

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

SIZE APPEAL OF:

B GSE Group, LLC,

Appellant,

Appealed From
Size Determination No. 3-2015-079

SBA No. SIZ-5679

Decided: September 17, 2015

APPEARANCE

Adam T. Duke, Esq., Bell, Davis & Pitt, P.A., Winston-Salem, North Carolina, for
Appellant

DECISION

I. Introduction and Jurisdiction

On August 13, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2015-079, finding that B GSE Group, LLC (Appellant) is not an eligible small business for the procurement at issue.

Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find Appellant to be eligible for the instant procurement. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

OHA decides appeals of size determinations 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 Protest

On June 2, 2015, the U.S. Department of the Air Force, Air Force Materiel Command (Air Force) issued Request for Quotations (RFQ) No. FA8126-15-Q-0153 for one 400 Hz

frequency converter. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 335312, Motor and Generator Manufacturing, with a corresponding size standard of 1,000 employees. The RFQ was structured as an acquisition of commercial items pursuant to Federal Acquisition Regulation (FAR) part 12.

On July 8, 2015, the CO announced that Appellant was the apparent successful offeror. On July 28, 2015, the CO initiated a size protest against Appellant. The CO noted that Appellant proposed a frequency converter manufactured by Piller USA, Inc. (Piller), a large business, and that there is no class waiver in place for frequency converters or for NAICS code 335312. The CO also observed that SBA had determined in an earlier size determination that Appellant was not eligible for award of a similar procurement because Appellant was not providing the end product of a small business. (Protest at 1, citing Size Determination No. 3-2015-066.)

B. Protest Response

On July 31, 2015, Appellant responded to the CO's protest. Appellant stated that Piller produces part of the converters, "and the remaining parts are additional subassemblies made from other companies." (Response at 1.) Appellant elaborated:

The finished product is produced with [Appellant's] logo and from [Appellant's] design utilizing an arrangement with mul[tiple] suppliers and specialized manufacturers. Products that are partially assembled are supplied to [Appellant] for final assembly, adjustments, and testing, which are directly performed by [Appellant] at a rental location facility.

(*Id.*) Appellant concluded that the majority of the work would be performed by small businesses and that Appellant is a kit producer. Accordingly, the Area Office should analyze whether Appellant is eligible for award as a kit assembler under 13 C.F.R. § 121.406(c). (*Id.* at 1-2.)

Attached to its protest response, Appellant submitted a document purporting to show the respective costs of Appellant and Piller in producing the frequency converter. (*Id.* at 3.) According to the document, once shipping and profit are excluded, less than 50% of the cost of the end item (\$10,300 of \$22,830) is attributable to Piller. The remaining \$12,530 is composed of Appellant's "engineering, final testing and adjustments to unit at facility," along with Appellant's facility rental costs. (*Id.*)

C. Size Determination

On August 13, 2015, the Area Office issued Size Determination No. 3-2015-079 finding that Appellant is not eligible for the instant procurement.

The Area Office explained that, to qualify for a small business set aside to provide manufactured products, the prime contractor either must manufacture the end item being procured or comply with the requirements for a nonmanufacturer, kit assembler, or supplier under simplified acquisition procedures. 13 C.F.R. § 121.406(a). The Area Office determined

that Appellant is not the manufacturer of the end item being procured. According to the Area Office, the most important part of the acquisition is the converter, which Piller will produce. Appellant, by contrast, is performing only minimal operations on the item being procured. As a result, Piller, not Appellant, is the manufacturer of the end item in question. (Size Determination at 4.)

The Area Office considered whether Appellant meets the requirements of the nonmanufacturer rule, which provides:

A firm may qualify as a small business concern for a requirement to provide manufactured products or other supply items as a nonmanufacturer if it:

- (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 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 found that Appellant meets the first three requirements, but not the fourth. Piller, the manufacturer of the end item, has more than 4,000 employees, and therefore exceeds the size standard associated with the NAICS code for this procurement. There is no waiver in place. As a result, Appellant does not meet the fourth element of the nonmanufacturer rule and is ineligible for award of the subject contract. (Size Determination at 3.)

The Area Office rejected Appellant's contention that the exception for kit assemblers should apply. The CO advised the Area Office that “the frequency converter is considered a commercial off the shelf product[;] . . . it is a piece of hardware that is delivered assembled and in full working condition meeting the specification of the solicitation.” (*Id.* at 4, quoting e-mail from N. Adam to I. Bascumbe (Aug. 4, 2015).) Further, the CO clarified, “[t]he government does not specify anything regarding a ‘kit’ or how assembly should be accomplished.” (*Id.*)

D. Appeal Petition

On August 28, 2015, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the Area Office committed errors of fact and law, so OHA should reverse the size determination.

Appellant argues that the Area Office should have determined whether Appellant is eligible for award under the exception for kit assemblers, 13 C.F.R. § 121.406(c)(1), rather than as a nonmanufacturer, 13 C.F.R. § 121.406(b). Appellant asserts that it is a small business concern because Appellant “does not exceed 500 employees, purchases items and packages them into a kit, and more than 50 percent of the total value of the kit and its contents is accounted for by small business.” (Appeal at 2.) Appellant contends that the frequency converter is a kit because Appellant “purchases certain parts of the frequency converter from [Piller]” and “supplies the remaining parts of the frequency converter.” (*Id.*) Appellant then assembles the finished kit and tests and adjusts it as needed. Therefore, Appellant should be eligible for award under the exception for kit assemblers.

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

SBA regulations provide that, when a procurement calls for manufacturing or supply of an end item and the procurement is set aside for small business, offerors must either be the manufacturer or producer of the end item, or must fall within certain “nonmanufacturer” exceptions. 13 C.F.R. § 121.406(a). In this case, the Area Office found that Appellant is not the manufacturer of the frequency converter, nor does Appellant comply with the nonmanufacturer rule because Piller, the manufacturer, is a large business. Appellant does not challenge the Area Office's findings that Piller is a large business and that Appellant does not comply with the nonmanufacturer rule. Rather, Appellant maintains that it qualifies for the procurement because Appellant meets the exception for kit assemblers.

This exception states:

(1) Where the manufactured item being acquired is a kit of supplies or other goods provided by an offeror for a special purpose, the offeror cannot exceed 500 employees, and 50 percent of the total value of the components of the kit must be manufactured by business concerns in the United States which are small under the size standards for the NAICS codes of the components being assembled. The offeror need not itself be the manufacturer of any of the items assembled.

(2) Where the Government has specified an item for the kit which is not produced by U.S. small business concerns, such item shall be excluded from the calculation of total value in paragraph (c)(1) of this section.

13 C.F.R. § 121.406(c); *see also* FAR 19.102(f)(2). Appellant argues that this exception is applicable here because, while Appellant will purchase portions of the frequency converter from Piller, Appellant will supply the remaining parts and will assemble them. Appellant's argument is unpersuasive for two reasons.

First, Appellant failed to demonstrate to the Area Office that Appellant will procure and assemble parts from multiple suppliers to produce the frequency converter. Appellant argued to the Area Office that Appellant will utilize parts from several suppliers, but Appellant's protest response did not identify any suppliers other than Piller, nor did Appellant attempt to show that those other suppliers were small businesses. Moreover, according to the cost breakdown accompanying Appellant's protest response, Appellant's contributions to the end item would consist of "engineering, final testing and adjustments to unit at facility," along with rental of a facility. Section II.B, *supra*. Notably, Appellant reported no expected costs for assembly or for the acquisition of parts from suppliers other than Piller. Based on this record, then, the Area Office could properly conclude that Appellant would have a minimal role in the manufacturing process, as Appellant offered no evidence that it would furnish parts from other suppliers, or that Appellant would engage in assembly of those parts.

Second, contrary to the premise of the appeal, the assembly of parts and components does not make a contractor a "kit assembler" under SBA regulations. Rather, provided that the modifications are more than minimal, such work would render the contractor the manufacturer. *See* 13 C.F.R. § 121.406(b)(2) (defining the "manufacturer" as the concern which "performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired"); *Size Appeal of Lanzen Fabricating North, Inc.*, SBA No. SIZ-4723, at 4 (2005) ("Assembly of components to produce the required end item is sufficient to designate the assembler as manufacturer of the end item.").

A closer review of the regulations provides further instruction as to the distinction between a manufacturer and a kit assembler. The FAR indicates that a kit assembler is a concern that "purchases items and packages them into a kit." FAR 19.102(f)(2). Likewise, an earlier iteration of SBA's exception for kit assemblers explained that:

The Government often purchases items in the form of kits such as, but not limited to, tool kits and survival kits which are not manufactured items but merely assemblages of separate manufactured items. Accordingly, a concern which purchases some or all of such items and packages them into kit form is considered to be a nonmanufacturer for size determination purposes.

13 C.F.R. § 121.3-8(c)(2)(ii) (1984).¹ Comparing these definitions of a "kit assembler" with the definition of a "manufacturer," the distinction between the concepts is clear. Although both

¹ Although SBA has since rephrased and redesignated the kit assembler exception, SBA has not expressed any intent to substantively change the definition of a kit assembler, or to abolish the distinction between a kit assembler and a manufacturer. 52 Fed. Reg. 32,870 (Aug.

obtain inputs from other firms, the kit assembler gathers a group of finished items and packages them together, without transforming the items themselves. An example of such a kit is a tool kit. A manufacturer, by contrast, does not merely collect separate parts and package them together. Instead, the manufacturer transforms those parts and substances into a new end item. In the instant case, the notion that Appellant is a kit assembler is meritless, because the Air Force is procuring one end item, a frequency converter, not a collection of separate items. Accordingly, the Area Office properly analyzed Appellant's contribution as a manufacturer rather than as a kit assembler.

It is worth noting that it is the procuring agency, not an offeror, which determines whether a "kit" is being acquired. Thus, in deciding whether the exception for kit assemblers applies, it is appropriate to examine the terms of the solicitation, and to give weight to the views of the procuring agency. Here, the RFQ did not characterize the frequency converter as a kit, and the CO advised the Area Office that "[t]he government d[id] not specify anything regarding a 'kit' or how assembly should be accomplished." Sections II.A and II.C, *supra*. The Area Office properly considered this information in concluding that this procurement is not for a kit.

IV. Conclusion

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

KENNETH M. HYDE
Administrative Judge