

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

SIZE APPEAL OF:

Superior Optical Labs, Inc.,

Appellant,

RE: PDS Consultants, Inc.

Appealed From

Size Determination No. 1-SD-2020-24

SBA No. SIZ-6068

Decided: August 27, 2020

APPEARANCES

Elizabeth H. Connally, Esq., Connally Law, PLLC, San Antonio, Texas, for Appellant

David S. Gallacher, Esq., Emily S. Theriault, Esq., SheppardMullin, Washington, D.C.,
for PDS Consultants

DECISION

I. Introduction and Jurisdiction

On June 23, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area I (Area Office) issued Size Determination No. 01-SD-2020-24 concluding that PDS Consultants, Inc. (PDS) is a small business under the applicable size standard. On appeal, Superior Optical Labs, Inc. (Appellant) maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse it and find that PDS is other than small. For the reasons discussed *infra*, the appeal is DENIED, and the size determination is AFFIRMED.

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 Proposal

On September 26, 2019, the Department of Veterans Affairs (VA) issued RFP No. 36C24919R0105 (Solicitation) for prescription eyeglasses for veterans in Veterans Integrated Service Network (VISN) 9. The Contracting Officer (CO) set the procurement entirely aside for service-disabled veteran-owned small businesses and assigned North American Industry Classification System (NAICS) code 339115, Ophthalmic Goods Manufacturing, with a corresponding 1,000 employee size standard as the appropriate code for this procurement. Proposals were due October 30, 2019. (Amended Solicitation, at 1.)

PDS submitted its proposal on October 29, 2019. The proposal explains that PDS is the incumbent prime contractor, and that “[c]urrently, PDS operates over 100 optical stores and manufactures over 1,200,000 pairs of eyeglasses annually.” (Technical Proposal, at 3.) For the VISN 9 contract, “PDS will use its own optical labs and equipment to meet production requirements.” (*Id.*) More specifically, “PDS’ Kentucky manufacturing facility (Louisville) will be the primary manufacturing location for the VISN 9 eyeglasses requirement.” (*Id.*, at 4.)

B. Protest

On January 14, 2020, the CO announced that PDS was the apparent awardee of the contract. On January 16, 2020, Appellant filed a timely size protest challenging PDS’s size. The CO forwarded the protest to the Area Office for review.

Appellant protested PDS’s size under NAICS code 339115 as a Service-Disabled Veteran-Owned Small Business (SDVOSB) because PDS (1) is other than small under the ostensible subcontractor rule because PDS is unusually reliant upon and is thus affiliated with Allan Baker, Inc. d/b/a Korrekt Optical (Korrekt), a non-SDVOSB entity; (2) is other than small under the nonmanufacturer rule because due to its affiliation with Korrekt its size is in excess of 500 employees; and (3) PDS and Korrekt are affiliated under the totality of the circumstances. (Protest, at 1.) The CO forwarded the size protest to the SBA Area Office to determine if PDS is eligible as a small business for this award.¹

C. Size Determination

On June 23, 2020, the Area Office issued Size Determination No. 1-SD-2020-24 concluding that PDS is a small business for the instant procurement. (Size Determination, at 1, 6.)

¹ Due to a Government Accountability Office (GAO) protest, the instant protest was suspended pending the outcome of the Department of Veterans Affairs (VA) corrective action to re-evaluate the submitted proposals. On June 12, 2020, VA requested that the Small Business Administration continue to process the subject size protest and make a size determination of PDS. (Size Determination, at 4.)

The Area Office first addressed the issue of the date to determine PDS's size. Generally, SBA determines the size of a concern as of the date it submits its self-certification it is small as part of its initial offer, including price. (*Id.*, at 5; citing 13 C.F.R. § 121.404(a).) Since PDS's proposal was submitted on October 29, 2019, the Area Office determined PDS's size as of that date. (*Id.*) The Area Office then determined the protest was timely. (*Id.*)

The Area Office also determined that John Loosen and Richard Murray each own 50% of PDS. (*Id.*) John Loosen is the President of PDS and Richard Murray is the Vice President and Chief Executive Officer. (*Id.*) The Area Office found that PDS is the sole owner of Ferris Optical Inc. and I See U Optical, Inc. Furthermore, as of August 28, 2019, PDS became the 100% owner of Korrekt. (*Id.*, at 6.) As such, Ferris Optical Inc., I See U Optical, Inc. and Korrekt are subsidiaries of PDS. (*Id.*)

The Area Office then addressed documentation revealing that on August 28, 2019, the alleged subcontractor, Korrekt became the wholly owned subsidiary of PDS. (*Id.*) For the instant solicitation, PDS's proposal stated that it would be the manufacturer of the eyeglasses. (*Id.*) More specifically, PDS' Kentucky manufacturing facility will be the primary manufacturing location for the VISN 9 eyeglasses requirement, and contingency eyeglasses manufacturing and administrative lab support will be conducted by PDS's Florida lab. (*Id.*) Based on the material presented, the Area Office concluded that the nonmanufacturer rule is inapplicable. (*Id.*)

The Area Office then addressed the breakdown PDS provided of employee counts by pay period between October 6, 2018 and October 28, 2019 for PDS and each of its affiliates. (*Id.*) The Area Office determined that the average number of employees of PDS and its affiliates for the preceding completed twelve calendar months is less than the 1,000-employee size standard. (*Id.*) As such, the Area Office determined found PDS to be a small business for the instant procurement. (*Id.*)

D. Appeal

On July 8, 2020, Appellant filed the instant appeal asserting that the Area Office erred in determining that PDS is a small business manufacturer. (Appeal, at 1.)

Appellant first argues the Area Office failed to recognize that on October 29, 2019, PDS was not a manufacturer and that PDS was also not an eligible nonmanufacturer small business. (*Id.*, at 6.) Appellant relies upon the nonmanufacturer rule (13 C.F.R. § 121.406(b)), under which, in order to qualify as a small business provider of manufactured products, the contractor must be the manufacturer of the end item provided or otherwise comply with the requirements of the regulation. (*Id.*) Appellant notes that under the rule a manufacturer is the concern “which, with its own facilities, performed the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being required.” (*Id.*) Appellant notes there can only be one manufacturer of the end item being acquired, and the regulation sets out factors to evaluate to determine whether a concern is the manufacturer of the end item being acquired. (*Id.*, at 6-7; citing 13 C.F.R. § 121.406(b)(2).) Appellant then asserts there is no evidence the Area Office undertook such an evaluation. (*Id.*, at 7.) Appellant argues that the appropriate date for determining size was the date of the Proposal, which was also the

date that PDS was relying upon its subsidiaries (Korrek and Premium Optics) for subcontract support to manufacture the eyeglasses. (*Id.*) As such, Appellant argues that Korrek and Premium Optics are ostensible subcontractors. (*Id.*)

Appellant asserts PDS admitted it will not be the entity manufacturing the eyeglasses, because Korrek will provide the manufacturing requirements and the Area Office acknowledged that fact. (*Id.*, at 8.) Appellant argues that PDS can only qualify as a small business if it satisfies the requirements of the nonmanufacturer rule, because it is not the manufacturer of the eyeglasses. (*Id.*)

Appellant notes that the number of employees of a concern is calculated by adding the average number of employees of the concern to the average number of employees of any affiliate concern. (*Id.*, at 9; citing 13 C.F.R. § 121.106(b)(4)(i).) Appellant maintains the Area Office used the wrong size standard to determine PDS's size. The Area Office used the 1,000-employee size standard applicable to NAICS code 339115, rather than the 500-employee size standard applicable to the nonmanufacturer rule. (*Id.*) Because Korrek alone has over 500 employees and Korrek and PDS are affiliated by virtue of PDS's ownership of Korrek, Appellant asserts that PDS is other than small for this procurement because it exceeds the 500 employee size standard set forth in the nonmanufacturer rule. (*Id.*)

Appellant then argues that Korrek is a separate legal entity because Korrek is PDS's ostensible subcontractor. (*Id.*, at 10.) More specifically, Appellant argues that a subsidiary is a separate and distinct entity to the parent company, and in contract terms, the name of one company cannot be treated as that for both. (*Id.*) Under the general principles of affiliation, entities are affiliated with each other when one controls or has power to control, regardless of whether it is exercised. (*Id.*; citing 13 C.F.R. § 122.106(4).)

Appellant claims that OHA has recognized that when a contractor attempts to change its relationship with an affiliate, OHA has held the contractor was not a small business under the nonmanufacturer rule and reiterated that the issue was, “which firm will be performing the manufacturing.” (*Id.*, at 10; citing *Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815, at 11 (2017).)

Appellant argues that OHA has repeatedly held that changes of approach occurring after the date of final proposals have little, if any, bearing on determining compliance with the ostensible subcontractor rule. (*Id.*; citing *Size Appeal of Onapa Mgmt. Corp.*, SBA No. SIZ-5302, at 16 (2011); *Size Appeal of Earthcare Solutions, Inc.*, SBA No. SIZ-5183, at 6 (2011).) Further, Appellant explains the Area Office must base its determination on the relationship between the parties at the time of the offeror's proposal. (*Id.*; citing *Size Appeal of WG Pitts Co.*, SBA No. SIZ-5575 (2014).)

Appellant then argues that the initial step in an ostensible subcontractor analysis is to determine whether the prime contractor will self-perform the primary and vital requirements of the contract. (*Id.*; citing *Size Appeal of Innovate Int'l Intelligence & Integration, LLC*, SBA No. SIZ-5882, at 6 (2018).) Such “primary and vital requirements” consist of those associated with the principle purpose of the acquisition. (*Id.*; citing *Size Appeal of Santa Fe Protective Servs.*,

Inc., SBA No. SIZ-5312, at 10 (2012).) An ostensible subcontractor must be a subcontractor that is *not* a “similarly situated entity,” defined as “a subcontractor that has the same small business program status as the prime contractor.” (*Id.*, at 11; citing 13 C.F.R. §§ 121.103(h)(4); 125.1.) Appellant asserts that Korrekt is not similarly situated to PDS because it is not a SDVOSB. (*Id.*)

Appellant further argues that the Size Determination improperly takes at face value PDS's statement that it will manufacture the eyeglasses when the Area Office acknowledges that Korrekt is a subsidiary. (*Id.*) Additionally, Appellant claims the Size Determination erroneously concludes, without the required analysis, that PDS is a manufacturer and applies the size standard of 1,000 employees. (*Id.*)

E. PDS's Response

On July 24, 2020, PDS filed a response to the instant appeal. PDS maintains that it is the manufacturer and that the nonmanufacturer rule does not apply. (Response, at 3.) More specifically, PDS states that before submitting its proposal on October 29, 2019, PDS purchased Korrekt, including all Korrekt's manufacturing assets and leases as reflected in the Stock Purchase Agreement and the Bill of Sale and Assignment and Assumption Agreement which are both dated August 28, 2019. (*Id.*) PDS argues that since it is the eyeglass manufacturer under the Solicitation, the Area Office did not commit a clear error in reaching its conclusion. (*Id.*)

