Cite as: *Size Appeal of CC Software, Inc.*, SBA No. SIZ-6328 (2024)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: CC Software, Inc., Appellant Appealed From Size Determination No. 05-2024-034	SBA No. SIZ-6328 Decided: December 19, 2024

APPEARANCE

James L. Ahlstrom, Esq., Parr Brown Gee & Loveless, P.C., Salt Lake City, Utah, for CC Software, Inc.

DECISION[1]

I. Introduction and Jurisdiction

On September 30, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination No. 05-2024-034, concluding that CC Software, Inc. (Appellant) is not eligible for award of the subject procurement. The Area Office found that Appellant is a small business, but is not compliant with the nonmanufacturer rule, 13 C.F.R. § 121.406. On appeal, Appellant maintains that the size determination is erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. 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 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.

[1] This decision was originally issued under the confidential treatment provisions of 13 C.F.R. § 134.205. No redactions were requested, and OHA therefore now issues the entire decision for public release.

II. Background

A. The RFP

On August 14, 2024, the U.S. Army Contracting Command (Army) issued Request for Proposals (RFP) No. W912NW24R0002 for "a turn-key automated Warehouse Management Solution (WMS) to manage Corpus Christi Army Depot's (CCAD's) inventory management and material handling operations." (RFP at 53.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 333248, All Other Industrial Machinery Manufacturing, with a corresponding size standard of 750 employees. (RFP, SF 1449.) The RFP was structured as a procurement of commercial items pursuant to Federal Acquisition Regulation (FAR) part 12. (*Id.*)

The RFP consisted of ten Contract Line Item Numbers (CLINs), with several sub-CLINs:

CLIN	Description
0001	WMS Software
0001AA	Design WMS Software Solution
0001AB	Development WMS Software Solution
0001AC	[Logistics Modernization Program (LMP)] Testing Software Solution
0001AD	Implementation of Software Solution
0002	Initial Design of New WMS
0003	Network Infrastructure
0004	WMS Solution Hardware
0004AA	High Density Robotics Storage Solution (HDRSS)
0004AB	Conveyance & Sortation
0004AC	Pallet & Item Dimensioner
0004AD	Material Handling Equipment
0005	Delivery of New WMS Equipment
0006	Assembly and Installation of WMS
0007	Testing, Integration, and Commissioning of WMS
0008	Training for WMS
0009	Item Unique Identification
0010	[Contract Data Requirements List (CDRL)]

(RFP at 4-13.) The RFP stated that the Army intended to award a single contract to the offeror with the lowest-price technically-acceptable (LPTA) proposal. (*Id.* at 20, 74.) The RFP also contained the following provision:

> Multiple Awards. The Government may accept any item or group of items of an offer, unless the offeror qualifies the offer by specific limitations. Unless otherwise

> provided in the Schedule, offers may not be submitted for quantities less than those specified. The Government reserves the right to make an award on any item for a quantity less than the quantity offered, at the unit prices offered, unless the offeror specifies otherwise in the offer.

(*Id.* at 18.)

Proposals were due September 12, 2024. (RFP, Amendment 0001.) Appellant submitted its proposal on September 12, 2024. On September 18, 2024, the CO announced that Appellant was the apparent awardee.

B. Protest and Responses

On September 19, 2024, Han-Tek, Inc. (Han-Tek), an unsuccessful offeror, timely filed a protest with the CO challenging Appellant's size. The protest alleged that Appellant is a software company that must rely upon a subcontractor or supplier for the WMS hardware. (Protest at 1.) Based on Appellant's website, Han-Tek asserted that Appellant likely intends to furnish WMS equipment manufactured by Dematic, which is not a small business. (*Id.* at 1-2.) The CO forwarded Han-Tek's protest to the Area Office for review.

On September 23, 2024, Appellant responded to the size protest. Appellant denied that it will partner with Dematic for this procurement. (Response at 1-2.) Appellant further contended that there is "[o]nly one automated storage system on the open market" that would meet the RFP's requirements. (*Id.* at 4.) This equipment is made by a Norwegian company, AutoStore Systems (AutoStore). (*Id.*) Appellant stated that, if selected for award, it intended to request a waiver of the nonmanufacturer rule under FAR 19.505(c)(4)(B). (*Id.*)

On September 25, 2024, in response to an inquiry from the Area Office, Appellant submitted additional information as to its compliance with the nonmanufacturer rule. Appellant renewed its claims that "[i]f [Appellant's] proposal is accepted, we w[i]ll request a waiver of such requirement pursuant to [13 C.F.R. § 121.406(b)(5)] as Autostore Systems is the only manufact[ur]er of these systems world wide." (Supp. Response at 2.) Appellant added that "[a]s proposed, the total cost of the systems is $16.4 [million]" and "the storage grid is estimated to be $6.5 [million] or 39%." (*Id.*) Appellant maintained that it would be contributing to the proposed solution by "connecting the storage machines to the upper level enterprise systems," and by "connecting to, controlling, and directing all of the physical components of one or more automated storage systems installed on a campus." (*Id.*)

Appellant provided the Area Office a copy of its proposal. Appellant's proposed total price was $16,242,331.10. (Appellant's Proposal, Part I at 4-13.) Appellant proposed a price of $7,756,822 for CLIN 0004, WMS Solution Hardware. (*Id.* at 8.)

C. Size Determination

On September 30, 2024, the Area Office issued Size Determination No. 05-2024-034, finding Appellant ineligible for award because Appellant is not the manufacturer of the end

items. (Size Determination at 6.) Appellant submitted its offer including price on September 12, 2024, so the Area Office used this date to determine Appellant's size and compliance with SBA regulations. (*Id.* at 2-3, citing 13 C.F.R. § 121.404(a).)

The Area Office first recited how a concern's size is calculated in line with 13 C.F.R. § 121.106. (*Id.* at 3-4.) After reviewing the information provided by Appellant, the Area Office determined that Appellant does not exceed the applicable 750-employee size standard. (*Id.* at 4.) Appellant therefore is a small business. (*Id.*)

Next, the Area Office considered "whether [Appellant] is the manufacturer of the end item." (*Id.*, quoting 13 C.F.R. § 121.406(b)(2)(i).) The Area Office explained that, in assessing this question, SBA considers:

> (A) The proportion of total value in the end item added by the efforts of the concern, excluding costs of overhead, testing, quality control, and profit;
>
> (B) The importance of the elements added by the concern to the function of the end item, regardless of their relative value; and
>
> (C) The concern's technical capabilities; plant, facilities and equipment; production or assembly line processes; packaging and boxing operations; labeling of products; and product warranties.

(*Id.* at 5, quoting 13 C.F.R. § 121.406(b)(2)(i).) The Area Office noted that Appellant conceded that it is not the manufacturer of the equipment for this procurement, and that, according to Appellant, AutoStore is the only producer of the requested grid storage systems. (*Id.*)

With regard to the first element of the test at § 121.406(b)(2)(i), the Area Office reviewed Appellant's proposal and subcontract agreements and found that "[t]he proportion of total value added by [Appellant] to the end item amounts to approximately 39% of the contract when excluding costs of overhead, testing, quality control, and profit." (*Id.*) Thus, the Area Office reasoned, Appellant would contribute some value to the end product, but less than a majority. (*Id.*) The Area Office found that Appellant also did not satisfy the second factor since AutoStore manufactures the WMS hardware, and Appellant additionally intends to subcontract a majority of the integration work. (*Id.*) Lastly, the Area Office found the third element inapplicable since "this is the manufacturing of software known as Army Contract Writing System for a new warehouse management system." (*Id.*)

Based on the above three-factor analysis, the Area Office found that Appellant is not the manufacturer of the end items and therefore is ineligible for the award. (*Id.* at 6.) The Area Office also noted that, although it was alleged in Han-Tek's protest, the ostensible subcontractor rule does not apply here since a procurement assigned a manufacturing NAICS code is instead analyzed under the nonmanufacturer rule. (*Id.*, citing *Size Appeal of Marwais Steel Co.*, SBA No. 3884 (1994).)

D. Appeal

On October 15, 2024, Appellant filed the instant appeal. Appellant contends that the Area Office erred in its analysis by incorrectly applying 13 C.F.R. § 121.406(b) and by failing to consider 13 C.F.R. § 121.406(d). (Appeal at 10.) In the appeal, Appellant describes itself as a "United States based, small, Veteran-owned software and automated system integrator." (*Id.* at 2.)

Appellant highlights that, in its discussion of 13 C.F.R. § 121.406(b), the Area Office stated that it reviewed Appellant's proposal and subcontract agreements. (*Id.* at 10.) Appellant, however, only submitted expired subcontracting agreements for the Area Office's review. (*Id.*) Appellant contends that these outdated agreements should have had no relevance to the subject procurement. (*Id.*) The Area Office, according to Appellant, also misread Appellant's proposal and protest response. (*Id.* at 11.) Appellant informed the Area Office that the hardware provided by AutoStore account for 39% of the total contract price. (*Id.*) The Area Office incorrectly found the opposite — that Appellant's added value to the contract is 39%. (*Id.*) Further evidence of error and confusion by the Area Office can be seen in its assertion that the procurement is for "manufacturing" of Army Contracting Writing System (ACWS) software. (*Id.* at 12.) The procurement actually is for a Warehouse Management Solution (WMS), which is completely unrelated to the ACWS. (*Id.*)

Appellant next argues that the Area Office should have considered whether Appellant qualifies as a nonmanufacturer under the exception for "multiple item acquisitions" at 13 C.F.R. § 121.406(d). (*Id.*) Appellant urges that this section could apply here because the RFP requested pricing for ten separate CLINs and eight sub-CLINs. (*Id.*) Additionally, a clause in the RFP reserved the right for the Army to make separate awards, and the RFP only requested pricing per CLIN rather than a total contract value. (*Id.* at 13-14.) The Army therefore evidently considered the procurement a "multiple item acquisition." (*Id.* at 14.) If this provision does apply, Appellant contends that it should qualify as a nonmanufacturer since its only large business subcontractor, AutoStore, is responsible for less than 50% of the estimated contract value. (*Id.*)

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

Appellant correctly observes that the Area Office committed certain errors in its analysis. These errors ultimately were harmless, though, because the Area Office properly concluded that

Appellant is ineligible for award of the instant procurement due to failure to comply with nonmanufacturer rule. Accordingly, Appellant has shown no valid reason to overturn the size determination, and the appeal must be denied.

As the Area Office recognized, the instant procurement was assigned a manufacturing NAICS code — 333248, All Other Industrial Machinery Manufacturing — and was set-aside entirely for small businesses. Section II.A, *supra*. Under these circumstances, the prime contractor either must be the manufacturer of the end items being procured, or must qualify as a "nonmanufacturer." 13 C.F.R. § 121.406(a); *Size Appeal of Mystic Ventures Grp., LLC*, SBA No. SIZ-6006 (2019).

Here, in response to Han-Tek's protest, Appellant acknowledged that it is not the manufacturer of the requested warehouse machinery. Section II.B, *supra*. Indeed, according to Appellant, there is "[o]nly one automated storage system on the open market" that meets the RFP's requirements, and this equipment is manufactured solely by AutoStore, a large Norwegian company. *Id.* In light of Appellant's admissions, then, it was unnecessary for the Area Office to have conducted any detailed analysis under 13 C.F.R. § 121.406(b)(2)(i), which sets forth a three-factor test for "determining whether a concern is the manufacturer of the end item." Instead, since there was no dispute that AutoStore, rather than Appellant, is the manufacturer of the equipment, the Area Office should have focused on whether Appellant, the proposed prime contractor, might nevertheless still be eligible for award as a nonmanufacturer.

SBA regulations specify that, in order for a prime contractor to qualify as a nonmanufacturer for a set-aside procurement of supplies or manufactured items, the prime contractor must meet the following four factors:

> (i) Does not exceed 500 employees (or 150 employees for the Information Technology Value Added Reseller exception to NAICS Code 541519, which is found at § 121.201, footnote 18);
>
> (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).

Here, the Area Office found that Appellant meets the first factor since it has fewer than 500 employees. Section II.C, *supra*. The Area Office should have proceeded to address whether Appellant meets the remaining three factors, but the Area Office's failure to do so was harmless, because Appellant plainly does not meet any of the remaining factors, nor did Appellant even

attempt to argue that it is compliant with these criteria. Section II.B, *supra*. The second factor requires that the prime contractor regularly "sell items of the same type being procured to qualify as a nonmanufacturer." *Size Appeal of Birdon Am., Inc.*, SBA No. SIZ-6243 at 12 (2023) (citing *Size Appeal of Sea Box, Inc.*, SBA No. SIZ-5881 at 10 (2018)). Appellant, however, does not purport to be a regular purveyor of warehouse machinery, and instead describes itself as a "software and automated system integrator." Section II.D, *supra*. The second factor thus is not met. The third factor is not met because Appellant did not show, or even claim, that it would take ownership or possession of the equipment. Section II.B, *supra*. Lastly, the fourth factor also is not met, because by Appellant's own admission, the actual manufacturer of the machinery, AutoStore, is neither a small business nor based in the United States. *Id.* Accordingly, Appellant does not qualify as a nonmanufacturer under 13 C.F.R. § 121.406(b)(1), as it fails to meet three of the four criteria.

In its communications with the Area Office, Appellant essentially conceded that it does not qualify as a nonmanufacturer, and stated that it instead intended to seek a waiver of the nonmanufacturer rule. Section II.B, *supra*. This argument reflects misunderstanding of the waiver process. Under SBA regulations, the procuring agency — not the prime contractor — is responsible for requesting a waiver of the nonmanufacturer rule for a particular procurement, and any such request then must be approved by SBA. 13 C.F.R. § 121.1204(b). Moreover, the procuring agency must specify any applicable waivers in the solicitation at the time the solicitation is issued. 13 C.F.R. § 121.1206(a). Absent such notice, "the waiver cannot be applied to the solicitation." 13 C.F.R. § 121.1206(b). Here, there is no indication that the Army requested, or that SBA approved, any waiver of the nonmanufacturer rule for this procurement, and the RFP in any event did not identify any applicable waivers of the nonmanufacturer rule. Section II.A, *supra*. Accordingly, there is no possibility that a waiver of the nonmanufacturer rule could apply at this stage of the acquisition.

On appeal, Appellant highlights that the Area Office performed an incomplete analysis of the four elements of the nonmanufacturer rule, and complains that the size determination is marred by factual errors. Sections II.C and II.D, *supra*. The Area Office, for example, at one point inaccurately described the procurement as being for contract-writing software rather than warehouse equipment. *Id.* While it is true that the size determination was not perfect, OHA has long held that an error is harmless when "rectifying the error would not have changed the result." *Size Appeal of Lukos, LLC*, SBA No. SIZ-6047, at 17 (2020) (citing *Size Appeal of Melton Sales & Serv., Inc.*, SBA No. SIZ-5893, at 14 (2018) and *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850, at 17 (2017)). Here, given that Appellant plainly is not the manufacturer of the end items and cannot qualify as a nonmanufacturer, Appellant has not shown that any misstatements by the Area Office might have had the potential to alter the outcome of the case.

Finally, Appellant contends that the Area Office erred by neglecting to address whether the exception for "multiple item acquisitions" at 13 C.F.R. § 121.406(d) should apply to this case. This argument fails for two reasons.

First, during the size review, Appellant did not attempt to argue that the instant procurement should be classified as a multiple item acquisition. Section II.B, *supra*. As a result,

the Area Office "cannot have 'erred' by failing to address information or arguments that were never presented to it in the first instance." *Size Appeal of Serviam Constr., LLC*, SBA No. SIZ-5872, at 8 (2017) (quoting *Size Appeal of DefTec Corp.*, SBA No. SIZ-5540, at 7 (2014)); *see also Size Appeal of ASI-SUMO JV, LLC*, SBA No. SIZ-5594, at 5 (2014); *Size Appeal of EASTCO Bldg. Servs., Inc.*, SBA No. SIZ-5437, at 7 (2013) ("Appellant failed to inform the Area Office of such inter-affiliate transactions, or to prove their validity. Appellant may not now argue on appeal what it should have argued to the Area Office.").

Second, the regulation Appellant references, 13 C.F.R. § 121.406(d), is not relevant to the instant case. The regulation addresses situations where a single solicitation calls for multiple manufactured items, and only some of those items are manufactured by small businesses. Here, while the RFP is divided into several CLINs, only one is for manufactured products: CLIN 0004, WMS Solution Hardware. Section II.A, *supra*. The remaining CLINs are for services such as design of the WMS, and delivery, installation, and testing of the equipment. *Id.* Moreover, Appellant itself concedes that all of the equipment in question will be manufactured by AutoStore, a large business, and none by small businesses. Section II.B, *supra*. Even assuming this were a "multiple item acquisition," then, the exception at 13 C.F.R. § 121.406(d) would not apply since small businesses will not be producing 50% or more of the manufactured items.

IV. Conclusion

Appellant has not demonstrated reversible error of fact or law in the size determination. The appeal therefore 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