United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEALS OF: Dehler Manufacturing Co., Inc., Appellant, Appealed From Size Determination Nos. 05-2018-069 and -073	SBA No. SIZ-5977 Decided: December 13, 2018

APPEARANCES

Kristi Morgan Aronica, Esq., Mark A. Weitz, Esq., Weitz Morgan PLLC, Austin, Texas, for Appellant

DECISION

I. Introduction and Jurisdiction

On September 26, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area V (Area Office) issued Size Determination No. 05-2018-069 and Size Determination No. 05-2018-073, concluding that Dehler Manufacturing Co., Inc. (Appellant) is not an eligible small business concern for the subject procurements. Appellant maintains that the size determinations are clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeals are denied, and the size determinations are affirmed.

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 appeals within fifteen days of receiving the size determinations, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Size Determinations

On September 26, 2018, the Area Office issued Size Determination No. 05-2018-069 and Size Determination No. 05-2018-073, finding that Appellant is ineligible for the instant

procurements.[1] The Area Office explained that the size determinations arose when the procuring agency referred Appellant for a Certificate of Competency (COC) in conjunction with the subject delivery orders. (Size Determination No. 05-2018-069, at 1.) The Area Office noted that "[i]n its COC application, [Appellant] indicated that the required product was going to be manufactured by HJA S.A. (HJA), which is located in La Estrella, Col[o]mbia." (*Id.*)

The Area Office explained that because the RFQs did not require recertification, Appellant's size is determined as of October 24, 2013, the date Appellant submitted its offer for the underlying GSA Schedule contract. (*Id.* at 4.) At that time, Appellant's parent company was AVTEQ, Inc. (AVTEQ). (*Id.*) A prior size determination found that Appellant was affiliated with AVTEQ and other concerns owned and controlled by AVTEQ as of October 24, 2013. (*Id.*) However, the combined employees of Appellant and these concerns do not exceed the size standard. (*Id.* at 5.)

The Area Office noted that in the prior size determination, the Area Office found that AVTEQ was not affiliated with HJA. (*Id.*) In the instant case, though, "[Appellant] asserts that it is affiliated with HJA under the identity of interest economic dependence rule" because "HJA manufacturers 100% of [Appellant's] products at HJA's facility and over 70% of HJA's revenue comes from [Appellant] and its [affiliates]." (*Id.*) The Area Office determined that because size is assessed as of October 24, 2013, HJA's current revenues from Appellant are immaterial. Moreover, it is irrelevant that HJA derives the majority of its revenue from Appellant, as HJA's size is not under review. (*Id.* at 6, citing *Size Appeal of Lost Creek Holdings, LLC d/b/a All-Star Health Solutions*, SBA No. SIZ-5848 (2017).)

The Area Office addressed Appellant's compliance with the non-manufacturer rule set forth at 13 C.F.R. § 121.406. Under the rule, Appellant either must be the manufacturer of the end items being procured, or must qualify for certain non-manufacturer exceptions. Appellant is not the manufacturer of the end items, nor is Appellant a proper non-manufacturer because it will not supply the end item of a small business manufacturer made in the United States. (*Id.* at 8.) In particular, the Area Office found, HJA is not a small business concern because it is not located in the U.S. and does not contribute significantly to the U.S. economy, and the end items that will be provided are not manufactured in the United States. (*Id.*) Appellant therefore is not an eligible small business concern for these procurements.

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[1] The Area Office issued two separate size determinations which are substantively identical except that they pertain to different delivery orders. Specifically, Size Determination No. 05-2018-069 is for Request for Quotations (RFQ) No. W912DY-18-T-0181 and Size Determination No. 05-2018-073 is for RFQ No. W912DY-18-T-0241. Both orders were for office furniture and were issued by the same procuring agency, the U.S. Army Corps of Engineers, through the GSA Schedule. In addition, both orders were set aside for small businesses, and were assigned North American Industrial Classification System (NAICS) code 337124, Metal Household Furniture Manufacturing, with a size standard of 750 employees. Unless otherwise indicated, citations are to Size Determination No. 05-2018-069.

B. Appeals

On October 8, 2018, Appellant filed the instant appeals.[2] Appellant maintains that the Area Office clearly erred in finding Appellant ineligible for the subject procurements.

Appellant first argues that, contrary to the size determinations, Appellant is the manufacturer of the end items in question and another concern, KLN Manufacturing, LLC (KLN), is "the producer." (Appeal at 2-3.) Appellant highlights that Appellant "is the exclusive owner of the drawings, specifications, and designs" of the end items, and thus should be considered the manufacturer, notwithstanding that Appellant subcontracts "100% of the production of its furnishings." (*Id.* at 2.) The Area Office erroneously focused on whether Appellant qualifies as a non-manufacturer without exploring whether Appellant is the manufacturer. (*Id.* at 3.)

Next, Appellant contends that, even if KLN is the manufacturer of the end items under 13 C.F.R. 121.406, Appellant and KLN share an identity of interest pursuant to 13 C.F.R. § 121.103(f). Based on this identity of interest, Appellant may be considered the manufacturer of the end items. (*Id.* at 3-4.)

Lastly, Appellant maintains that the Area Office's analysis also is flawed because, as of the date to determine size, KLN was a small business that made the end items in the U.S. (*Id.* at 4.) Appellant contends that the Area Office incorrectly considered Appellant's "current production relationship" with HJA, rather than Appellant's 2013 relationship with KLN. (*Id.*) Thus, no violation of 13 C.F.R. § 121.406 exists.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeals. Specifically, Appellant must prove that the size determinations are 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's principal argument here is that the Area Office should have found that Appellant is the manufacturer of the end items because Appellant is "the exclusive owner of the drawings, specifications, and designs" for those end items. Section II.B, *supra*. OHA has

[2] Appellant filed two separate appeals, one pertaining to each of the size determinations. The appeals are substantively identical, so for convenience citations refer only to the appeal from Size Determination No. 05-2018-069. OHA formally consolidated the appeals on October 9, 2018.

repeatedly explained, however, that a concern does not qualify as the "manufacturer" of an end item merely by providing designs or specifications. *E.g., Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815, at 9 (2017) (the challenged firm's "contributions to the design and engineering of the [end item] are not relevant in determining whether it is the manufacturer"); *Size Appeal of Camp Noble, Inc. dba 3-D Marketing*, SBA No. SIZ-5644 (2015). Providing designs or specifications is not sufficient to be considered the manufacturer because, under SBA regulations, "[t]he 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." 13 C.F.R. § 121.406(b)(2). In the instant case, there is no dispute that Appellant subcontracts all production of the end items, and that such production occurs entirely at subcontractor facilities. Sections II.A and II.B, *supra*. Appellant thus is not the "manufacturer" of the end items within the meaning of 13 C.F.R. § 121.406 and OHA case precedent.

Appellant also contends that, even if Appellant is not the manufacturer of the end items, Appellant nevertheless shares an identity of interest with the manufacturer. This argument is meritless. SBA regulations make clear that "[f] or size purposes, there can be only one manufacturer of the end item being acquired." 13 C.F.R. § 121.406(b)(2). Any affiliation between Appellant and the manufacturer, then, has no bearing on whether Appellant is the manufacturer of the end items under 13 C.F.R. § 121.406.

Appellant also argues that, as of the date to determine size, Appellant subcontracted production to KLN, rather than HJA. The distinction is significant, Appellant asserts, because unlike HJA, KLN is a small business concern based in the U.S. As a result, Appellant reasons, the Area Office incorrectly concluded that Appellant does not qualify as a non-manufacturer.

The problem for Appellant is that Appellant did not raise this argument during the course of the size review. On the contrary, Appellant indicated that it subcontracts "all of the production to HJA." (E-mail from J. O'Donnell to S. Chou (Sept. 6, 2018).) Appellant later reiterated that it "subcontracts production to an affiliated entity known as HJA." (E-mail from J. O'Donnell to S. Lewis (Sept. 24, 2018).) At no point during the size review did Appellant claim that, as of the date to determine size, Appellant actually subcontracted production to KLN, rather than HJA. It is well-settled law that an area office cannot have "erred" by failing to address information or arguments that were never presented to it in the first instance. *E.g., Size Appeal of EASTCO Building Servs., Inc.*, SBA No. SIZ-5437, at 5 (2013) (recognizing that a challenged firm "may not now argue on appeal what it should have argued to the Area Office"); *Size Appeal of J.M. Waller Assocs., Inc.*, SBA No. SIZ-5108, at 3 n.1 (2010) (denying appeal because the challenged firm "seeks to charge the Area Office with error for not considering an argument [the challenged firm] never made and that was not apparent from the face of the documentation [the challenged firm] presented."). Accordingly, based on the record available to the Area Office, Appellant has not shown that the Area Office committed any error in its review.

IV. Conclusion

Appellant has not shown clear error in the size determinations. As a result, the appeals are DENIED and the size determinations are AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge