

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

SIZE APPEAL OF:

AeroSage LLC,

Appellant,

RE: Foster Fuels, Inc.

Appealed From

Size Determination No. 2-2020-041

SBA No. SIZ-6075

Decided: October 13, 2020

APPEARANCES

David M. Snyder, President, AeroSage LLC, Tampa, Florida

C. William Rohrig III, Senior Vice President, Foster Fuels, Inc., Brookneal, Virginia

Matthew Vasquez, Esq., Office of Counsel, Defense Logistics Agency, Fort Belvoir,
Virginia

DECISION

I. Introduction and Jurisdiction

On June 22, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area II (Area Office) issued Size Determination No. 2-2020-041, finding that Foster Fuels, Inc. (Foster Fuels) is an eligible small business for the subject procurement. AeroSage LLC (Appellant), which had previously protested Foster Fuels' size, contends that the size determination is clearly erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand for a new size determination. 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.

II. Background

A. The RFP

On October 18, 2019, the Defense Logistics Agency (DLA) issued Request for Proposals (RFP) No. SPE605-20-R-0202 for the supply and delivery of petroleum fuel products, distillates, and residuals to the Department of Defense (DoD) and federal civilian agencies in Connecticut, Maine, Massachusetts, New Hampshire, New York, and Pennsylvania. The RFP was structured as a simplified acquisition of commercial items pursuant to Federal Acquisition Regulation (FAR) part 12 and subpart 13.5. According to the RFP, DLA planned to award fixed-price requirements contracts for each of 11 Contract Line Item Numbers (CLINs). (RFP at 5-10, 105.) The RFP advised that each CLIN would be evaluated and awarded separately on a lowest-price, technically-acceptable basis, considering technical capability and price. (*Id.* at 109.) The RFP was set aside entirely for small businesses. (RFP, Standard Form 1449.) Proposals were due November 18, 2019.

The Contracting Officer (CO) assigned North American Industry Classification System (NAICS) code 324110, Petroleum Refineries, to the RFP. SBA regulations provide that “[t]o qualify as small for purposes of [a] Government procurement [under NAICS code 324110], the petroleum refiner, including its affiliates, must be a concern that has either no more than 1,500 employees or no more than 200,000 barrels per calendar day total Operable Atmospheric Crude Oil Distillation capacity.” 13 C.F.R. § 121.201 fn.4. The RFP did not state that any waiver of the nonmanufacturer rule would apply to the procurement, nor did the RFP identify a Product Service Code (PSC) that would apply to the procurement as a whole or to individual CLINs.

B. Modification P00005

On March 13, 2020, DLA awarded CLINs 0007, 0008, and 0009 to Foster Fuels. Because Foster Fuels already held an existing contract, No. SPE605-18-D-8501, for the delivery of fuel within the same geographic area, the awards were accomplished through a modification to the existing contract. The combined estimated dollar value of the three CLINs was \$195,486.66. (Contract Modification P00005 at 2.) As a result of the modification, the estimated value of Foster Fuels' existing contract increased from \$860,159.91 to \$1,055,646.57. (*Id.*)

C. Protest

On March 18, 2020, Appellant, an unsuccessful offeror, filed a size protest challenging Foster Fuels' size. In its protest, Appellant alleged that Foster Fuels has at least 20 affiliates and more than 500 employees. Appellant highlighted various contracts recently awarded to Foster Fuels and contended that “[j]ust looking at the scale of simultaneous disaster relief, fuel support and delivery operations of [Foster Fuels'] multiple divisions throughout the country, it is clear that Foster [Fuels] cannot support this domina[nt] level of federal, state, and commercial performance without less than 500 employees and employees of affiliates.” (Protest at 4.) Indeed, Appellant continued, if each alleged affiliate is assumed to have “an average of just 10 employees,” this alone would add at least 200 employees to Foster Fuels' employee count. (*Id.*) Appellant further contended that, for the instant procurement, Foster Fuels will not supply the

products of a small domestic refinery, in contravention of the nonmanufacturer rule, 13 C.F.R. § 121.406. Appellant acknowledged that the nonmanufacturer rule does not apply to procurements below the simplified acquisition threshold, which currently is \$250,000, but contended that the dollar value of the instant procurement was \$1,055,646.57, and thus exceeded the simplified acquisition threshold. (*Id.* at 1.) The CO forwarded the protest to the Area Office for review.

D. Protest Response

On May 4, 2020, Foster Fuels responded to the protest, and submitted its completed SBA Form 355, Articles of Incorporation, tax records, and other documents. Foster Fuels explained that it is solely owned by Mr. Watt R. Foster, Jr. (Protest Response at 2.) Although Mr. Foster and other officers and directors of Foster Fuels do hold controlling interests in several businesses, those affiliates have a combined total of only seven employees. (*Id.*) Further, none of the affiliates are performing any work on the instant contract. (*Id.*) According to Foster Fuels, including the employees of its affiliates, Foster Fuels had fewer than 200 employees at the time of its proposal, well within the size standard assigned to the RFP. (*Id.* at 1-2.)

With regard to the nonmanufacturer rule, Foster Fuels conceded that it will not supply the products of a small domestic refinery. (*Id.* at 2.) However, Foster Fuels observed, in September 2018 SBA granted an individual waiver of the nonmanufacturer rule after concluding that there were no small domestic refineries that could meet DLA fuel requirements in this geographic region. (*Id.*) Moreover, DLA awarded the three CLINs at issue here through a modification to Foster Fuels' existing Contract No. SPE605-18-D-8501. (*Id.* at 3.) In Foster Fuels' view, it would be unreasonable for Foster Fuels to be “burdened with additional requirements the original Award either did not have to meet, or which have already been satisfied by the original Award.” (*Id.*)

E. Size Determination

On June 22, 2020, the Area Office issued Size Determination No. 2-2020-041, concluding that Foster Fuels is an eligible small business.

The Area Office first addressed Appellant's allegations pertaining to the affiliates and employees of Foster Fuels. In response to the protest, Foster Fuels did not dispute affiliation, but rather contended that the combined employees of Foster Fuels and its affiliates do not exceed the size standard. The Area Office agreed with Foster Fuels, based on the sworn SBA Form 355 and other documentation provided. (Size Determination at 2-3, 9.) Appellant's allegations to the contrary were “purely speculative” and unsupported by any evidence. (*Id.* at 3.)

The Area Office then turned to Appellant's allegations concerning the nonmanufacturer rule. The Area Office found that the nonmanufacturer rule is inapplicable here for three reasons. First, the nonmanufacturer rule applies only to small business set-asides, and the Area Office found no specific indication that the three CLINs awarded to Foster Fuels were, in fact, set aside. (*Id.* at 4-5.) Second, the nonmanufacturer rule does not apply to “small business set-aside acquisitions with an estimated value between the micro-purchase threshold and the simplified acquisition threshold (as both terms are defined in the [FAR].” (*Id.* at 5, quoting 13 C.F.R. §

121.406(c).) The instant RFP was issued under the simplified acquisition procedures of FAR part 13, which would not have been possible if the value of the procurement exceeded the simplified acquisition threshold. (*Id.* at 5-6.) Third, SBA has issued a class waiver of the nonmanufacturer rule for NAICS code 324110. (*Id.* at 7-8.) Although the instant RFP contained no notice that a waiver would apply, both Appellant and Foster Fuels nevertheless knew of the waiver. (*Id.* at 8.) “Further, as the class waiver was granted, it is clear that SBA has concluded that the [nonmanufacturer rule] should not apply to any set-aside solicitations under the applicable NAICS code regardless of value due to unavailability.” (*Id.*)

F. Appeal

On July 7, 2020, Appellant filed the instant appeal. Appellant argues that the Area Office incorrectly applied the nonmanufacturer rule, and failed to include the employees of all of Foster Fuels' affiliates in the total employee count. (Appeal at 9-12.)

Appellant complains, first, that the Area Office took more than 90 days to issue a size determination “misapplying the law and misrepresenting the facts.” (*Id.* at 11.) Appellant alleges that DLA, the Area Office, and Foster Fuels made “written statements which are false, fictitious, or fraudulent because they omit material facts that [they] have a duty to include in the statement.” (*Id.* at 3.) Appellant requests that the size determination be reversed, or that the matter be remanded to a different area office for a new size determination. (*Id.* at 12.)

Appellant contends that the Area Office clearly erred in concluding that the RFP was not a small business set-aside. (*Id.* at 12.) In Appellant's view, the RFP plainly was a set-aside, and the issue “is only made unclear by the misrepresentation and omission of material facts.” (*Id.*) Moreover, Appellant maintains, DLA misled the Area Office into concluding that the nonmanufacturer rule does not apply whenever simplified acquisition procedures are used. (*Id.* at 9.) Rather, Appellant maintains:

Regulation and law require call for exemption to [the nonmanufacturer rule] only when [simplified acquisition procedures] are used, the anticipated cost of the procurement will not exceed \$25,000 and the offeror will provide end products that [are] manufactured in the United States as stated in [FAR 19.50[5] (c)(5) and [13 C.F.R. part] 121 applicable at the time of publishing the original solicitation, and subsequent follow-on solicitations which this award was made.

(*Id.*)

Appellant highlights that 13 C.F.R. § 121.406 requires that “the end product furnished must be manufactured or produced in the United States or its outlying areas.” (*Id.* at 10.) Similar language is repeated in the FAR. Exceptions exist only when the value of the procurement is below the simplified acquisition threshold or if SBA has granted an individual or class waiver. (*Id.*) Appellant expresses concern that DLA is not properly adhering to these regulations because “[a] significant quantity of commercial ground fuel products in the distribution storage and terminal pipeline is from foreign located refineries including Canada, Mexico, and Venezuela.”

(*Id.*) Appellant questions whether “any small business domestic refineries even exist” that would be capable of meeting DLA's requirements. (*Id.* at 12.)

Appellant claims that the Area Office's employee calculations were erroneous because the Area Office relied solely on documentation from Foster Fuels, such as its SBA Form 355 and tax records. (*Id.* at 11.) Appellant renews its contentions that Foster Fuels has additional affiliates that should have been included in the employee count. (*Id.* at 11-12.)

G. Foster Fuels' Response

On July 20, 2020, Foster Fuels responded to the appeal. Foster Fuels denies that it made any false or inaccurate representations to the Area Office. (Foster Fuels' Response at 1-2.) Moreover, Foster Fuels reiterates that it “employed less than 200 employees during the timeframe of this bid, including all of the employees of the affiliated companies.” (*Id.* at 2.) As a result, no grounds exist to find that Foster Fuels is not small. (*Id.*)

H. DLA's Response

On July 22, 2020, DLA responded to the appeal. DLA argues that the Area Office correctly determined that Foster Fuels is a small business, and correctly found that the nonmanufacturer rule does not apply to this case. The appeal should therefore be denied.

With regard to the size of Foster Fuels, DLA maintains that the Area Office properly based its decision on tax records and the sworn SBA Form 355 in concluding that Foster Fuels is small. (DLA Response at 5.) Further, the Area Office appropriately gave greater evidentiary weight to Foster Fuels' sworn statements and records than to Appellant's unsupported accusations. (*Id.*) The appeal merely “regurgitates” baseless allegations from Appellant's protest, without supporting evidence or explanation. (*Id.*) As a result, Appellant has not met its burden of proving clear error in the size determination. (*Id.*, citing *Size Appeal of AeroSage LLC*, SBA No. SIZ-5841 (2017).)

DLA next contends that, although DLA disagrees with some of the Area Office's reasoning, the Area Office nevertheless correctly found that the nonmanufacturer rule is not applicable here. (*Id.* at 7-8.) DLA highlights that FAR 2.101 currently defines the simplified acquisition threshold as \$250,000, and this dollar threshold became effective in 2018 for DoD and its component agencies. (*Id.* at 2, citing Deviation 2018-O0018.) The instant RFP was a simplified acquisition of commercial items, consisting of 11 CLINs which would be evaluated and awarded independently, and the three CLINs awarded to Foster Fuels had a combined estimated dollar value of \$195,486.66. (*Id.* at 8.) Because the RFP was a simplified acquisition, and because the three CLINs, both individually and collectively, were below the simplified acquisition threshold, “[t]he award to Foster Fuels therefore falls within the exception to the nonmanufacturer rule.” (*Id.*)

DLA maintains that, although the Area Office correctly concluded that the nonmanufacturer rule did not apply in this case, the Area Office's reasoning was flawed in certain respects. (*Id.*) The Area Office posited that some CLINs may not have been set aside for

small businesses, but this is incorrect because the entire RFP was set aside. (*Id.*) The Area Office further suggested that the nonmanufacturer rule does not apply whenever simplified acquisition procedures are utilized, but this is true only if the dollar value of the procurement does not exceed the simplified acquisition threshold. (*Id.* at 9.) Notably, FAR 13.500 does permit the use of simplified acquisition procedures for procurements above the simplified acquisition threshold when a procuring agency is acquiring commercial items. (*Id.*) Lastly, the Area Office erred in its discussion of the class waiver. (*Id.*) Although SBA has promulgated a class waiver pertaining to NAICS code 324110, that waiver does not apply to liquid petroleum fuel products, such as found here. (*Id.*) Notwithstanding these errors, the Area Office ultimately reached the correct result by concluding that the nonmanufacturer rule does not apply to this case. (*Id.*)

Lastly, DLA contends that Appellant's arguments with regard to the timeliness of the size determination are not a valid basis to disturb the decision. OHA has held that Government officials are presumed to act in good faith. (*Id.* at 10, citing *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834 (2007).) Appellant's bare allegations that the Area Office and/or DLA may have acted improperly are not sufficient to overcome this presumption. (*Id.*)

I. Motion to Reply

On July 23, 2020, the date of the close of record, Appellant moved to reply to DLA's Response, and attached its proposed Reply. A reply is warranted, Appellant maintains, because DLA's Response "is misleading, withholds and misrepresents material facts, intentionally misapplies the law, and contains errors in fact and law." (Motion at 1.) DLA opposes the motion.

In OHA practice, a reply to a response generally is not permitted, unless OHA directs otherwise. 13 C.F.R. §§ 134.206(e) and 134.309(d). Here, OHA did not direct Appellant to file a reply, and the proposed Reply merely elaborates on points previously made in the appeal petition. Accordingly, Appellant's motion to reply to DLA's Response is DENIED. *E.g.*, *Size Appeal of Mali, Inc.*, SBA No. SIZ-5506, at 3 (2013).

J. Motion for Clarifications

On August 21, 2020, almost a month after the close of record, Appellant filed a "Motion for Clarifications" seeking "clarification of timely motion (July 23, 2020 4:56 PM ET) addressing errors of fact and law in [DLA's Response], clarification of law and status for pending expedited [Freedom of Information Act (FOIA)] requests (July 15, 2020), and clarification of protest documents available to and used in size determination." (Motion at 1.) Much of Appellant's Motion reiterates the same arguments raised in Appellant's appeal petition and in the proposed Reply. (*Id.* at 3-14.)

In OHA practice, a reply to a response generally is not permitted, unless OHA directs otherwise. 13 C.F.R. §§ 134.206(e) and 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, although styled as a request for "clarification," Appellant's Motion is in the nature of a proposed reply. As explained above, OHA did not direct Appellant to file a reply, nor has Appellant demonstrated that a reply is warranted in this case. Section II.I, *supra*. The instant Motion was filed well after the close of

record. Further, insofar as Appellant seeks guidance, or a ruling, related to FOIA requests, OHA lacks jurisdiction over such matters. *See generally* 13 C.F.R. part 102; 13 C.F.R. § 134.102. For these reasons, Appellant's Motion for Clarifications is DENIED.

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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

I find no merit to this appeal. Beginning with the issue of Foster Fuels' affiliates and employee count, the record reflects that Foster Fuels responded fully to Appellant's protest allegations, and submitted corroborating evidence including a sworn SBA Form 355 and tax records. Sections II.D and II.E, *supra*. Foster Fuels did not dispute affiliation, but rather contended that the combined employees of Foster Fuels and its affiliates do not exceed the size standard. Appellant's protest, on the other hand, offered no evidence concerning the employee count of Foster Fuels and its affiliates, beyond mere conjecture. Section II.C, *supra*. By regulation, an area office must give greater weight to “specific, signed, factual evidence” than to “general, unsupported allegations or opinions.” 13 C.F.R. § 121.1009(d). Accordingly, Appellant has not carried its burden of proving that the Area Office erred in its analysis of Foster Fuels' affiliates or employees.

Appellant's contention that the Area Office and/or DLA were motivated by bad faith likewise fails. Government officials are presumed to act in good faith, and this presumption “can only be overcome by clear and convincing evidence of personal animus, prejudice, or other irregular conduct.” *Size Appeal of Lukos-VATC JV, LLC*, SBA No. SIZ-5532, at 10 (2014) (quoting *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 11 (2007)). Appellant here has provided no credible evidence to overcome the presumption of good faith. While Appellant complains that the Area Office delayed in issuing the size determination, and that DLA selected Foster Fuels for the instant awards, Appellant has not established that such conduct was even improper, let alone motivated by bad faith.

Appellant's strongest arguments on appeal are that the Area Office erred in its consideration of the nonmanufacturer rule. The Area Office found that the nonmanufacturer rule did not apply to the instant case for three reasons, but I agree with Appellant that some aspects of the Area Office's reasoning were flawed. The Area Office determined that the three CLINs awarded to Foster Fuels were not set aside for small businesses, but this conclusion is contradicted by the text of the RFP, which stated that the RFP was set aside entirely for small businesses. Sections II.A and II.E, *supra*. The Area Office further found that a class waiver of

the nonmanufacturer rule applied to this RFP. Section II.E, *supra*. Under 13 C.F.R. § 121.1206, though, a waiver of the nonmanufacturer rule can apply only if offerors are expressly notified of the waiver in the solicitation, and the instant RFP did not indicate that any waiver of the nonmanufacturer rule was in effect. Section II.A, *supra*. Moreover, while it is true that SBA has promulgated a class waiver relating to NAICS code 324110, that class waiver does not extend to every procurement under NAICS code 324110, but only to those for “Refinery Gases made in Petroleum Refineries.” *See* 71 Fed. Reg. 24,889 (Apr. 27, 2006). The instant RFP was for liquid petroleum fuel products, not refinery gases, and thus does not appear to fall within the scope of the class waiver. Section II.A, *supra*.

Nevertheless, while Appellant raises some valid critiques of the Area Office's reasoning, the Area Office also found that the nonmanufacturer rule was inapplicable because the instant RFP was a simplified acquisition. SBA regulations stipulate that the nonmanufacturer rule does not apply to “a supplier under Simplified Acquisition Procedures.” 13 C.F.R. § 121.406(a)(2). More specifically, the nonmanufacturer rule “do[es] not apply to small business set-aside acquisitions with an estimated value between the micro-purchase threshold and the simplified acquisition threshold (as both terms are defined in the FAR at 48 CFR 2.101).” *Id.* § 121.406(c). In the instant case, as Appellant acknowledged in its protest, the simplified acquisition threshold is currently \$250,000. FAR 2.101. Although the simplified acquisition threshold at the time of Foster Fuels' self-certification was only \$150,000 for many procuring agencies, DoD and its component agencies, such as DLA, at that time enjoyed a FAR deviation (2018-O0018) which expressly set the simplified acquisition threshold at \$250,000. For purposes of the instant awards, then, the simplified acquisition threshold was \$250,000. The three CLINs awarded to Foster Fuels did not exceed \$250,000, either individually or collectively. Rather, those three CLINs had a combined dollar value of \$195,486.66. Section II.B, *supra*. The Area Office therefore correctly concluded that the nonmanufacturer rule did not apply to the instant awards. As a result, there was no requirement that Foster Fuels supply the products of a small domestic refinery.

In its protest, Appellant alleged that the value of the instant procurement was \$1,055,646.57, an amount which would exceed the simplified acquisition threshold. Section II.C, *supra*. This allegation, though, appears to refer to the total value of Foster Fuels' existing Contract No. SPE605-18-D-8501, not to the value of the CLINs awarded to Foster Fuels under the instant RFP. Sections II.B and II.C, *supra*. Moreover, Appellant overlooks that the instant RFP called for each CLIN to be evaluated and awarded independently. Section II.A, *supra*. Given the structure of this RFP — which essentially involved 11 separate awards — the relevant inquiry is whether the three CLINs awarded to Foster Fuels exceeded the simplified acquisition threshold, either individually or collectively. It is immaterial that DLA chose to make those awards through a modification to an existing contract.

Lastly, Appellant highlights an inconsistency between SBA regulations and a corresponding FAR provision. Specifically, whereas SBA's rules at 13 C.F.R. § 121.406(c) state that the nonmanufacturer rule does not apply to procurements below the simplified acquisition threshold, FAR 19.505(c)(5) instead suggests that the nonmanufacturer rule does not apply when simplified acquisition procedures are utilized and “[t]he cost [of the procurement] is not anticipated to exceed \$25,000.” While I do not disagree with Appellant that the two regulations are not consistent, FAR 19.505 itself directs the reader to SBA's rules at 13 C.F.R. § 121.406

“for further information.” The Area Office thus did not err in applying the version of the nonmanufacturer rule as set forth in SBA's regulations.

IV. Conclusion

Appellant has not shown reversible error in the size determination. Accordingly, the appeal is DENIED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge