuel from a small refinery. DLA notes that at no point does Appellant claim that its offer meets the requirements of the nonmanufacturer rule, and therefore has failed to effectively challenge the Area Office's findings on appeal. This further supports the Area Office's conclusion. (*Id.* at 7.)

Next, DLA argues that because the procurement was not issued under SAP, Appellant's arguments to the contrary should be dismissed. DLA explains that the procurement here is not a multiple award contract, nor does it incorporate SAP. The procurement was for commercial items issued under FAR Part 12 and negotiated under FAR Part 15; it also exceeds the monetary threshold for SAP, making it improper to be issued under FAR Part 13. (*Id.* at 8.) Appellant's claims that the RFP did not contain clauses that would only have been excluded had it been issued using SAP are baseless. DLA maintains that one of those clauses (52.203-6) was indeed included in the RFP, and the remaining six clauses were not included because under FAR Part 12 they were not required. (*Id.*) Lastly, any argument regarding the structure of the solicitation is a matter under GAO jurisdiction, and cannot be entertained in a size appeal before OHA. (*Id.* at 9.)

F. Appellant's Reply

On March 13, 2017, after the deadline specified by OHA for close of record, Appellant requested leave to reply to SBA's response to the appeal. The reply should be accepted, Appellant argues, because SBA's response included errors of fact. (Appellant's Reply, at 1.) A reply to a response to a size appeal is not permitted unless the Administrative Judge so directs. 13 C.F.R. § 134.309(d). I have made no such direction 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 here was found to be other than small because its offer did not meet the four requirements of the nonmanufacturer rule. 13 C.F.R. § 121.406(b)(1). Specifically, it did not definitively offer to supply the end item of a small business manufacturer made in the United States, but only to undertake its "best efforts" to supply such a product. Appellant therefore did not comply with the rule. 13 C.F.R. § 121.406(b)(1)(iv).

SBA regulations require appellants to submit "a full and specific statement as to why the size determination . . . is alleged to be in error, together with argument supporting such allegations." 13 C.F.R. § 134.305(a)(3). Here, Appellant does not address the crux of the size determination, that is, Appellant does not explain or indicate how it meets the four criteria of the nonmanufacturer rule. Instead, Appellant argues the size determination is in error based on issues

completely unrelated to the question of whether Appellant complied with the nonmanufacturer rule. Appellant simply restates arguments it made to the Area Office during the size protest process, and does not address the Area Office's findings that it failed to meet the requirements of the nonmanufacturer rule. Appellant has thus failed to establish clear error of fact or law in the size determination.

Appellant argues that the recently revised version of § 121.406(d) (“The performance requirements (limitations on subcontracting) and the nonmanufacturer rule do not apply to small business set-aside acquisitions with an estimated value between \$3,500 and \$150,000”), applies to the instant procurement because it became effective before final proposals, including price, were submitted. This is categorically incorrect. The Area Office correctly found that the revised § 121.406(d) does not apply because it became effective June 30, 2016, almost three months after the RFP was issued on April 1, 2016. The Federal Register stated that the revised version of § 121.406(d) became effective June 30, 2016, and I find that revised version only applies to solicitations issued after June 30, 2016. 81 FR 34243, 34259; *Size Appeal of GASL, Inc.*, SBA No. SIZ-4191 (1996).

The version of § 121.406(d) applicable at the time would also not apply here. This regulation only applies to procurements where the anticipated cost does not exceed \$25,000. 13 C.F.R. § 121.406(d) (2016). As SBA correctly points out, “[t]he Area Office conducted the size determination on the contract as a whole, not an individual order. The exception thus applies only if the procurement was ‘processed under [SAP]’ and ‘the anticipated cost will not exceed \$25,000.’” (SBA Response, at 4.) This is consistent with our holding in *Size Appeal of Hardie's Fruit & Vegetable Company South, LP*, SBA No. SIZ-5347 (2012), that the \$25,000 threshold applies to the procurement as a whole, not individual orders or contracts. The record unmistakably shows that the procurement as a whole far exceeds \$25,000 and, as discussed below, the procurement was not issued using SAP.

Appellant errs when it states the procurement is a BPA and that SAP applies here. The record contains explicit documentation from the CO stating that the RFP is not a BPA, explaining that the line items are multiple delivery orders, and therefore rendering Appellant's arguments to the contrary moot. In addition, any argument that SAP applies to the instant procurement is contrary to the facts found here. The RFP was not issued under FAR Part 13, instead it was issued under FAR Part 12, thus SAP is not applicable. Further, because the RFP was issued under FAR Part 12, the clauses Appellant argues should have been included were not required. FAR 3.404, 3.502-3, 22.305, 23.501, 23.406(d). In any event, any issues Appellant has with the RFP cannot be addressed here. OHA has no jurisdiction over the conduct of a procurement, and will not consider the issues Appellant raises with respect to DLA's decision to issue the RFP under FAR Part 12. *Size Appeal of Specialty Bar Products Co.*, SBA No. SIZ-4778 (2006).

In its supplemental appeal, Appellant states that the Area Office erred in implementing the changes to limitations on subcontracting found in the National Defense Authorization Act (NDAA) of 2013. However, the size determination at no point discusses the NDAA. Further, OHA does not have the jurisdictional power to delete parts of the FAR as requested by Appellant, thus that request is also denied.

I find that the alleged errors cited by Appellant fail to support a finding that the size determination contained a clear error of fact or law. In fact, at no point does the appeal challenge the Area Office's findings that Appellant failed to meet all four of the exceptions to the nonmanufacturer rule. The letters in the record submitted by Appellant in its proposal fall far short from establishing that all fuel will be supplied from small refineries. Therefore, I find that Appellant fails to meet the burdens imposed by § 134.305(a)(3) and § 134.314. Further, OHA does not have the jurisdictional power to delete parts of the FAR as requested by Appellant, thus that request is also denied.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. 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).

CHRISTOPHER HOLLEMAN
Administrative Judge