PDS notes that for size purposes, there is “only one manufacturer of the end item being acquired.” (*Id.*; citing 13 C.F.R. § 121.406(b)(2).) The manufacturer is 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. (*Id.*) The factors set forth in 13 C.F.R. § 121.406(b)(2)(i) determine whether a concern is the manufacturer. (*Id.*) PDS explains that the phrase “with its own facilities” includes leased facilities, citing *Size Appeal of Lynxnet LLC*, SBA No. SIZ-5971, at 11 (2018), (“in the absence of a requirement in the solicitation, the phrase ‘its own facilities’ in the regulation means that the contractor need only occupy and control the facilities, if not as the owner, then as the lessor or tenant. Thus, the fact ... facility will be leased has not meaning on the adequacy of the contractor's manufacturing facilities.”) So long as the lease is in place at the time of the final proposal, leasing the means of production is sufficient. (*Id.*, at 4; citing *Size Appeal of Technology Assocs., Inc.*, SBA No. SIZ-5814 (2017).)

The proposal was submitted on October 29, 2019, which PDS argues is the relevant date for determining the applicability of the nonmanufacturer rule. (*Id.*) On August 28, 2019, before submitting the proposal, PDS purchased Korrekt, including all its leases and assets. (*Id.*) Since the acquisition, PDS has possessed and controlled the facilities and assets required to manufacture eyeglasses. (*Id.*) PDS argues that Appellant's “proof” of the contrary, a printout from a website that had not yet been updated, does not undermine the reality that PDS owns the manufacturing equipment, and controls the leases and manufacturing facilities, despite continuing to use “Korrekt” as a retail trade name. (*Id.*) Furthermore, PDS argues that Appellant is simply wrong in stating Korrekt controlled the manufacturing facilities on October 29, 2019. (*Id.*, at 5.)

PDS claims that a variety of statements made in the appeal are false and misleading. (*Id.*) Additionally, PDS argues that Appellant fails to quote or cite language from the proposal stating that Korrekt would be the manufacturer, because such language does not exist. (*Id.*) PDS argues that the Area Office does not acknowledge that Korrekt would provide manufacturing requirements, as Appellant alleges. (*Id.*) To the contrary, PDS points to the Size Determination, where Area Office referenced the proposal stating that manufacturing would occur at PDS's Kentucky and Florida laboratories. (*Id.*; citing Size Determination, at 3.) Further, PDS asserts that "Premium Optics" is merely a brand name and not a separate legal entity or subsidiary and that there is no affiliation or subcontracting relationship with "Premium Optics." (*Id.*; citing Appeal, at 7.)

As of October 29, 2019, when PDS submitted its proposal, PDS maintains it was the manufacturer and did not intend to subcontract the manufacturing work to Korrekt (or Premium Optics). (*Id.*) PDS instead intended to be: (1) the sole entity adding value to the end item/ eyeglasses; (2) the sole entity manufacturing the eyeglasses; and (3) the company using its own facilities and equipment, production or assembly line processes; packaging and boxing operations; labeling of products; and product warranties per 13 C.F.R. § 121.406(b)(2)(i). (*Id.*) PDS, therefore, claims that the nonmanufacturer rule does not apply because PDS was the intended manufacturer on October 29, 2019. (*Id.*)

PDS argues that the Area Office correctly looked at NAICS code 339115 with a size standard of 1,000 employees. (*Id.*, at 7; citing Size Determination, at 3.)

PDS then addresses the ostensible subcontractor issue. PDS first asserts the ostensible subcontractor rule does not apply because it will not subcontract the work to Korrekt. (*Id.*, at 8.) Further, PDS argues the ostensible subcontractor rule does not apply to procurements such as the instant procurement, which are assigned a manufacturing NAICS code. (*Id.*; citing *CVE Protest of Superior Optical Labs, Inc.*, SBA No. CVE-157-P (2020)).

PDS further argues that even if Appellant was correct that Korrekt was performing the primary and vital requirements under the contract and was an ostensible subcontractor, PDS argues that would mean that PDS and Korrekt are treated as joint venturers, and are thus affiliated entities under 13 C.F.R. § 121.103(h)(4). (*Id.*) Since a joint venture is considered small if each firm is small under the contract's size standard, and both PDS and Korrekt are small under the contract's 1,000 employee size standard, even if Appellant's allegations are true, the end result aligns with the Area Office's decision. (*Id.*; citing 13 C.F.R. § 121.103(h)(3)(i); *see also Size Appeal of Lynxnet LLC*, SBA-5971 (2018).) Since joint venturers can perform manufacturing responsibilities, PDS argues that under Appellant's allegations there would be no grounds for reversal. (*Id.*)

As a factual matter, PDS argues it owns Korrekt and the manufacturing equipment formerly owned by Korrekt in addition to controlling the leases for Korrekt's former manufacturing facilities. (*Id.*, at 9.) As previously discussed, PDS purchased Korrekt on August 28, 2019, two months prior to submitting the proposal on October 29, 2019. (*Id.*) The proposal stated that PDS was the manufacturer, and since PDS did not intend to subcontract the work to

Korrek as of the date of its proposal, PDS argues that the ostensible subcontractor rule does not apply. (*Id.*; citing *Size Appeal of Tiger Enterprises, Inc.*, SBA No. SIZ-4647 (2004).)

F. SBA Response

On July 24, 2020, the SBA Office of General Counsel responded to the instant appeal. SBA attaches a copy of a U.S. Government Accountability Office (GAO) decision, *In the Matter of Superior Optical Labs, Inc.*, B-418618 (2020). The GAO decision references *Size Appeal of Mistral, Inc.*, SBA No. SIZ-5877 (2018), for the proposition that using another firm's facilities does not by itself trigger the nonmanufacturer rule. (SBA Response, at 1.) SBA maintains this is an accurate interpretation of OHA's statement in *Mistral* that a manufacturer “need only occupy and control the facilities, if not as an owner, then as a lessor or tenant.” (*Id.*; citing *Mistral*, at 12.)

SBA Office of General Counsel further argues that Appellant has not presented sufficient evidence to disturb the Size Determination. (*Id.*) More specifically, SBA argues that the Appellant's ostensible subcontractor analysis comes to the same result as the Area Office because if found to be an ostensible subcontractor, Korrek would be in a joint venture with PDS. (*Id.*) SBA argues that even if Korrek and PDS were affiliates, together they would still be under the contract's size standards. (*Id.*, at 2.) Furthermore, as parties to a joint venture can share manufacturing responsibilities and the joint venture will be considered the manufacturer under SBA's definition, SBA argues that Size Determination should be upheld. (*Id.*; citing *Size Appeal of Lynxnet, LLC*, SBA No. SIZ-5971 (2018).)

G. The Acquisition

In a Bill of Sale and Assignment and Assumption Agreement (Bill of Sale) dated August 28, 2019, PDS purchases all of the assets of Korrek. The document defines “assets” as “all of the assets, including, but not limited to leases, rights to control access and control property where manufacturing is taking place and the capital equipment necessary to manufacture.” (Bill of Sale, at 1.)

The Stock Purchase Agreement (Agreement) was also dated August 28, 2019. Under this Agreement, PDS agrees to purchase one hundred percent of the issued and outstanding stock in Korrek. PDS is purchasing all of Korrek's equity. (Agreement, at 1, 11.) The Agreement states that Korrek is primarily engaged in the business of “manufacture, distribution and sale of eyeglasses and related optical products, including operation of retail eyewear stores...” (*Id.*, at 1.) The Agreement specifically includes a warranty that leases pursuant to which Korrek uses or occupies real property are valid, in full force and effect, and that Korrek enjoys peaceful and undisturbed possession of the property. (*Id.*, at 22.)

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

The size status of a concern, including its affiliates, is generally determined as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation) which includes price. 13 C.F.R. § 121.404(a). However, for purposes of compliance with the nonmanufacturer rule (13 C.F.R. § 121.406(b)(1)) and the ostensible subcontractor rule (13 C.F.R. § 121.103(h)(4)), size status is determined as of the date of the final proposal revisions. 13 C.F.R. § 121.404(d). Because PDS submitted its proposal on October 29, 2019, and there were no final proposal revisions, PDS's size must be determined as of that date.

On August 28, 2019, prior to submitting its proposal, PDS purchased Korrect, and directly purchased all of Korrect's manufacturing facilities and assets, so that the equipment and leased premises were directly owned by PDS. (*Id.*) The details of the acquisition are in the Stock Purchase Agreement and the Bill of Sale and Assignment Agreement. Section II.G., *supra*. Thus, PDS directly owned and controlled all of the assets to be used to manufacture the eyeglasses. PDS would not be providing a product manufactured by Korrect, but by itself, nor would it have been subcontracting with Korrect. PDS would be performing the contract directly. *Size Appeal of Superior Optical Labs*, SBA No. SIZ-6066, at 7 (2020). For size purposes, there is “only one manufacturer of the end item being acquired.” 13 C.F.R. § 121.406(b)(2). The manufacturer is 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.” (*Id.*) Here, it is PDS, with its own facilities, that will perform the primary activities in transforming the inorganic or organic substances into the end item being acquired and intended to do so on October 29, 2019.

I therefore agree with PDS's contention on appeal that on October 29, 2019, PDS was to be the sole entity adding value to the end item, the sole entity manufacturing the eyeglasses, and the company using its own facilities and equipment, production or assembly line processes; packaging and boxing operations; labeling of products; and product warranties in accordance with 13 C.F.R. § 121.406(b)(2)(i).

In evaluating whether the nonmanufacturer or ostensible subcontractor rules apply, it is the proposal which is the most important evidence. *Size Appeal of OSG, Inc.*, SBA No. SIZ-5718, at 12 (2016); *Size Appeal of CWU, Inc.*, SBA No. SIZ-5118, at 12 (2010). Here, PDS's proposal explicitly states that it is PDS which will be manufacturing the eyeglasses. The proposal does not refer to Korrect or any other subcontractor. Therefore, the proposal makes it clear that PDS will perform the contract itself, without a subcontractor. This is supported by the fact that PDS purchased Korrect's leases and equipment, so it could directly perform the contract with what is now its own equipment and on its own premises. Thus, Appellant's allegations that PDS is in violation of the nonmanufacturer or ostensible subcontractor rules is completely meritless.

In any event, Appellant's allegation that PDS is violating the ostensible subcontractor rule is inapposite here, because the instant procurement was assigned a manufacturing NAICS code; such procurements are governed by the nonmanufacturer rule, 13 C.F.R. § 121.406:

In classifying the procurement as a manufacturing/supply procurement, the procuring agency must have determined that the “principal nature” of the procurement was supplies. As a result, any work done by a subcontractor on the services portion of the contract cannot rise to the level of being “primary and vital” requirements of the procurement, and therefore cannot be the basis of [f] affiliation as an ostensible subcontractor.

76 Fed. Reg. 8, 222, 8225 (Feb. 11, 2011). *See also Size Appeal of Marwais Steel Co.*, SBA No. 3884, at 5 (1994); *see also Size Appeal of Superior Optical Labs*, SBA No. SIZ-6066 (2020).

Additionally, while Appellant argues that there is no evidence to demonstrate that the Area Office provided an analysis under 13 C.F.R. § 121.406, I find to the contrary. It is clear in the size determination that the Area Office considered the rule. (Size Determination, at 5.) While the Area Office may not have specifically outlined its reasoning for concluding that PDS is the manufacturer of the end item, such analysis was not necessary since PDS acquired Korrekt, including all assets and leases. *Size Appeal of Superior Optical Labs*, SBA No. SIZ-6066, at 8.

IV. Conclusion

Appellant has failed to demonstrate clear error in the size determination. I, therefore, must DENY this appeal and AFFIRM the Size Determination. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge