

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

SIZE APPEAL OF:

Silver Enterprises Associates, Inc.

Appellant

Re: National Railway Equipment Co.

Appealed from
Size Determination No. 4-2010-38

SBA No. SIZ-5124

Decided: April 19, 2010

APPEARANCES

Robert W. McGuire, Jr., President, for Appellant.

Robert E. Loewer, General Counsel, for National Railway Equipment Co.

DECISION

I. Jurisdiction

This appeal is decided 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 Area Office's determination that Appellant is an eligible small business was based upon clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Background

A. Solicitation and Protest

On August 14, 2009, the Department of the Navy issued the subject Solicitation No. N40083-09-R-2246 for refurbishing a locomotive. The Contracting Officer (CO) set the procurement aside 100% for small businesses, and designated North American Industry Classification System (NAICS) code 336510, Railroad Rolling Stock, Manufacturing, with a

corresponding 1000 employee size standard, as the appropriate code for the procurement.¹ Offers were due on September 10, 2009.

On January 15, 2010, the CO awarded the contract to National Railway Equipment Co. (NREC) and notified other offerors of the award. On January 20, 2010, Silver Enterprises Associates, Inc. (Appellant), filed a timely and specific size protest against NREC. Appellant asserted NREC is other than small because its officers have been cited in news reports as claiming to have over 1000 employees. Appellant also listed a number of alleged affiliates. Appellant asserted it had obtained the names of these alleged affiliates from a public records search. Appellant asserted NREC was dominant in its field. Appellant also quoted statements by NREC officers in business publications as stating that NREC has variously 1,100, 1,000, and “nearly” 1,000 employees.

The CO forwarded the size protest to the Small Business Administration (SBA) Office of Government Contracting-Area IV, in Chicago, Illinois (Area Office), for a size determination.

On February 2, 2010, the Area Office issued Size Determination No. 4-2010-35 concluding NREC was other than small because NREC had not responded to the Area Office’s letter notifying it of the protest and requesting various submissions. On determining that it had used an incorrect address in the notification letter, the Area Office vacated Size Determination No. 4-2010-35 and reopened the size determination investigation.

On February 11, 2010, NREC submitted its response to the protest letter, its completed SBA Form 355, and spreadsheets listing the number of employees for NREC and all its affiliates, which NREC incorporated by reference into its Form 355.

B. The Size Determination

On February 12, 2010, the SBA Area Office issued Size Determination No. 4-2010-38 (Size Determination) concluding NREC is an eligible small business under the 1000 employee size standard.

The Area Office found NREC is owned by three individuals, a parent and two children.² The Area Office further identified these firms as controlled directly or indirectly by one or another of these three individuals:

NRE Electronics
LJB Electronics Canada Co.
LJB Electronics Illinois Co.
Transpar Corporation

¹ Originally, the procurement was set aside for Service-Disabled Veteran-Owned Small Business Concerns; however, on August 26, 2009, and September 1, 2009, the solicitation was amended to change the procurement to a small business set-aside.

² While the size determination did not identify them, according to NREC’s Form 355 they are: Lawrence J. Beal, Chief Executive Officer, Steven L. Beal, Executive Vice President, and Susan Beal Frangella, Treasurer.

Air National, LLC
Paramax, Illinois, LLC
National Fabricating, LLC
Steven and Susan Kentucky Building Co., LLC
Steven and Bryan Building Company, LLC
Steven and Susan Building Company, LLC
NREC-ALCO Locomotive Company Proprietary Limited (NRE Australia)
Clark Industrial Properties, Inc.
Clark Industrial Power, LLC
IPT Power, Inc.

In addition, NREC has eight subsidiaries:

Waycross Locomotive Co., LLC
N.R.E. Acquisition Co., LLC (VMV Paducahbilt)
NRE Wheelworks, Inc.
NRE Alco Locomotives of Canada, Inc.
NRE Alco Locomotives of Canada Co.
NREC Power Systems, Inc.
NREC IC-DISC, Inc.
Alco Locomotive Company

The Area Office found that the firms identified in Appellant's protest were merely a list of names, without any facts supporting the allegations of affiliation. The Area Office further noted that statements from the magazine articles Appellant presented in its protest are inconsistent, some placing NREC over the size standard, and some under it.

The Area Office also found NREC was not dominant in its field. The Area Office stated that a firm which meets the applicable size standard cannot be dominant. SBA considers dominance in preparing the size regulations and setting size standards, but inquiries into a particular concern's dominance are not appropriate in an individual size determination.

Finally, the Area Office reviewed the information submitted by NREC listing the number of employees for NREC and all its affiliates. On the basis of this information, the Area Office concluded NREC was an eligible small business.

Appellant received the Size Determination on February 16, 2010.

C. The Appeal

On March 15, 2010, Appellant filed the instant appeal.

First, Appellant argues that the Area Office improperly vacated Size Determination No. 4-2010-35. The Area Office erred when it determined it had misaddressed the initial notification of the protest, and improperly sent a new protest package to NREC and provided NREC additional time to respond. Appellant asserts the original package was sent to NREC's headquarters and signed for by an employee. Appellant argues it was inappropriate to give NREC the additional time to respond. Appellant complains that it was given no additional time to amend or supplement its protest.

Second, Appellant asserts that the Area Office improperly shifted the burden of persuasion at the protest level from NREC to Appellant. Appellant asserts the Area Office failed to identify evidence Appellant provided that NREC was other than small. Appellant asserts it offered as evidence that NREC certified false information in the ORCA database, that it was in fact not a proprietorship but an Illinois corporation with employment which exceeded the number of employees on the ORCA certification. Appellant suggest that with additional time to supplement its protest, it could have established NREC had a clear record of making self-serving false and misleading statements. Appellant refers to information obtained from www.hoovers.com to support its allegation NREC is other than small.

Third, Appellant asserts the Area Office erred in not considering whether NREC was dominant in its field. Appellant distinguishes *Size Appeal of Joan of Arc Electric Supply Co.*, SBA No. SIZ-4237 (1997) from the instant case because since 1997 SBA has changed from using the Standard Industrial Classification (SIC) code system to the NAICS code system to determine size. Appellant argues it submitted evidence that NREC was dominant in its field.

Fourth, Appellant also asserts the size determination is conclusory and fails to identify the specific evidence the Area Office relied upon to determine NREC met the size standard. Appellant asserts that NREC's payroll records must be examined to determine whether it meets the size standard.

Fifth, Appellant argues the evidence it presented of statements to the media by NREC's officials establish that NREC makes conflicting statements, and thus NREC's statements have no credibility.

D. Response to the Appeal

On March 26, 2010, NREC responded to the appeal. NREC asserts the Area Office properly used its discretion to allow NREC more time to respond after the improperly addressed initial letter failed to reach the responsible company official in time.

NREC further asserts that the Area Office did not improperly shift the burden of persuasion to Appellant, but rather gave the appropriate weight to the evidence NREC submitted.

NREC asserts the Area Office properly did not consider the issue of whether NREC was dominant in its line of business. NREC further states that a number of firms are in the business of producing locomotives, some of them Fortune 500 companies and all of them much larger than NREC. NREC therefore cannot be dominant in this field.

NREC asserts it provided the Area Office a completed Form 355, payroll records, and various corporate documents, which it was not obligated to provide to Appellant. These records establish that NREC is other than small.

NREC asserts the Hoover study Appellant relies upon is clearly flawed, as it classes NREC with much larger firms. NREC concedes that one of its employees once inaccurately

marked it down as a sole proprietorship in its ORCA listing. NREC maintains this has no significance and Appellant's reliance on it as a measure of NREC's credibility is meritless.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant appeal within 30 days of receiving the Size Determination, and thus the appeal is timely for future procurements only, and not for the instant procurement. 13 C.F.R. § 134.304(a)(2).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office's 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

Appellant's contention that the Area Office erred in vacating the first size determination and granting NREC an extension of time is meritless. Clearly, there was some error in the delivery of the initial letter giving NREC notice of the protest, and NREC failed to respond. However, NREC informed the Area Office promptly of the error, and the Area Office vacated a size determination issued on the basis of no submissions from the challenged firm and collected the relevant evidence before issuing a final size determination. The regulation grants the Area Office the discretion to modify the deadlines for a challenged firm to respond to the protest. 13 C.F.R. § 121.1008(c).

Appellant misunderstands the nature of the size protest process. The Area Office has no discretion to modify the deadline for filing a protest. 13 C.F.R. § 121.1004. Further, the regulation contemplates no role for the protestor in the process after the protest is filed. 13 C.F.R. §§ 121.1001-121.1009. Appellant thus had no further role to play and no further submissions to make after filing its protests. The submissions from the challenged firm are not served on the protestor. The protestor has no need of the submissions because it has no further role in the process. Further, this procedure protects confidential business information. Appellant's arguments that the Area Office lacked discretion to extend NREC's deadline and should have taken more submissions from Appellant is thus meritless.³

³ Appellant complains that it had only two business days to submit its protest after receiving notice. In fact, Appellant misread the regulation and miscounted the days. Appellant had five business days to submit its protest. 13 C.F.R. § 121.1004(a)(2). Appellant was notified on Friday, January 15, 2010, of the award to NREC. Thus, Appellant had until Monday, January 25th to file its protest. It chose to do so on January 20th.

There is nothing in the record to reflect that the Area Office moved the burden of persuasion from NREC to Appellant. The burden clearly lies with the challenged firm. 13 C.F.R. § 121.1009(c). Here the Area Office found Appellant's protest timely and specific, notified NREC, and received a response which the Area Office reviewed. As required by the regulation, the Area Office gave greater weight to NREC's signed, specific factual evidence than to Appellant's general allegations. 13 C.F.R. § 121.1009(d). Appellant provided a list of potential affiliates from a general records search, some of which were clearly not connected to Appellant. NREC provided a completed SBA Form 355, with a listing of all its affiliates and the number of employees for each, derived from the firm's payroll records. The SBA Form 355 is a sworn statement, including all the information the submitter incorporates by reference.

Accordingly, the Area Office evaluated the submitted evidence as required by the regulation, and did not disturb the regulatory burden of proof. Rather, Appellant submitted evidence which, while it was enough to support the protest as timely and specific, and cause SBA to investigate NREC, ultimately failed to be persuasive.

Appellant's contention that the Area Office should have considered whether NREC was dominant in its field is meritless. SBA addresses that issue in setting the size standards. No firm which meets the applicable size standard is considered dominant in its field. Under SBA's regulations, the issue of whether a firm is dominant in its field may not be considered in a size determination for an individual firm. 13 C.F.R. § 121.102(b); *Size Appeal of Joan of Arc Electric Supply Co.*, SBA No. SIZ-4237 (1997). The change from the SIC code to the NAICS code system did nothing to disturb this regulatory scheme. Appellant's attempt to raise this issue here in the face of the clear language in the regulation and case law is so meritless it borders on bad faith.

Here NREC presented a Form 355, signed under penalties of perjury, with specific information drawn from its payroll records which identified all of its affiliates and the number of employees for each affiliate. Taken altogether, NREC and its affiliates' total number of employees is under 1,000, and thus within the applicable size standard. All Appellant has to present are indiscriminate lists drawn from a records search, and inconsistent statements in the media. None of this evidence begins to outweigh the probative value of NREC's evidence.

OHA's settled precedent establishes that more weight is given to the signed and sworn statements made by the challenged firm on its SBA Form 355, and any other sworn statements submitted, than to unsupported statements made by other parties. *Size Appeal of Public Communications Services, Inc.*, SBA No. SIZ-5008, at 9 (2008). Here, the Area Office properly relied upon NREC's submissions, which establish the firm is within the size standard. While the Area Office could have discussed the evidence it relied upon in more detail, the record is clear it relied upon signed evidence NREC submitted, and thus complied with the regulation.

The record establishes that the Area Office properly determined NREC is a small business. Appellant has failed to meet its burden of establishing the size determination was based upon clear error of fact or law, and I must therefore affirm the size determination.

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