

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

SIZE APPEAL OF:

Batteries Plus of Sumter, LLC

Appellant

Appealed from
Size Determination No. 3-2008-41

SBA No. SIZ-4980

Decided: August 7, 2008

APPEARANCE

Robert Wazney, Batteries Plus of Sumter, LLC, Sumter, South Carolina, for Appellant.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

The Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

On December 5, 2007, the Defense Logistics Agency (DLA), Defense Supply Center Richmond, issued the Solicitation No. SPM4L1-08-T-0653 for battery storage. The Contracting Officer (CO) issued the solicitation as a total small business set aside and assigned North American Industry Classification System (NAICS) code 335911, Storage Battery Manufacturing, with a corresponding 500 employees size standard. The solicitation closed on December 19, 2007. The CO awarded the contract to Batteries Plus of Sumter, LLC (Appellant) on December 27, 2007.

On January 2, 2008, Comlink Wireless Technologies (Comlink) filed a protest with the CO alleging Appellant is listed as a large business on the Central Contractor Registration database. Additionally, Comlink asserted Appellant is not an authorized reseller of Motorola products and that Appellant could not be providing the NTN8297AR original battery based on the quoted pricing. Comlink states Appellant may be providing a non-approved or surplus product in violation of the contract. On May 1, 2008,¹ the CO forwarded the protest to the Small Business Administration's Office of Government Contracting, Area III (Area Office), in Atlanta, Georgia.

A. The Size Determination

On May 15, 2008, the Area Office issued Size Determination No. 3-2008-41 (size determination) finding Appellant other than small for this procurement because it is not providing a product that is manufactured in the United States.

The Area Office noted Appellant is a franchisee. The Area Office found the franchise agreement does not impose unacceptable control provisions and Appellant is not affiliated with the franchisor, Batteries Plus LLC, located in Hartland, Wisconsin. Additionally, the Area Office stated the size determination does not address Comlink's concerns about whether Appellant is providing an approved product because that is a responsibility issue that needs to be addressed by the CO.

The Area Office noted Appellant provided a May 8, 2008 email from Motorola stating the battery being supplied under the procurement is assembled in Mexico and, later, Appellant submitted a May 13, 2008 email from Motorola indicating the battery is assembled in Japan. The Area Office stated that DLA's request for quotation incorporates simplified acquisition procedures and the Area Office noted that the bid for this procurement was \$18,832.60. Thus, in accordance with 13 C.F.R. § 121.406(d), the Area Office recognized that Appellant "need not supply the end product of a small business concern as long as the product acquired is manufactured or produced in the United States." Based on the emails supplied by Appellant, the Area Office concluded that Appellant is supplying an item not manufactured or produced in the United States and therefore is not a small business for this procurement.

B. The Appeal

On May 30, 2008, Appellant appealed the Area Office's size determination on May 30, 2008.

Appellant asserts that it is supplying the exact part requested by the government. Appellant argues if the battery is unacceptable then it should not be required by the solicitation. Moreover, Appellant states if it is considered other than small because of the battery then no other small business will qualify under 13 C.F.R. § 121.406. Appellant suggests: the solicitation

¹ The record does not explain why the CO waited four months to forward Comlink's protest to the Area Office.

erred in listing the Motorola part; that 13 C.F.R. § 121.406 contains an error; or that it was inappropriate to procure this manufactured product under a small business set-aside contract.

Additionally, Appellant indicates a Motorola representative said the previous emails about the battery being made in Mexico or Japan should be disregarded and Appellant states he is expecting additional information from Motorola on where the battery is manufactured. Appellant also shares its frustration in attempting to obtain the information about where the battery is manufactured from Motorola. Finally, Appellant requests an extension of time to obtain the information about where the battery is manufactured.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the Area Office's size determination only if the administrative judge, after reviewing the record and pleadings, has a definite and firm conviction 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. The Merits

In order to qualify as a small business concern for a small business set-aside contract to provide manufactured products, an offeror must be either the manufacturer, or supply the end item of a domestic small manufacturer in compliance with the non-manufacturer rule. 13 C.F.R. § 121.406(a). However, 13 C.F.R. § 121.406(d) provides:

Where the procurement of a manufactured item is processed under Simplified Acquisition Procedures, as defined in § 13.101 of the Federal Acquisition Regulation (FAR) (48 CFR 13.101), and where the anticipated cost of the procurement will not exceed \$25,000, the offeror need not supply the end product of a small business concern as long as the product acquired is manufactured or produced in the United States, and the offeror does not exceed 500 employees. The offeror need not itself be the manufacturer of any of the items acquired.

Id.

Here, it is clear that 13 C.F.R. § 121.406(d) applies. The solicitation explicitly states that simplified acquisition procedures apply and the record establishes that the bid for the procurement, \$18,832.60, is below the \$25,000 threshold specified in 13 C.F.R. § 121.406(d). Thus, Appellant does not need to supply batteries manufactured by a small business as long as

Appellant meets two requirements: (1) the batteries supplied under the procurement are manufactured in the United States, and (2) Appellant does not exceed 500 employees.

The record includes information Appellant supplied to the Area Office indicating the Motorola battery it will provide under the procurement is not manufactured in the United States, but manufactured in Mexico or Japan. The record before the Area Office thus established that the battery was either from Mexico or Japan and the Area Office consequently did not err in finding it to be of foreign manufacture. Appellant's attempts now to try to assert it is of domestic manufacture smack of disingenuousness, and are in any event an attempt to introduce new evidence in violation of 13 C.F.R § 134.308(a). Therefore, the Area Office did not err in concluding that Appellant is other than a small business for this procurement; Appellant is supplying batteries manufactured outside the United States and 13 C.F.R. § 121.406(d) applies. Appellant's number of employees is irrelevant in this case because Appellant is not supplying a product manufactured in the United States.

Appellant attempts to raise the issue of whether a solicitation for a specific Motorola battery should be issued as a small business set-aside contract, but those concerns are outside the scope of my review and are best directed to the CO. I am charged with determining if the Area Office erred in making its key findings of fact or law, 13 C.F.R. § 134.314, and, based on the record and pleadings, Appellant has failed to establish any clear error by the Area Office.

Accordingly, I affirm the Area Office determination and deny the appeal.

V. Conclusion

For the above reasons, I DENY the instant appeal and AFFIRM the Area Office's Size Determination.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge