United States Small Business Administration
Office of Hearings and Appeals

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF: Technology Associates, Inc., Appellant, Appealed From Size Determination No. 05-2017-002	SBA No. SIZ-5814 Decided: February 16, 2017

APPEARANCES

Steven J. Koprince, Esq., Matthew T. Schoonover, Esq., Candace M. Shields, Esq., Matthew P. Moriarty, Esq., Ian P. Patterson, Esq., Koprince Law LLC, Lawrence, Kansas, for Appellant

Karl F. Dix, Jr., Esq., Garrett E. Miller, Esq., Smith, Currie & Hancock LLP, Atlanta, Georgia, for Conrad Orange Shipyard, Inc.

DECISION[1]

I. Introduction and Jurisdiction

On December 2, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area V (Area Office) issued Size Determination No. 05-2017-002 finding Technology Associates, Inc. (Appellant) ineligible for the subject procurement because it would not manufacture the end item being procured and did not qualify as a nonmanufacturer. Appellant maintains that the size determination is clearly erroneous, and requests that SBA's

[1] This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

Office of Hearings and Appeals (OHA) remand the matter for further review. 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 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. RFP

On March 4, 2016, the U.S. Department of Transportation, Saint Lawrence Seaway Development Corp. (SLSDC) issued Request for Proposals (RFP) No. DTSL55-16-R-0100 for construction of an ice-breaking tugboat. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 336611, Shipbuilding and Repairing, with a corresponding size standard of 1,250 employees. Proposals were due June 1, 2016. (RFP, Amendment A006.)

The RFP contained three principal Contract Line Item Numbers (CLINs), which would be procured in two phases. CLINs 0001 and 0002 would be procured in Phase I, and CLIN 0003 would be procured in Phase II. Whether SLSDC would award Phase II was dependent on funding. (RFP § B, at 4.) The RFP also contained five optional CLINs that would be awarded dependent on funding, and that could be awarded during either Phase I or Phase II. (*Id.*)

For CLIN 0001, the contractor will complete "all engineering necessary (structural, mechanical, electrical, etc.) . . . for the sole purpose of acquiring one vessel of this design." (*Id.*, at 2.) The contractor must submit all plans and documentation to the appropriate regulators and obtain unconditional approvals. (*Id.*) Deliverables under CLIN 0001 would include "required production engineering products such as production level plans, engineering calculations/analyses, purchase orders, etc. for review and approval by the SLSDC for all of the items included in [all CLINs]." (*Id.*)

Under CLIN 0002, the contractor would procure items with long lead times that are essential components for the tug's construction. (*Id.* at 3.) Such items would include: Z Drive propeller assemblies and associated connecting rods; main engines and mounting silencers; generator sets; various winches and other towing equipment; fresh and waste water tanks and pumps; and navigational equipment. (*Id.*) These items would be stored in a secure warehouse until needed for construction. (*Id.* at 2.) In the event funding for Phase II did not materialize, these items would be turned over to SLSDC for storage and use by another contractor at a future time. (*Id.*)

CLIN 0003 called for the balance of materials needed, the "labor, materials, tools, equipment, and services necessary to build and deliver the vessel and associated deliverables," and the "installation, commissioning and testing" of the items with long lead times. (*Id.* at 4.)

The five optional CLINs consisted "of the procurement, installation, making service support connections, commissioning, and testing" of a workboat, capstan, tugger winch, crane, and pump, gear, and clutch monitors. (*Id.*)

The RFP stated that SLSDC would evaluate proposals using three evaluation factors: Price, Past Performance, and Management/Technical. (RFP § M.6.) The Past Performance factor consisted of four subfactors: Overall Customer Satisfaction, Cost Control, Quality of Product, and Timeliness of Performance. (*Id.*) The Management/Technical factor consisted of three subfactors: Production Approach, Project Organization and Management, and Experience. (*Id.*) In making the award decision, Price would be equal in importance to the non-Price factors. (*Id.*)

B. Appellant's Proposal

Appellant's proposal stated that "[Appellant] will be responsible for overall project management, comprehensive engineering, testing, training and ancillary services, as well as [] supervis[ing] equipment and material acquisition, and production at the facilities." (Proposal, Vol. I, at 2.) In addition, Appellant will "be responsible for all the data preparation and submittal including the spares lists, technical manuals, training, and safe shipment and delivery of the vessel to destination" and "will also coordinate warranty claims through the warranty period." (*Id.*)

Appellant represented that, through teaming agreements over the preceding seven years, it had "been instrumental in the 'Design and Build' completion of over $300 million in vessels, many of equal or greater complexity than the [tug]." (*Id.*) On some of these contracts, to satisfy Limitations on Subcontracting requirements, Appellant "accomplished part of the production at its team partner facilities." (*Id.*)

The proposal stated that "[t]he vessel construction will be subcontracted to Gulf Island Shipyards, LLC (GIS), which is ISO 9001-2008 certified." (*Id.* at 3.) "GIS," Appellant continued, "builds a wide variety of vessels and workboats of up to 600 feet in length and consists of four [] shipyards located in southern Louisiana": two in Houma, one in Jennings, and the other at Lake Charles. (*Id.* at 3-4.) For the instant procurement, Appellant's proposed strategy was "[xxxx]." (*Id.* at 4.) In numerous places, the proposal refers to Appellant and GIS together as "the TAI Team."

The proposal represented that Appellant's principals and project managers "have extensive experience in turn key shipbuilding projects and have been in management and in charge of the design and building of hundreds of millions [of] dollars of vessel construction projects." (*Id.*, Vol. II, at 2.) Appellant also stated that it "has bonding capability as a Prime Contractor, and has a Performance and Payment bonding line adequate to satisfy the [requisite] bonding requirements." (*Id.*) GIS will provide payment and performance bonding to Appellant for GIS's scope of work. (*Id.*)

The proposal delineated the work to be performed by Appellant and GIS, respectively. Appellant will have [xxxx]. The proposal specified that "[xxxx]." (*Id.* at 3.)

Appellant stated that it "[xxxx]." (*Id.*) After explaining that the vessel "will be built" at GIS's facilities, the proposal stated, "[xxxx]."[2] (*Id.* at 3-4.)

According to the proposal, the vessel construction will take place at GIS's Jennings shipyard, and GIS will [xxxx]. (*Id.* at 4-6.) GIS will also provide [xxxx]. (*Id.* at 6.) The proposal reiterated that "[xxxx]." (*Id.*) "The size and complexity of the [tug] is well within the capability of the proposed Jennings shipyard." (*Id.*)

The proposal indicated that Appellant will subcontract with firms other than GIS, too. Specifically, Appellant will subcontract "[xxxx]." (*Id.*) Appellant and GIS will "[xxxx]." (*Id.*)

Of the [x] past performance references, [x] were Appellant's and [x] were GIS's. (*Id.*, Vol. III, at 2.) One of Appellant's past performance references contained a questionnaire completed by a procurement official [xxxx]. (*Id.*, App'x A, at 9.) For Appellant's [x] past performance reference, Appellant stated that it could not reach the responsible CO to provide a questionnaire, [xxxx]. (*Id.*, at 14-16.)

Appellant's Price proposal [xxxx]. (*Id.*, Vol. IV, at 9-10.) The total proposed price for CLIN 0001 was $[x], of which $[x] was for [xxxx]. (*Id.* at 9.) The proposed price for CLIN 0002 was $[x]. (*Id.*) The proposed price for CLIN 0003 was $[x]. (*Id.* at 10.) The five optional CLINs together were valued at $[x]. (*Id.*)

C. Protest and Size Investigation

On September 27, 2016, SLSDC awarded the contract to Appellant. On October 4, 2016, Conrad Orange Shipyard, Inc. (Conrad), a disappointed offeror, protested Appellant's size. Conrad alleged that Appellant is in violation of the ostensible subcontractor rule, 13 C.F.R. § 121.103(h)(4), due to its relationship with GIS, which Conrad asserted is a large business. (Protest at 2-3.) Conrad also highlighted that, although Appellant provides engineering services to the shipbuilding industry, it does not own a shipyard. As a result, Appellant lacks the facilities and experience necessary to perform the instant contract. (*Id.* at 3.) The CO forwarded the protest to the Area Office for review.

In response to the protest, Appellant maintained that "[t]o build boats, it is not necessary to 'own' a shipyard when there is plenty of surplus shipyard space and equipment available to rent or share on the US Gulf Coast." (Letter to A. Raj to S. Lewis (Oct. 7, 2016), at 3.) Appellant subsequently forwarded to the Area Office a letter from GIS stating that "[w]ithin the intent of teaming agreement between GIS and [Appellant], GIS agrees to lease a section of GIS facilities to [Appellant] as the Prime Contractor." (Letter from E. Hebert to A. Raj (Nov. 2, 2016).)

On November 2, 2016, the Area Office asked the CO, "When Phase II is awarded, will this be a separate contract award under a different contract number?" (E-mail from S. Lewis to P.

[2] The Area Office considered that this "section of the proposal . . . appears to be written by GIS." (Size Determination at 4.)

White (Nov. 2, 2016).) The CO responded that "Phase II will be a modification to the original contract to be awarded in [fiscal year 2017]. There will be no separate contract for Phase II." (E-mail from P. White to S. Lewis (Nov. 2, 2016).)

D. Size Determination

On December 2, 2016, the Area Office issued Size Determination No. 05-2017-002 finding Appellant ineligible for award of the subject contract because Appellant will not manufacture the tugboat being procured, and it does not qualify as a nonmanufacturer. The Area Office did not address whether Appellant is in violation of the ostensible subcontractor rule, noting that this procurement was assigned a manufacturing NAICS code. (Size Determination at 7.)

In determining that Appellant would not manufacture the tugboat, the Area Office quoted the pertinent SBA regulation, which provides:

> For size purposes, there can be only one manufacturer of the end item being acquired. The manufacturer is the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. The end item must possess characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed. The end item may be finished and ready for utilization or consumption, or it may be semifinished as a raw material to be used in further manufacturing. Firms which perform only minimal operations upon the item being procured do not qualify as manufacturers of the end item. Firms that add substances, parts, or components to an existing end item to modify its performance will not be considered the end item manufacturer where those identical modifications can be performed by and are available from the manufacturer of the existing end item:
>
> (i) SBA will evaluate the following factors in determining whether a concern is the manufacturer of the end item:
>
> (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 8, quoting 13 C.F.R. § 121.406(b)(2).) The Area Office then consulted Appellant's proposal and concluded that GIS will manufacture the tug boat. The Area Office observed that

Appellant's proposal stated that "vessel construction will be subcontracted to [GIS], which is ISO 9001-2008 certified." (*Id.* at 9, quoting Proposal, Vol. I, at 3.) In addition, in the list of duties to be performed by Appellant and GIS respectively, "vessel fabrication and assembly" was assigned to GIS. (*Id.*, citing Proposal, Vol. II, at 3.) "GIS also bonded that portion of the contract, has the facility, has the quality certification, and all the key equipment for the production of the vessel." (*Id.*)

Another reason Appellant cannot be considered the manufacturer is that Appellant would not utilize "its own facilities", as required by 13 C.F.R. § 121.406(b)(2). (*Id.*) During the course of the size investigation, Appellant claimed that it will rent the plant, facilities, and equipment necessary to manufacture the vessel at GIS's Jennings shipyard. The Area Office questioned whether renting a facility is sufficient to meet the regulatory requirement, but notwithstanding this issue, found that Appellant is not merely leasing an empty building and manufacturing the end item with Appellant's own equipment and employees. Rather, Appellant "is reliant upon all the key equipment in the facility owned by GIS to produce the vessel." (*Id.*) Thus, Appellant "is not the manufacturer [of the tugboat] because the proposal states outright that GIS is the manufacturer and because [Appellant] does not own the facilities in which the [tug] is being manufactured." (*Id.*)

The Area Office found that Appellant does not qualify as a nonmanufacturer of the tugboat because it will not supply the end item of a small business. The combined employees of GIS and its affiliates[3] exceed the 1,250-employee size standard associated with NAICS code 336611. (*Id.* at 10, citing 13 C.F.R. § 121.406(b)(1)(iv).)

E. Appeal

On December 16, 2016, Appellant filed the instant appeal and moved to introduce new evidence. Appellant contends that the size determination is clearly erroneous, and urges OHA to remand the matter.

Appellant argues that the Area Office mischaracterized the end item being procured as a completed tugboat. Appellant emphasizes that SLSDC would only procure a completed tugboat if funds permitted. Under Phase I, which was the only guaranteed portion of the procurement, SLSDC would procure design and engineering services and components with long lead times. Given the uncertainty of the procurement, then, the Area Office should have determined that the services and components procured under Phase I constituted the "end item" for purposes of a manufacturer analysis. (Appeal at 9.)

Appellant argues in the alternative that, even if the end item is a completed tug, Appellant is the manufacturer pursuant to 13 C.F.R § 121.406(b)(2)(i). Appellant asserts that "the engineering, design, and production modeling functions [Appellant] performs constitute the essential parts of the transformation of materials into the finished product." (*Id.* at 10.) Further,

[3] GIS is a wholly-owned subsidiary of Gulf Islands Fabricators, Inc. (GIFI), which also owns 100% of Gulf Island Marine Fabricators, LLC. These firms are therefore affiliated due to their common ownership and control by GIFI. (Size Determination at 3.)

Appellant will be contributing a large portion of the tugboat's total value. For instance, the total value of Phase I is $[x], $[x] of which is labor, and Appellant will perform [xxxx]. (*Id.*) The total value of Phase II is $[x], $[x] of which is labor, and Appellant will perform [xxxx] and will contribute more than [xxxx]. Appellant maintains that it "contributes the most value and effort to the engineering, modeling, and potential assembly of a unique icebreaking tug boat." (*Id.* at 11.)

Appellant contends that its contributions are vitally important to the tugboat. Appellant will perform all of the engineering, design, and production modeling work, which will serve as the basis for construction of the vessel. (*Id.* at 11-12.) In addition, Appellant will develop schematics, other design work, and 3D modeling, and will obtain necessary permitting and other approvals. Without these contributions, Appellant argues, there will be no tug. Appellant will also provide supervisors and fabricators to lift, weld, assemble, and paint the vessel. (*Id.* at 12.) Although GIS will cut steel members, Appellant will ensure they are "actually assembled into a functioning vessel." (*Id.*) Under this arrangement, GIS is no more than a component manufacturer, and Appellant is the manufacturer of the end item. Further, Appellant will fit out the vessel and ensure it is ready for delivery by integrating the systems and components. "Without this crucial step, SLSDC will have bought little more than a $20 million barge." (*Id.* at 13.)

Appellant contends that it has the capability, facilities, and equipment necessary to manufacture the tug. As for facilities and equipment, Appellant will lease these means of production from GIS, so Appellant has satisfied this part of the requirement. (*Id.* at 13-14, citing *Size Appeal of CymSTAR Servs., LLC*, SBA No. SIZ-5329 (2012).) The Area Office's finding that Appellant lacked these means is based on a misunderstanding of law, and to affirm this misinterpretation would create bad policy. SBA regulations do not require a firm to own the facilities and equipment, and "[s]uch an interpretation would severely curtail the ability of small businesses to qualify as manufacturers." (*Id.* at 15.) As for capabilities, Appellant highlights that it employs [x] engineers and program management personnel, more than [x]% of which hold degrees in naval architecture, marine mechanical and electrical engineering, as well as [x] shipbuilding production personnel. (*Id.* at 16.)

Next, Appellant argues the Area Office confused the proposal's colloquial use of the term "manufacture" as an admission that GIS is the manufacturer for purposes of SBA's regulations. "The proposal did not say that vessel construction will be subcontracted to GIS, but instead that the vessel will be built at 'TAI's team's Gulf Island Shipyards, LLC' facility," which Appellant asserts is space that Appellant will lease from GIS. (*Id.* at 17, quoting Proposal, Vol. II, at 3.) Likewise, the proposal did not state that GIS would fabricate and assemble the tug; rather, it indicated that "GIS will ***support*** fabrication and assembly." (*Id.* (emphasis Appellant's).) Further, Appellant used the word "manufacture" to describe its own work, too, not just GIS's. (*Id.*, citing Proposal, Vol. I, at 2.)

Appellant argues that the Area Office erred by applying elements of the ostensible subcontractor rule to a manufacturing analysis. On this point, Appellant takes issue with two statements: (1) that "the leased GIS facility is not [Appellant]'s 'own' facility because [Appellant] is reliant upon all the key equipment in the facility owned by GIS to produce the vessel"; and (2) that "other GIS work is being performed at the facility, and even if [Appellant's]

employees performed some of the production function for the subject procurement, they are intermingled with GIS manufacturing employees at the facility." (*Id.* at 18, quoting Size Determination at 9.) These statements, Appellant argues, are not relevant to a manufacturing analysis, but rather go to whether the prime contractor is unusually reliant upon its subcontractor.

Lastly, Appellant contends that, even if it is not considered the manufacturer of the end item, it qualifies as a nonmanufacturer. Here, Appellant challenges the Area Office's determination that Appellant would not provide the product of a small business manufacturer. Appellant points out that, although GIS exceeds the 1,250-employee size standard, GIS is a small business under a 1,500-employee size standard. Appellant argues the Area Office should have applied this larger size standard because the NAICS code governing compliance with the nonmanufacturer rule should be the one applicable to the prime contractor's subcontract with the manufacturer, rather than the NAICS code designated by the CO to the prime contract. (*Id.* at 19, citing *Size Appeal of Nuclear Fuel Servs., Inc.*, SBA No. SIZ-5324 (2012).) Here, the NAICS code that best describes the work to be performed by GIS is 331110, Iron and Steel Mills and Ferroalloy Manufacturing, and this NAICS code has a 1,500-employee size standard. (*Id.* at 20.)

F. Conrad's Response

On January 4, 2017, Conrad responded to the appeal and moved to introduce new evidence. Conrad argues that Appellant has not shown that the size determination is clearly erroneous. As such, OHA should deny the appeal.

SLSDC issued a manufacturing procurement, Conrad contends. As evidence, Conrad points out that SLSDC specifically stated that the contractor would be required to "construct a tugboat." (Response at 2, quoting Synopsis.) Likewise, the RFP confirms that the awardee is to "[p]erform the detail design and construction of the vessel." (*Id.*, quoting RFP at 1.) Reinforcing the manual labor-intensive nature of this procurement, SLSDC attached the U.S. Department of Labor's wage rates associated with "Heavy Construction Projects" to the RFP.

Further, SLSDC designated a manufacturing NAICS code, which was not challenged by Appellant. Had SLSDC agreed with Appellant that the procurement was primarily for boat design and engineering, it would have chosen a different NAICS code, such as 541330, Engineering Services. (*Id.* at 3.)

Conrad then turns to Appellant's proposal and notes that CLINs 0002 and 0003 represent [x]% of Appellant's total proposed price. Conrad concludes from this information that "the solicitation was for the manufacturing of the vessel and the engineering and design was only a minor cost and was ancillary to the pricing work scope to manufacture and construct the vessel." (*Id.* at 4.)

Conrad addresses Appellant's contention that only services performed during Phase I are relevant to a manufacturer analysis. Conrad notes that, although the procurement was divided into two phases for funding reasons, the RFP made clear that SLSDC would make only a single award. (*Id.*, citing RFP at 38.) Appellant's focus on Phase I is unpersuasive, too, because it "ignores the fact that the majority of this item is not engineering . . . but the supply of

manufactured long lead time components." (*Id.*) Design and engineering comprise just [x]% of Appellant's Phase I pricing.

Conrad contends that Appellant cannot "independently satisfy the essential purpose of the procurement—tugboat manufacturing—without significant assistance from a large shipbuilder." (*Id.* at 4-5.) In fact, Appellant's own proposal states as much. Contrary to Appellant's assertions, "[t]his was not a one-time admission taken out of context from [Appellant's] proposal or colloquial language by [Appellant]." (*Id.* at 5.) Indeed, the Area Office determined that Appellant "represented that the large shipbuilding contractor would be responsible for 'construction, testing, and delivery of the vessel,' and would 'perform **all** of the steel work, pipe fitting and welding, propulsion system installation and alignment, and support of subcontracted systems."' (*Id.*, quoting Size Determination at 5 (emphasis Conrad's).) Once Appellant received the protest and adverse size determination, though, it attempted to downplay GIS's role. Such *post hoc* arguments are unpersuasive. (*Id.* at 5-6, citing *Size Appeal of Fernandez Enters., LLC*, SBA No. SIZ-4863 (2007).)

Further, Conrad emphasizes, Appellant represented to SLSDC that GIS owns the shipyard where construction of the tugboat is to occur. The fact that Appellant intends to lease specific premises and equipment on GIS's shipyard "does nothing to encumber GIS' ownership interests in the leased premises or the specialized equipment highlighted in [Appellant]'s proposal," because "any actual shipbuilding work performed by [Appellant's] employees would necessarily occur alongside GIS employees and ongoing GIS manufacturing at the facility." (*Id.* at 8.) Conrad argues that it is not unduly burdensome to require a small business to own shipbuilding facilities, as Conrad does.

Conrad then renews its argument from the protest that GIS is Appellant's ostensible subcontractor, in the event that OHA determines that Appellant is the manufacturer or that Appellant complies with the nonmanufacturer rule. (*Id.* at 9-10.)

G. New Evidence

With its appeal, Appellant moved to introduce new evidence. Specifically, Appellant seeks to admit a Process Map of the manufacturing process it described in writing to the Area Office. Appellant asserts that "the Process Map is less new evidence *per se* and more a demonstrative exhibit that explains evidence already in the record." (Appellant's Motion at 4.)

Good cause exists to admit the Process Map, Appellant maintains, because it is directly relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies them. (*Id.* at 4-5.) Appellant argues that the Area Office misunderstood Appellant's manufacturing process; therefore, "[t]his evidence is pertinent to the Area Office's findings under the nonmanufacturer rule, but its value was not known until after the Area Office issued its size determination." (*Id.* at 1.) Accordingly, there is a compelling justification for why Appellant did not present the Process Map to the Area Office. (*Id.* at 5, citing *Size Appeals of Medical Comfort Systems, Inc., et al.*, SBA No. SIZ-5640 (2015).)

Conrad opposes Appellant's motion. Conrad contends that there is no indication in the size determination that there was any confusion regarding Appellant's manufacturing process, and the Area Office afforded Appellant the opportunity to clarify its procedures. At such time, then, Appellant could have submitted its Process Map. Because Appellant failed to do so, it "should not be permitted to offer a *post hoc* demonstrative exhibit at this stage of the proceedings." (Response at 12.)

Accompanying its response to the appeal, Conrad moved to introduce new evidence, too. Specifically, Conrad seeks to admit its pricing proposal, which Conrad argues, "is necessary to refute arguments advanced in [the appeal]." (Conrad's Motion at 1.) Conrad asserts that there is good cause to admit Conrad's pricing proposal because it was impossible for Conrad to have anticipated Appellant's arguments based on Appellant's pricing proposal. Appellant opposes Conrad's motion. Appellant argues that Conrad's proposal is not relevant in considering whether Appellant is the manufacturer or complies with the nonmanufacturer rule. (Opp. at 1-2.)

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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g., Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). OHA "will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review." *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014).

In this case, I find that neither party has established good cause for the submission of new evidence. Appellant's Process Map could have been submitted to the Area Office during the size investigation. The notion that Appellant did not because, at that time, Appellant did not anticipate that Appellant's manufacturing processes would be misunderstood, is unpersuasive

because Appellant had the burden of proving its small business status. 13 C.F.R. § 121.1009(c). It therefore was incumbent upon Appellant to present its arguments and evidence to the Area Office in a clear and compelling manner, and Appellant's failure to do so cannot be cured on appeal. *Size Appeal of Leonardo Techs., Inc.*, SBA No. SIZ-4597, at 11 (2003); *Size Appeal of Frontier Applied Sciences, Inc.*, SBA No. SIZ-4316, at 8 (1998). As for Conrad's pricing proposal, I agree with Appellant that it is not relevant. Conrad's approach and pricing are not at issue here, and shed no light on whether Appellant is eligible for this procurement. *Size Appeal of iGov Techs. Inc.*, SBA No. SIZ-5359, at 13 (2012). Accordingly, because the parties have not demonstrated good cause for the admission of their new evidence, the motions to supplement the record are DENIED.

C. Analysis

Appellant has not met its burden of proving that the size determination is clearly erroneous. As a result, this appeal must be denied.

Appellant argues unconvincingly that, because SLSDC made Phase II of the procurement subject to the availability of funds, the Area Office incorrectly found that the RFP called for the production of a completed tugboat. This argument fails for two reasons. First, as Conrad correctly observes, SLSDC selected a manufacturing NAICS code, 336611, Shipbuilding and Repairing, for the RFP. Section II.A, *supra*. This choice of NAICS code indicates that the principal purpose of the procurement is manufacturing, and specifically shipbuilding. Federal Acquisition Regulation 19.303(a)(2) ("The contracting officer shall select the NAICS code which best describes the principal purpose of the product or service being acquired."); 13 C.F.R. § 121.402(b). Based on the NAICS code assigned to the RFP, then, SLSDC sought a complete and functioning vessel, and was not merely attempting to procure services, such as engineering design services. Second, SLSDC issued a single RFP covering both Phase I and Phase II, instructed offerors to submit a single proposal addressing both Phase I and Phase II, and stated that the RFP would result in one contract encompassing both Phase I and Phase II. Sections II.A and II.C, *supra*. Thus, Phase II — which involved the construction and delivery of the vessel — was central to this procurement, notwithstanding that Phase II was subject to the availability of funds. Accordingly, I find no error in the Area Office's conclusion that the principal purpose of the instant procurement is manufacturing, and that the end item being acquired, considering the procurement as a whole, is the completed tugboat.

Appellant's arguments that it is the manufacturer of the tugboat are equally unpersuasive. Appellant highlights that, prior to vessel construction, Appellant will perform all engineering, design, and production modeling work. In addition, Appellant maintains, during the construction process, Appellant will ensure that components are properly assembled into a functioning vessel. The latter argument, though, is largely undermined by Appellant's own proposal. Contrary to Appellant's suggestions, Appellant's proposal did not merely indicate that the tugboat would be constructed at GIS's Jennings shipyard. Rather, the proposal stated that "[t]he vessel construction will be subcontracted to Gulf Island Shipyards, LLC (GIS)", and later reiterated that "[t]he construction, testing, and delivery of the vessel will be subcontracted to Gulf Island Shipyards, LLC (GIS)". Section II.B, *supra*. The proposal identified "Vessel fabrication and Assembly, Launch and make ready during phase II" as tasks that would be performed by GIS. *Id.* Further,

GIS "will perform all of the steel work, pipe fitting and welding, propulsion system installation and alignment, and support of subcontracted systems." *Id.* The proposal did not indicate that Appellant too would be engaged in vessel assembly and construction. *Id.*

By regulation, SBA must determine a concern's size as of the date of self-certification, or for purposes of 13 C.F.R. § 121.406, the date of final proposal revisions. 13 C.F.R. § 121.404(a) and (d). As a result, OHA has long held that an offeror's proposal is controlling, and changes of approach created in response to a protest may not be used to contradict the proposal. *E.g., Size Appeals of ProActive Techs., Inc., et al.*, SBA No. SIZ-5772, at 29 (2016); *Size Appeal of SeaBox, Inc.*, SBA No. SIZ-5699, at 8 (2015); *Size Appeal of NMC/Wollard, Inc.*, SBA No. SIZ-5632, at 8 (2015); *Size Appeal of M1 Support Servs., LP*, SBA No. SIZ-5297, at 11 (2011). Here, as discussed above, Appellant's proposal stated that GIS, not Appellant, will perform the construction and assembly of the tugboat. Section II.B, *supra*. Appellant's arguments to the contrary are inconsistent with the proposal, and therefore unavailing. *See Size Appeal of Camp Noble, Inc. dba 3-D Marketing*, SBA No. SIZ-5644, at 5 (2015) (affirming determination that challenged firm was not the manufacturer of antennae when the challenged firm's proposal identified another company as the "actual manufacturer").

Similarly, Appellant's proposal cannot support the notion that Appellant would utilize its "own facilities" to accomplish the manufacturing, as is required by 13 C.F.R. § 121.406(b)(2). It is undisputed that Appellant itself does not own a shipyard. While Appellant argues that leasing a facility is sufficient to meet the regulatory requirement, the problem for Appellant is that the proposal stated that production would occur at GIS's Jennings shipyard but made no mention of Appellant leasing or renting the Jennings facility or any equipment from GIS. Section II.B, *supra*. Nor did Appellant submit a lease or other evidence to the Area Office demonstrating that such an arrangement existed prior to the date of final proposals. Indeed, the only indication of a lease arrangement Appellant offered was a letter from GIS dated November 2, 2016. Section II.C, *supra*. This letter, though, was prepared during the course of the size investigation, and thus does not establish that Appellant and GIS had any lease arrangement as of the date to determine size. Insofar as Appellant decided to lease facilities from GIS after receiving the protest, this change of approach is untimely for purposes of compliance with 13 C.F.R. § 121.406 and thus is not relevant. *Size Appeal of Rich Chicks, LLC*, SBA No. SIZ-5556, at 6 (2014).

Appellant also argues that this case should be remanded in order for the Area Office to more thoroughly examine the factors set forth at 13 C.F.R. § 121.406(b)(2)(i). I agree with Appellant that the Area Office should have considered these factors. *E.g., ProActive Techs.*, SBA No. SIZ-5772, at 27 (remanding for further investigation because "although the Area Office recited the three-part test found at 13 C.F.R. § 121.406(b)(2)(i), the Area Office did not fully analyze [the challenged firm's] proposal against these elements"); *NMC/Wollard*, SBA No. SIZ-5632, at 7-9 (remanding due to incomplete analysis of factors under 13 C.F.R. § 121.406(b)(2)(i)). Nevertheless, the issue is ultimately immaterial here because, as discussed above, there is simply no evidence that, as of the date of final proposal revisions, Appellant would utilize its "own facilities" to accomplish the shipbuilding. Appellant therefore is not "the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired", as is required to be considered the "manufacturer" under 13 C.F.R. § 121.406(b)(2).

Appellant's contention that it qualifies as a nonmanufacturer is also meritless. Appellant cites *Size Appeal of Nuclear Fuel Services, Inc.*, SBA No. SIZ-5324 (2012) for the proposition that a prime contractor determines which NAICS code and size standard is appropriate for a subcontract. However, *Nuclear Fuel Services* did not involve the nonmanufacturer rule, but rather the regulation for SBA's subcontracting program. For purposes of the nonmanufacturer rule, the firm providing the end item must qualify as small under the size standard assigned to the prime contract. *Size Appeal of BGSE Group, LLC*, SBA No. SIZ-5679 (2015) (affirming an adverse size determination where the manufacturer exceeded the size standard associated with the NAICS code assigned to the procurement); *see also Size Appeal of Sea Box, Inc.*, SBA No. SIZ-5699 (2015). Accordingly, the Area Office did not err in applying the 1,250 size standard to GIS and its affiliates, and properly concluded that Appellant does not qualify as a nonmanufacturer.

IV. Conclusion

Appellant has not proven reversible error in the size determination. Therefore, the appeal 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