

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

SIZE APPEAL OF:

Ira Green, Inc.,

Appellant,

RE: Iris Kim, Inc.

Appealed From
Size Determination No. 2-2011-138

SBA No. SIZ-5287

Decided: October 11, 2011

APPEARANCES

Brian A. Darst, Esq., Fairfax, Virginia, for Appellant

Jeanne T. Anderson, Cowardin & Kim PLC, Newport News, Virginia, for Iris Kim, Inc.

DECISION¹

I. Introduction and Jurisdiction

On August 24, 2011, the U.S. Small Business Administration's (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2011-138 finding that Iris Kim, Inc. (Iris Kim) is a small business for the procurement at issue. On September 8, 2011, Ira Green, Inc. (Appellant), the original protestor, appealed the size determination. For the reasons discussed below, the appeal is granted, and this matter is remanded to the Area Office for further consideration.

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

¹ This decision was initially issued on September 30, 2011, under a protective order to prevent the disclosure of confidential or proprietary information. On September 30, 2011, I issued an order for redactions directing each party to file a request for redactions by October 6, 2011, if that party desired to have any information redacted from the published decision. OHA has received no timely request from any party requesting that the original decision be redacted in any way. Thus, OHA now publishes the decision in its entirety.

appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protests

On June 3, 2011, the Contracting Officer (CO) for the U.S. Department of the Air Force issued Solicitation No. 11TC447 (RFQ) for chevrons and ribbons. The RFQ was set aside for small businesses, and the CO designated North American Industry Classification System (NAICS) code 314999, All Other Miscellaneous Textile Product Mills, with a corresponding size standard of 500 employees. Iris Kim certified that it is a small business when it submitted its offer on or about July 4, 2011.

On July 8, 2011, the CO selected Iris Kim for award. On July 15, 2011, Appellant learned of the award, and on July 22, 2011, Appellant filed a protest challenging Iris Kim's size. Appellant alleged that Iris Kim is not a small business for this procurement because Iris Kim does not manufacture the end item being acquired and cannot meet the requirements of the nonmanufacturer rule.

B. Size Determination

On August 24, 2011, the Area Office issued its size determination. Upon consideration of Appellant's protest and Iris Kim's response, the Area Office found that Iris Kim is not manufacturing the end items required by the procurement. However, the Area Office determined that Iris Kim is providing end items manufactured by two other domestic small businesses and meets the other requirements of the nonmanufacturer rule. 13 C.F.R. § 121.406(b). The Area Office explained that Iris Kim has far fewer than 500 employees, is a manufacturer or retailer, and derives a significant amount of revenue from NAICS code 314999. The Area Office also noted that only the CO may determine whether Iris Kim is responsible and capable of performing the solicitation requirements. The Area Office concluded that Iris Kim is an eligible small business for the procurement at issue.

C. Appeal Petition

On September 8, 2011, Appellant filed the instant appeal claiming the size determination is cursory and lacks “any rational basis.” (Appeal Petition 9.) Appellant first contends the Area Office improperly considered post-offer evidence from Iris Kim regarding the firm's ability to comply with the nonmanufacturer rule. Appellant contends that an offeror must prove compliance with the rule as of the date of its offer—here, July 4, 2011. 13 C.F.R. § 121.404(d); *Size Appeal of DynaLantic Corp.*, SBA No. SIZ-5125 (2010). Appellant claims the Area Office failed to require Iris Kim to prove that it complied with the rule as of the date of its offer, failed to link any of its findings to that date, and instead improperly allowed Iris Kim to present post-hoc evidence to satisfy the nonmanufacturer rule. Appellant also submits a declaration from the executive vice president of Vanguard Industries (Vanguard), one of the companies from which Iris Kim purports to obtain the manufactured end items for this

procurement. The declaration indicates that Iris Kim did not contact Vanguard until after the offer due date and that Iris Kim currently does not have a contract with Vanguard.²

Appellant next argues that Iris Kim cannot meet two of the four prongs of the nonmanufacturer test, specifically: (1) the nonmanufacturer must be “primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied” and (2) must “supply the end item of a small business manufacturer, processor or producer made in the United States.” 13 C.F.R. § 121.406(b)(ii), (iv). Appellant contends the Area Office never considered whether Iris Kim normally sells the items being acquired by the instant procurement. The Area Office indicated that Iris Kim sells products under the same NAICS code as that assigned to the procurement, but Appellant emphasizes that the NAICS code assigned to the procurement encompasses a wide variety of products. Thus, Appellant argues the Area Office should have specifically considered whether Iris Kim normally sells chevrons, ribbons, military awards, or other similar insignia. *See Size Appeal of Precision Standard, Inc.*, SBA No. SIZ-4858 (2007). Appellant notes that it provided evidence with its protest to support its argument that Iris Kim does not normally sell the types of items being procured. Appellant contends the Area Office's failure to consider this issue is clear error and requires reversal of the size determination.

Appellant also claims the Area Office failed to investigate whether Iris Kim would supply end items of a domestic small business manufacturer. Appellant contends that where, as here, there is no proposal, the Area Office must carefully investigate the facts at issue, and the acceptance of Iris Kim's conclusory assertions without any independent investigation constitutes reversible error. *See Size Appeal of Space Concepts, LLC*, SBA No. SIZ-5169 (2010). Appellant explains that only itself and one other manufacturer are currently certified by the U.S. Army Institute of Heraldry to manufacture several of the award ribbons required by the RFQ, and neither firm has agreed to sell its ribbons to Iris Kim or its alleged vendors. Appellant argues that despite its presentation of this information in its protest, the Area Office merely accepted Iris Kim's assertion that it would obtain the end items from another small business manufacturer. Appellant complains that the Area Office made no independent investigation as to where the items will actually be manufactured, but simply accepted that Iris Kim's alleged vendors are small business manufacturers in the United States based on each firm's Dynamic Small Business Search (DSBS) profile.

Appellant points out that the letter sent from the Area Office to Iris Kim at the outset of the size determination process requested a complete SBA Form 355 for the manufacturer of the end items. Appellant also points out that the size determination fails to indicate whether Vanguard or Conrad will actually manufacture the required end items and, if so, whether they

² With its Appeal Petition, Appellant submitted a Motion to Supplement the Record. Appellant seeks to admit the declaration of Vanguard's executive vice president and pages from the website of Conrad Industries, the other alleged manufacturer from which Iris Kim will obtain the end items for this procurement. Iris Kim opposes the motion. Because I am remanding this matter, it is unnecessary to rule upon this motion. *See Size Appeal of Mark Dunning Indus., Inc.*, SBA No. SIZ-5284, at 12 n.6 (2011). The Area Office may consider the evidence on remand. *See Size Appeal of TPMC-Energy Solutions Envtl. Servs.*, SBA No. SIZ-5109, at 7 (2010).

will be manufactured in the United States. Based upon information from Conrad's website, Appellant alleges Conrad's manufacturing facilities are located in Mexico and China. Appellant maintains the Area Office failed to conduct any analysis of these issues, and such failure is grounds for remand. *See Size Appeal of General Atronics Corp.*, SBA No. SIZ-4224 (1996). Appellant concludes that the size determination is flawed and should be reversed and remanded.

D. Iris Kim's Response

On September 26, 2011, Iris Kim filed its response to the appeal. Iris Kim first asserts that the appeal must be dismissed pursuant to 13 C.F.R. § 121.1101(b).³ Alternatively, Iris Kim contends the Area Office properly concluded that it is a small business for this procurement. Iris Kim notes the Area Office considered whether Iris Kim normally sells the type of item being procured and properly found that it does. Iris Kim also asserts “[t]here is no requirement that [Iris Kim] had received a binding commitment from the manufacturers prior to winning the procurement. It would be premature for [Iris Kim] to commit itself or a manufacturer before [Iris Kim] had even won the solicitation/bid.” (Response 3.)

Iris Kim also disputes Appellant's assertion that only two U.S. companies manufacture the end items required by the procurement. Iris Kim emphasizes that the Area Office agreed that its vendors are domestic small business manufacturers. Iris Kim submits that the declaration of Vanguard's executive vice president is unreliable hearsay and cannot be used to challenge Iris Kim's statements made in response to the protest allegations. Iris Kim argues that even if the executive vice president does not recall speaking with anyone from Iris Kim prior to the offer date, that fact does not prove that Iris Kim did not contact Vanguard through another sales representative. Iris Kim asserts its reliance on Vanguard's and Conrad's small business self-certifications was proper and was accepted by the Area Office. Iris Kim also points out that it never indicated it had a contractual relationship with Vanguard or Conrad; it only identified those firms as prospective end item manufacturers. Iris Kim requests that the appeal be dismissed based on the foregoing analysis.

III. Discussion

A. Standard of Review

The standard of review for this appeal is whether the Area Office based the size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office made a patent error of fact or law based on the record before it. It is Appellant's burden to prove, by a preponderance of the evidence, that

³ Iris Kim is incorrect on this point. Although 13 C.F.R. § 121.1101(b) formerly prohibited OHA from hearing contract specific appeals where, as here, the contract had been awarded, the regulation was recently amended and no longer contains such a restriction. 76 Fed. Reg. 5680, at 5683 (Feb. 2, 2011)(listing an effective date of March 4, 2011). The current 13 C.F.R. § 121.1101(b) reads: “OHA will review all timely appeals of size determinations.”

the Area Office committed an error. 13 C.F.R. § 134.314. Consequently, OHA may not disturb the Area Office's size determination unless the administrative judge has a definite and firm conviction that the Area Office made key findings of law or fact that are mistaken. *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

B. Analysis

To qualify as a small business concern for a small business set-aside contract for manufactured products, an offeror must be either the manufacturer of the end item (and manufacture the item in the United States), or supply the end item of a domestic manufacturer in compliance with the nonmanufacturer rule. 13 C.F.R. § 121.406(a), (b). A concern that is not the manufacturer is in compliance with the nonmanufacturer rule if: (1) it has 500 or less employees; (2) it is primarily engaged in the retail and wholesale trade and normally sells the type of item being supplied; (3) it takes ownership or possession of the end items with its own personnel, equipment, or facilities in a manner consistent with industry practice; and (4) it will supply the end item of a small business manufacturer made in the United States. 13 C.F.R. § 121.406(b)(1). A concern's size status for purposes of compliance with the nonmanufacturer rule is determined as of the date of its final proposal revision or its final bid. 13 C.F.R. § 121.404(d). Here, Iris Kim's final (and only) offer was submitted on July 4, 2001, so its size must be determined as of that date.

The Area Office found, on the basis of Iris Kim's statements and its Form 355, that Iris Kim is not the manufacturer of the end items and that it has less than 500 employees. Appellant does not dispute these conclusions, nor does Appellant dispute that Iris Kim will take possession of the end items with its own personnel and equipment. Appellant does dispute the Area Office's conclusion that Iris Kim is in compliance with the remaining two prongs of the test: that Iris Kim normally sells the type of item being supplied and that Iris Kim will supply an end item manufactured in the United States by a small business. I conclude the Area Office's determination that Iris Kim is in compliance with these elements is not supported by the record.

Ordinarily the best source to evaluate a challenged concern's manufacturing operations is the concern's own proposal. *Size Appeal of Fernandez Enters., LLC*, SB A No. SIZ-4863, at 7 (2007). Where, as here, there is no proposal in the record, it is particularly important for the Area Office to investigate how a challenged concern will perform the work required by the contract. *Size Appeal of Space Concepts, Inc.*, SBA No. SIZ-5169, at 5 (2010).

Here, the Area Office did not make sufficient inquiry into whether Iris Kim regularly sells the type of item being supplied in this procurement. The Area Office simply accepted Iris Kim's bare assertion that it does so. In an email dated August 18, 2011, the Area Office specifically inquired whether Iris Kim normally sells the type of item required by the procurement. In a second email of the same date, the President of Iris Kim responded: "Yes we do." Apparently, the Area Office accepted this statement without any further investigation. This was clear error. The Area Office is obligated to inquire into whether a challenged firm regularly sells the specific type of item being procured. *See Size Appeal of Precision Standard, Inc.*, SB A No. SIZ-4858, at 8-9 (2007) (noting, based on the facts of the case, that just because a contractor sells aircraft tires does not mean it also typically sells aircraft windows or aircraft engine parts).

The Area Office noted that a significant portion of Iris Kim's revenues are derived from the same NAICS code assigned to the procurement. However, as Appellant points out, the NAICS code is extremely broad and encompasses a wide variety of miscellaneous textile products. As in *Precision Standard*, simply because a firm may produce sleeping bags or fishing nets⁴ does not mean it produces military chevrons and ribbons.

If Iris Kim maintains that it does in fact regularly sell the type of item being acquired, and not merely items that fall within the same broad NAICS code, there must be some documentation in the form of advertising materials, price lists, website information, etc., that the Area Office could review to determine the accuracy of the assertion. On remand, the Area Office must require Iris Kim to produce some proof of the fact that it typically sells similar military chevrons, ribbons, and insignia to those required by this procurement.

With regard to whether Iris Kim will supply a product made in the United States by a small business manufacturer, the Area Office committed the same error. The Area Office simply accepted Iris Kim's bald assertions that it would do so. In its initial August 1, 2011, letter to Iris Kim notifying the firm of the size protest, the Area Office requested that Iris Kim file an SBA Form 355 for each of its manufacturers. In its initial response, dated August 10, 2011, Iris Kim asserted that it “intends to provide the end-item from another U.S. manufacturer.” In a subsequent letter, dated August 15, 2011, Iris Kim indicated that “[t]he manufacturer(s) are not prepared to submit SBA Form 355 at this time.” In an email dated August 16, 2011, the Area Office reiterated its request for a Form 355 for each manufacturer and explained that the manufacturers could submit the information directly to the Area Office. In a letter dated August 17, 2011, Iris Kim identified its alleged manufacturers, Vanguard and Conrad, and asserted that they are both small businesses. Iris Kim did not file a Form 355 for either firm, instead again noting that “the manufacturers are not prepared to submit SBA Form 355 at this time.”

Based upon this record, the DSBS profiles for Vanguard and Conrad, and the Central Contractor Registration (CCR) entries for Vanguard and Conrad, the Area Office somehow concluded that Iris Kim will supply an end item manufactured in the United States by a small business. Perhaps the CCR and DSBS entries offer a sufficient basis to conclude that Vanguard and Conrad are small business concerns. However, this information is undoubtedly insufficient to prove that Vanguard and Conrad will manufacture the end items required by the procurement in the United States. The Area Office offered no discussion or analysis regarding whether Vanguard and Conrad would manufacture the items and, if so, where the items would be manufactured. Instead, the Area Office accepted Iris Kim's mere assertions that the items would be manufactured in the United States, without any verifying documentation. The Area Office should have obtained some evidence, especially in the absence of each manufacturer's Form 355, that the items would be domestically manufactured. *See Space Concepts, Inc.*, SIZ-5169, at 5 (remanding for further investigation where the Area Office accepted “without thought or

⁴ The NAICS Manual index entries for these items refer the user to NAICS code 314999. Executive Office of the President, Office of Management and Budget, *North American Industry Classification System* 1126, 1316 (2007), available at <http://www.census.gov/eos/www/naics/>. I note that this example is strictly hypothetical because the record does not reflect what Iris Kim actually produces.

question” the challenged firm's assertion that it would manufacture the end item).

Iris Kim is correct that it was not required to obtain a binding commitment from its proposed manufacturers prior to award, but it should have presented evidence of its intent to supply end items of a small U.S. manufacturer before its offer date. 13 C.F.R. § 121.406(b)(1)(iii); *Size Appeal of Precision Lift, Inc.*, SBA No. SIZ-4876, at 12 (2007) (“SBA's regulations do not require manufacturing to be taking place at the time of offer; instead, 13 C.F.R. § 121.406(b)(1)(iii) provides that a concern qualifies as a nonmanufacturer if it ‘will supply the end item of a small business manufacturer or processor made in the United States Thus, objective evidence of the intent of [the challenged firm and its proposed manufacturer] concerning what they ‘will’ do must be demonstrated on or before [the challenged firm's] final proposal revisions.”). Here, Iris Kim presented no such evidence, and the Area Office made a conclusory finding that Iris Kim complied with the regulation. This was clear error.

Accordingly, I must remand this case to the Area Office for a new size determination, consistent with this opinion. The Area Office must obtain documentation or other evidence from Iris Kim that it is a regular dealer in the items to be procured and that it will supply an end item manufactured in the United States by a small business.

IV. Conclusion

The size determination was based upon clear errors. Accordingly, this appeal is GRANTED, and the matter is REMANDED to the Area Office for further consideration consistent with this decision.

CHRISTOPHER HOLLEMAN
Administrative Judge