

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

SIZE APPEAL OF:

Mystic Ventures Group, LLC,

Appellant,

Appealed From
Size Determination No. 3-2019-031

SBA No. SIZ-6006

Decided: May 21, 2019

APPEARANCES

Tenley A. Carp, Esq., Arnall Golden Gregory LLP, Washington, D.C., for Appellant

Steven J. Koprince, Esq., Shane J. McCall, Esq., Robert D. Kampen, Esq., Koprince Law, LLC, Lawrence, KS, for Salvadorini Consulting, LLC.

DECISION¹

I. Introduction and Jurisdiction

On February 28, 2019, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area III (Area Office) issued Size Determination No. 3-2019-031 concluding that Mystic Ventures Group, LLC (Appellant) is not eligible for award of the instant procurement. Appellant 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.

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.

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

II. Background

A. Solicitation and Protest

On November 21, 2018, the U.S. Department of Veterans Affairs (VA), Network Contracting Office 20, issued Request for Quotations (RFQ) No. 36C26019Q0063 for the lease of one mobile Computerized Tomography (CT) scanner. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Businesses (SDVOSBs), and assigned North American Industry Classification System (NAICS) code 334517, Irradiation Apparatus Manufacturing, and Product Service Code (PSC) W023 “Lease or Rental of Equipment — Ground Effect Vehicles, Motor Vehicles, Trailers, and Cycles.” The RFQ did not state that any waiver of the nonmanufacturer rule would apply to the procurement. Quotations were due January 3, 2019. On January 17, 2019, the CO announced that Appellant was the apparent awardee.

On January 24, 2019, Salvadorini Consulting Group, LLC (Salvadorini), an unsuccessful offeror, filed a protest challenging Appellant's size. Salvadorini alleged that Appellant is not in compliance with the nonmanufacturer rule because Appellant will supply a CT scanner manufactured by [XXXXXXXX], a large business, and because Appellant “is not primarily engaged in the retail or wholesale trade and it does not ‘normally sell the type if item being acquired,’ in this case mobile CT scanners, as required by 13 C.F.R. § 121.406(b)(1)(ii).” (Protest at 4.) The CO forwarded the protest to the Area Office for review.

B. Protest Response

On February 6, 2019, Appellant responded to the protest. Appellant asserted that there are four large businesses which dominate the market for imaging equipment, so “imaging equipment must come” from one of these four companies. (Protest Response at 3-4.) In Appellant's view, because “[e]very company that submitted a bid must use one of the four companies,” Salvadorini's protest creates the untenable result that “no one can bid and that would include this very protestor.” (*Id.* at 4.)

C. Area Office Proceedings

During the course of its review, the Area Office asked the CO to clarify “do you have a non manufacturer waiver for the item you are procuring or is it on the class waiver list? What is the [PSC] for this item.” (E-Mail from I. Bascumbe to K. Rhodes (Jan. 30, 2019).) The CO responded: “There is a class waiver in place for this NAICS. The PSC I used is W023 as I believe it to be a service.” (E-Mail from K. Rhodes to I. Bascumbe (Jan. 30, 2019).)

On February 22, 2019, the Area Office asked the CO to describe the customary industry practice for taking ownership or possession of a mobile CT scanner. The CO responded:

[A]ny small business offeror would need to contract with 2 companies in order to satisfy [the] requirement: a trailer company and a CT manufacturer (Phillips, Siemens, GE) and marry the two products together. I highly doubt any

small business would actually take physical possession of an actual CT and a trailer. I would presume any of the potential offerors would have the CT manufacturer and the trailer manufacturer work together to create a “mobile CT trailer” as one unit.

(E-mail from K. Rhodes to I. Bascumbe (Feb. 22, 2019).)

D. Size Determination

On February 28, 2019, the Area Office issued Size Determination No. 3-2019-031, sustaining the protest. The Area Office found that Appellant itself is a small business. (Size Determination at 7.) Nevertheless, Appellant is ineligible for award because it is neither the manufacturer of the end item being procured, nor does it qualify as a nonmanufacturer. (*Id.*)

The Area Office observed that the RFQ was assigned a manufacturing NAICS code. (*Id.* at 3, 5.) Appellant does not claim to be the manufacturer of the end item, so Appellant could be eligible for award only if it complies with the nonmanufacturer rule. (*Id.* at 3-4, citing 13 C.F.R. § 121.406(b)(1).)

The Area Office found that Appellant meets the first three elements of the nonmanufacturer rule. (*Id.* at 4.) Appellant does not, however, meet the fourth element, which requires that the prime contractor supply the end item of a small business manufacturer, processor or producer made in the United States, or obtain a waiver of this requirement. Appellant acknowledged that it will provide a CT scanner manufactured by [XXXXXX]. (*Id.* at 5.) Further, no waiver applies. The Area Office noted that “[t]here is no class waiver for [NAICS code] 334517, Irradiation Apparatus Manufacturing with a PSC code of W023,” and no individual waiver was requested or obtained for the instant RFQ. (*Id.* at 4-5.)

The Area Office reiterated that “[b]ecause the [VA] used a manufacturing NAICS code for this procurement the non manufacturer rule applies.” (*Id.* at 5.) According to 13 C.F.R. § 121.406(b)(4), though, the rental of an item is a service and should be treated as such in the application of the nonmanufacturer rule and the limitations on subcontracting. (*Id.*) The Area Office asserted that “the nonmanufacturer rule does not apply to the mobile CT scanner part of the requirement.” (*Id.* at 6.) Nevertheless, Appellant must still meet the performance of work requirements set forth in 13 C.F.R. § 125.6 for the services portion of the procurement. (*Id.*) Appellant here does not meet this requirement. (*Id.*)

The Area Office concluded that Appellant is ineligible for award of the instant procurement, as Appellant does not meet all of the requirements of the nonmanufacturer rule because it “is not supplying the end item of a small business manufacturer and there is no waiver for this procurement.” (*Id.*) The Area Office added that, had the VA classified this procurement as services instead of manufacturing, Appellant would not have complied with the limitations on subcontracting. (*Id.*)

E. Appeal

On March 15, 2019, Appellant filed the instant appeal. Appellant maintains that the Area Office clearly erred in using the limitations on subcontracting as the basis for its determination “as the clause is expressly solely within the jurisdiction of the contracting agency.” (Appeal at 4.) Further, the Area Office erred in finding that Appellant violated the nonmanufacturer rule. Appellant asserts that the assigned PSC was “a clear administrative mistake,” which the Area Office improperly disregarded in reaching its decision. (*Id.* at 4-5.)

Appellant first argues that the Area Office erred in treating the RFQ as if it were a services contract. (*Id.* at 7.) The Area Office compounded this error by analyzing Appellant's compliance with the limitations on subcontracting, which “is a matter of contractor responsibility for the procuring agency, not the SBA, to determine.” (*Id.* at 6, citing 13 C.F.R. § 125.6; *Size Appeal of CorTrans Logistics, LLC and Central Delivery Service*, SBA No. SIZ-4691, at 10-11 (2005); and *Size Appeal of SDS Int'l Inc.*, SBA No. SIZ-4541, n.3 (2003).)

With regard to the nonmanufacturer rule, Appellant acknowledges that it “is not the manufacturer of the CT scanner (nor the mobile trailer) at issue,” and therefore must comply with the nonmanufacturer rule. (*Id.* at 5.) The Area Office correctly found that Appellant meets the first three elements of the nonmanufacturer rule, but its conclusion regarding the fourth element was erroneous. (*Id.* at 7.) In particular, “[w]hile the Area Office accurately note[d] that no class waiver exists for NAICS code 334517 in combination with PSC [] W023, it fails to recognize that this must be a drafting error on the part of the procuring agency.” (*Id.*)

Appellant highlights that SBA has issued a class waiver of the nonmanufacturer rule for NAICS code 334517 when paired with PSC 6525 (“Imaging Equipment and Supplies: Medical, Dental, Veterinary”), and thus has recognized that there are no small business manufacturers of this type of equipment. (*Id.* at 7-8.) The CO, however, did not assign this combination of NAICS code and PSC to the instant RFQ, and thereby “effectively created a procurement contract that cannot be fulfilled” because no offeror could meet the fourth element of the nonmanufacturer rule on this procurement. (*Id.* at 8.) It is unjust to hold the CO's drafting error against Appellant, “especially when the wrong PSC code renders all small business offerors unable to meet the requirements of the Solicitation.” (*Id.*)

F. Response and Supplemental Response

On April 3, 2019, Salvadorini responded to the appeal. Salvadorini argues that Appellant has not shown reversible error in the size determination. Therefore, the appeal should be denied. (Response at 1.)

Salvadorini first argues that the Area Office correctly analyzed the nonmanufacturer rule and its four elements. (*Id.* at 4.) In doing so, the Area Office found that Appellant violated the nonmanufacturer rule by providing a mobile CT scanner manufactured by a large business without a waiver. (*Id.* at 5-6.) This alone, Appellant argues, is a sufficient basis to deny the appeal, particularly since the remainder of Appellant's arguments do not identify any clear error in the size determination. (*Id.* at 6.)

With regard to Appellant's contention that the CO included the wrong PSC in the RFQ, Salvadorini emphasizes that “protests of ‘alleged improprieties in a solicitation,’ including ambiguities or errors, are to be filed before tribunals other than OHA, such as the Government Accountability Office.” (*Id.* at 6, quoting 4 C.F.R. § 21.2(a)(1).) OHA therefore should dismiss this portion of Appellant's arguments. Even if OHA had jurisdiction to decide this issue, a challenge to the terms of a solicitation must be filed within 10 days after the impropriety was known or should have been known, and Appellant here did not timely file any such challenge. (*Id.* at n.3.) Alternatively, insofar as the appeal may be construed as taking issue with the NAICS code assigned to the RFQ, such an argument also would be untimely, as a NAICS code appeal must be brought within 10 calendar days after issuance of the solicitation. (*Id.* at 7.)

Salvadorini argues that the Area Office's “cursory” discussion of the limitations on subcontracting is, at most, “harmless error.” (*Id.*) Given that the Area Office had already determined that Appellant violated the nonmanufacturer rule, the limitations on subcontracting analysis did not affect the result of finding Appellant ineligible for the contract. (*Id.* at 7-8.)

On April 10, 2019, after its counsel reviewed the record under the terms of an OHA protective order, Salvadorini filed a supplemental response to the appeal. Salvadorini reiterates that Appellant proposed to provide a CT scanner manufactured by [XXXXXXX], a large business, without a waiver, in contravention of the nonmanufacturer rule. (Supp. Response at 1-2.) Salvadorini also maintains that the record confirms that Appellant's arguments regarding the NAICS code and PSC designations are untimely where Appellant did not previously dispute the designations in the RFQ. (*Id.* at 2.)

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

I find that the Area Office properly analyzed Appellant's compliance with the nonmanufacturer rule. As the Area Office recognized, the CO assigned a manufacturing NAICS code — 334517, Irradiation Apparatus Manufacturing — to the instant RFQ. Section II.A, *supra*. Under SBA regulations, a concern qualifies to provide manufactured goods for a small business set-aside if it is the manufacturer of the end items being procured, or of it meets certain nonmanufacturer exceptions. *See* 13 C.F.R. § 121.406(a). Appellant here concedes that it is not the manufacturer of the end item. Section II.E, *supra*. Accordingly, Appellant is eligible for award only if it complies with the four elements of the nonmanufacturer rule:

- (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 the 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 that Appellant meets the first three elements of the nonmanufacturer rule. Section II.D, *supra*. Appellant does not, however, comply with the fourth element of the nonmanufacturer rule, because Appellant proposed to supply a product manufactured by [XXXXXX], a large business, and no waiver applies to this RFQ. *Id.*

Appellant contends that a waiver of the nonmanufacturer rule does apply in this case. Specifically, Appellant highlights that SBA has issued a class waiver for NAICS code 334517 when combined with PSC 6525. Section II.E, *supra*. Although the CO here assigned NAICS code 334517 and a different PSC, W023, Appellant argues that the Area Office should have understood that this was a “drafting error” in the RFQ. *Id.*

Appellant's argument fails for several reasons. First, the record reflects that the CO intentionally selected PSC W023 for the RFQ. Section II.C, *supra*. I therefore cannot conclude that the assigned PSC was the result of a drafting error. Second, SBA regulations make clear that “[c]ontracting officers must provide written notification to potential offerors of any waivers being applied to a specific acquisition, whether it is a class waiver or a contract specific waiver,” and that if such notice is not provided, “then the waiver cannot be applied to the solicitation. This applies to both class waivers and individual waivers.” *See* 13 C.F.R. § 121.1206. Here, the instant RFQ made no mention any waiver of the nonmanufacturer rule. Section II.A, *supra*. As a result, no waiver applies to this procurement, irrespective of any drafting error in the RFQ. Third, as Salvadorini emphasizes in its Response, OHA lacks jurisdiction over disputes arising from an agency's conduct of a procurement. Rather, such arguments are reserved for bid protests brought before the U.S. Government Accountability Office or other similar forums. *E.g., Size Appeal of JEQ & Co., LLC*, SBA No. SIZ-5932, at 2 (2018). Accordingly, OHA is not the proper forum to adjudicate Appellant's allegations of a drafting error in the RFQ.

Appellant also argues that the Area Office erred in analyzing Appellant's compliance with the limitations on subcontracting. I agree with Appellant that the CO, rather than SBA, is responsible for ensuring compliance with the limitations on subcontracting, as provided under 13 C.F.R. § 125.6(e)(2). Nevertheless, Salvadorini is correct that the Area Office's discussion on this point was harmless, given that the Area Office had already determined Appellant is ineligible for award due to the nonmanufacturer rule. *See Size Appeal of CopaSat, LLC*, SBA No.

SIZ-5918, at 6 (2018) (explaining that “[a]n area office's error is harmless when rectifying the error would not have changed the result.”).

IV. Conclusion

Appellant has failed to establish clear error of fact or law in the size determination. Accordingly, I DENY the instant appeal. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge