

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

SIZE APPEAL OF:

Mission Analytics, LLC,

Appellant

RE: AGI International Inc.

Appealed From
Size Determination No. 04-2025-01

Solicitation No. FA268024Q4035

SBA No. SIZ-6325

Decided: December 12, 2024

APPEARANCE

Mike Winters, President, Mission Analytics, LLC, Falls Church, Virginia

DECISION

I. Introduction and Jurisdiction

On October 7, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) issued Size Determination No. 04-2025-01, dismissing the protest of Mission Analytics, LLC (Appellant) contending that AGI International Inc. (AGI) was not an eligible small business for U.S. Department of the Air Force issued Solicitation No. FA268024Q4035 the subject procurement. On appeal, Appellant contends the Size Determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. 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 15 days after 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.

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II. Background

A. Solicitation, Protest, and Size Determination

On August 15, 2024, U.S. Department of the Air Force issued Solicitation No. FA268024Q4035 for the upgrade of the 1st Helicopter Squadron Camera System. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran Owned Small Businesses (SDVOSBs) and designated North American Industry Classification System (NAICS) code 561621 — Security Systems Services (except Locksmiths), with a corresponding \$25 million annual receipts size standard, as the appropriate code. Proposals were due on September 16, 2024. On October 7, 2024, the Air Force awarded the contract to AGI. Appellant asserts it received a notice of award that same day. Appellant further asserts it made a number of requests for information from the procuring agency, and only received the information it requested on October 10, 2024. (Size Protest at 1.)

On October 15, 2024, Appellant protested the award, asserting AGI was ineligible because AGI “is not a manufacturer of the offered end products and therefore is required to meet the NMR [nonmanufacturer rule] requirements to be qualified as a nonmanufacturer.” (Protest, at 3). Specifically, Appellant argued the nonmanufacturer rule applies to this procurement under FAR 19.505(a)(2), which states that the nonmanufacturer rule applies to all awards under FAR Subpart 19.14, and the Solicitation lacks a nonmanufacturer rule waiver as required by 19.505(c)(4).

Appellant alleged that in AGI's offer none of the manufacturers for the listed equipment list are small business manufacturers, and so AGI is not in compliance with the rule.

On October 24, 2024, the Area Office dismissed the protest as not specific under 13 C.F.R. § 121.1007. The Area Office found that because this Solicitation has a services NAICS code designation the principal purpose of the procurement is services, not supplies. Therefore, the nonmanufacturer rule is not applicable to this procurement. Appellant's protest accordingly lacks an allegation that, if true, would be adequate grounds for the protest. The protest was accordingly non-specific. (Size Determination, at 2.).

B. The Appeal

On November 8, 2024, Appellant filed the instant appeal.

Appellant argues SBA erred in determining its protest was not sufficiently specific. Appellant asserts that the protest contained the following allegations and supporting facts:

- 1.) The solicitation was an SDVOSB set-aside, and referenced FAR 19.14.
- 2.) The solicitation contains no class or individual waiver of the nonmanufacturer rule.

- 3.) The total amount of the award was \$107,162 for the base year, and total equipment cost is \$60,695.53.
- 4.) The manufacturers Appellant identified in its protest as AGI's suppliers are known to be neither U.S. small businesses nor domestic manufacturers.
- 5.) AGI is not a manufacturer.

Appellant maintains its protest allegations are sufficient to establish a likelihood that AGI's offer does not meet the nonmanufacturer rule requirements of FAR 19.505(c). (Appeal at 2-3).

Appellant also asserts the Size Determination errs in relying upon the SBA regulations at Title 13 C.F.R. rather than the nonmanufacturer rule requirements in the FAR upon which Appellant relied in its protest. Appellant argues that the SBA Area Director is arguing 13 C.F.R. § 121.406 takes precedence over FAR 19.505(c) which it cited in its Protest. Appellant argues this is an argument about the merits of the case, it does not in any way establish that the size protest lacks sufficient or specific allegations and facts. (Appeal at 3).

Appellant further alleges there is a clear link between FAR 19.505(c) and 13 C.F.R. § 121.406(b)(3). If anything, the Area Office's reference to § 121.406(b)(3) establishes an inconsistency between the nonmanufacturer rules of FAR and SBA. Thus, there is no basis to dismiss the protest as non-specific because there are inconsistent rule sets. This very inconsistency between the two sets of rules is well-known to both entities, as FAR Case 2016-11 contains four different instances that acknowledge that FAR and SBA rules are inconsistent. Appellant argues FAR 19.505 is clear that a solicitation's NAICS code designation does not determine whether the nonmanufacturer rule is applicable. (Appeal at 4).

Appellant contends that if the SBA Area Director wishes to allege that FAR 19.505(c) is overruled by 13 C.F.R. § 121.406(b)(3), then Appellant should be afforded the opportunity to allege that the SBA regulation is overruled by 15 U.S.C. § 637(a)(17),¹ which makes no mention of NAICS. All this serves to underscore the broader point that Appellant's protest contains very specific allegations that, if true, establish that the nonmanufacturer rule applies to this Solicitation and the awardee is not in compliance with the rule and is therefore ineligible for this SDVOSB Set-Aside Award. (Appeal at 4-5).

Appellant further maintains that if OHA agrees its protest is specific, then the Area Director's Size Determination is premature under 13 C.F.R. § 121.1009(a)(2):

If a protest is pending under FAR subpart 33.1, the SBA Area Office will suspend processing a valid, timely and specific size protest. Once the procuring agency,

¹ Appellant cited to 13 U.S.C., but it is clear it meant the statute dealing with the nonmanufacturer rule.

GAO or the Court of Federal Claims issues a decision under FAR subpart 33.1, the SBA Area Office will recommence the size determination process.

Appellant maintains it has a FAR 33.103 protest pending for subject solicitation and award. Accordingly, Size Determination 04-2025-01 is premature and should be revoked. No Size Determination should be issued until the procuring agency issues a protest decision. Any subsequent Size Determination will establish a new 15-day period to appeal to OHA if required. (Appeal at 5).

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

SBA's regulations require that a size protest be sufficiently specific to provide reasonable notice to the protested concern of the grounds upon which its size is questioned. 13 C.F.R. § 121.1007(b). The protest must give some basis for the belief. A protest merely alleging that the concern is not small or is affiliated with unnamed other concerns does not provide adequate grounds for the protest. *Id.* The regulation includes examples of specificity or the lack thereof. The regulation provides that an allegation that a concern exceeds the size standard without setting forth a basis for the allegation is insufficiently specific. *Id.* at Example 3. An Area Office must dismiss an insufficiently specific protest. 13 C.F.R. § 121.1007(c).

Here, Appellant's protest is not sufficiently specific. Appellant based its size protest on the belief that AGI is not a manufacturer of the offered end products and therefore is required to meet the requirements of the nonmanufacturer rule to qualify as a nonmanufacturer.

However, the solicitation's designated NAICS code is 561621 — Security Systems Services. The assignment of a services NAICS code means that the principal purpose of the procurement is services, not supplies. 13 C.F.R. § 121.402(b). The regulation is clear that the nonmanufacturer rule is not applicable to a services procurement:

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).

While Appellant argues the SBA regulations conflict with the FAR, this is not true. The FAR explicitly states that the rule does not apply to contracts for services or construction. FAR 19.505(c)(1).

OHA addressed this issue in *Size Appeal of Encore Analytics, LLC*, SBA No. SIZ-5796 (2016), which held the nonmanufacturer rule does not apply to a services procurement. OHA quoted the regulation at 13 C.F.R. § 121.406(b)(3), and held:

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.

Encore at 5-6.

Appellant's reference to FAR 2016-011 is inapposite. That case addresses the Limitations on Subcontracting rule and is not applicable here. Similarly, Appellant's citation to 15 U.S.C. § 637(a)(17), the statute on the nonmanufacturer rule, is inapposite because the statute itself states the 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).

Accordingly, it is clear that the nonmanufacturer rule does not apply to services procurement, and that since the subject procurement here is a services procurement, the rule does not apply to this procurement. Therefore, the Area Office appropriately found that Appellant's protest did not raise an allegation that, even if true, would be the basis for a challenge to AGI's size and therefore dismissed the protest as insufficiently specific.

Appellant has failed to show clear error in the size determination. Accordingly, I must deny this appeal.

IV. Conclusion

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

CHRISTOPHER HOLLEMAN
Administrative Judge