United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEALS OF: Dehler Manufacturing Co., Inc., Appellant, Petition for Reconsideration of SBA No. 5977	SBA No. SIZ-5995 (PFR) Decided: April 2, 2019

APPEARANCES

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

ORDER DENYING PETITION FOR RECONSIDERATION

I. Background

A. Prior Proceedings

On January 2, 2019, Dehler Manufacturing Co., Inc. (Petitioner) filed the instant Petition for Reconsideration (PFR) of the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decision in *Size Appeals of Dehler Manufacturing Co., Inc.*, SBA No. SIZ-5977 (2018) ("*Dehler I* "). In *Dehler I*, OHA found that SBA's Office of Government Contracting — Area V (Area Office) correctly concluded that Petitioner is not the manufacturer of the end items being procured, and is not eligible as a nonmanufacturer. OHA explained that, because Petitioner informed the Area Office that the end items would be manufactured by a Colombian company, HJA S.A. (HJA), the Area Office reasonably determined that Petitioner would not supply the end items of a small business made in the United States, as would be required for Petitioner to qualify as a nonmanufacturer. *Dehler I*, SBA No. SIZ-5977, at 3.

In reaching its decision, OHA rejected Petitioner's contention that, as of the date to determine size, Petitioner actually subcontracted production to a different company, KLN Manufacturing, LLC (KLN), which, according to Petitioner, is a small business based in the United States. OHA found that Petitioner did not raise this argument during the size review, and, on the contrary, repeatedly represented to the Area Office that Petitioner "subcontracts production to an affiliated entity known as HJA." *Id.* (quoting E-mail from J. O'Donnell to S. Lewis (Sept. 24, 2018)).

B. PFR

In the PFR, Petitioner highlights that the instant case involves delivery orders under a GSA Schedule contract. The Area Office stated in the size determination that Petitioner's size would be assessed as of October 24, 2013, the date Petitioner submitted its offer for its GSA Schedule contract. (PFR at 3.) The Area Office, though, utilized factual circumstances existing in September 2018, *i.e.*, Petitioner's utilization of HJA rather than KLN. (*Id.*) Petitioner asserts that "[i]f [Petitioner] had known that the Area [Office] was going to use October 24, 2013 as the relevant date for compliance and that it was going to apply the circumstances of 2018, then [Petitioner] would have pointed out that the Area [Office] was applying the wrong set of facts." (*Id.*) Because Petitioner could not have anticipated that the Area Office "was going to say the relevant date was 2013 and then apply the facts of 2018," OHA incorrectly found that Petitioner raised a new issue for the first time on appeal. (*Id.*)

II. Discussion

A. Jurisdiction and Standard of Review

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. Petitioner filed its PFR within twenty days of service of *Dehler I*, so the PFR is timely. 13 C.F.R. § 134.227(c).

SBA's regulations provide that OHA may grant a PFR upon a "clear showing of an error of fact or law material to the decision." *Id.* This is a rigorous standard. *Size Appeal of Straughan Envtl., Inc.*, SBA No. SIZ-5776, at 3 (2016) (PFR). A PFR must be based upon manifest error of law or mistake of fact and is not intended to provide an additional opportunity for an unsuccessful party to argue its case before OHA. *Size Appeal of BryMak & Assocs., Inc.*, SBA No. SIZ-5789, at 3 (2016) (PFR); *Size Appeal of Brown & Pipkins, LLC*, SBA No. SIZ-5642, at 2 (2015) (PFR).

B. Analysis

Petitioner has not shown any error in *Dehler I*. As a result, this PFR must be denied.

In the PFR, Petitioner asserts that, had Petitioner known that the Area Office would assess Petitioner's size as of October 2013, Petitioner would have argued that KLN, rather than HJA, was the manufacturer of the end items at that time. Such an argument, though, would have conflicted with Petitioner's claim, discussed in *Dehler I*, that Petitioner was actually the manufacturer of the end items, due to Petitioner's affiliation with HJA. Moreover, the record reflects that the Area Office did make clear to Petitioner that size would be determined as of October 2013. The Area Office informed Petitioner, for example, that "since the regulations require that [the Area Office] use the date the [GSA Schedule] offer is placed . . . , [the Area Office] must use it in the size determination," and specifically referred to October 24, 2013 as the date for determining size. (E-mail from S. Lewis to J. O'Donnell (Sept. 25, 2018).) Likewise, Petitioner itself referenced this date, stating that "the ownership on October 24, 2013 was the same as described in [an earlier size determination]. The employee counts for October 24, 2013

would have been very close to the employee counts we provide[d] to you for Jan. 25, 2014." (E-mail from J. O'Donnell to S. Lewis (Sept. 25, 2018).) Accordingly, I see no merit to the notion that Petitioner was unaware of the relevant date to determine size, or that Petitioner was precluded from arguing to the Area Office that KLN, rather than HJA, was the manufacturer of the end items.

III. Conclusion

OHA may grant a PFR upon a "clear showing of an error of fact or law material to the decision." 13 C.F.R. § 134.227(c). Here, Petitioner has not established any error in OHA's decision. I therefore DENY the PFR and AFFIRM the decision in *Size Appeals of Dehler Manufacturing Co., Inc.*, SBA No. SIZ-5977 (2018).

KENNETH M. HYDE
Administrative Judge