United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: HWI Gear, Inc. Appellant, RE: Mechanix Wear, LLC Appealed From Size Determination No. 06-2020-041	SBA No. SIZ-6072 Decided: September 16, 2020

APPEARANCES

Theodore P. Watson, Esq., Cheryl E. Adams, Esq., Watson & Associates, LLC, Denver, Colorado, for Appellant

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DECISION[1]

I. Introduction and Jurisdiction

On June 3, 2020, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2020-041 concluding that Mechanix Wear, LLC (Mechanix) is a small business under the size standard associated with the subject procurement. HWI Gear, Inc. (Appellant), which had previously protested Mechanix's size, contends that the size determination is clearly erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed infra, the appeal is granted in part and the matter is remanded to the Area Office for further review.

[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.

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. The Solicitation

On July 3, 2018, the Defense Logistics Agency (DLA) issued Request for Proposals (RFP) No. SPE1C1-18-R-0093 for Army combat gloves with capacitive capability. (RFP at 16.) The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 315990, Apparel Accessories and Other Apparel Manufacturing, with a corresponding size standard of 500 employees. (*Id.* at 45.) Proposals initially were due August 31, 2018. (RFP Amendment 0004 at 2.) Mechanix and Appellant submitted timely offers. The CO informed OHA that Mechanix submitted its final proposal revisions on March 12, 2020.

According to the RFP, DLA planned to award a single indefinite-delivery indefinite-quantity (ID/IQ) contract. (RFP at 25.) Quantities and sizes of gloves would be specified in delivery orders issued after award of the base contract. (*Id.*) The contract would consist of a base year and three one-year options. (*Id.* at 9, 12-13.) DLA estimated that it would purchase 200,000 pairs of gloves during the base period, and 210,000 pairs during each option year. (*Id.* at 13.) A maximum of 1,037,500 pairs of gloves could be purchased over the entire duration of the contract. (*Id.*)

Following initial proposal submission, Mechanix filed two pre-award bid protests at the Government Accountability Office (GAO) challenging the terms of the RFP. In the first protest, Mechanix challenged the RFP's requirement for utilizing domestic leather, which GAO subsequently sustained. *Matter of Mechanix Wear, Inc.*, B-416704 and B-416704.2, Nov. 19, 2018, 2018 CPD ¶ 395. DLA then revised the RFP and permitted offerors to submit revised proposals through February 15, 2019. The second protest challenged domestic sourcing requirements, but was subsequently denied. *Matter of Mechanix Wear, Inc.*, B-416704.3, May 6, 2019, 2019 CPD ¶ 171.

B. Initial Proposal

The Area Office file includes Mechanix's initial offer including price, dated August 29, 2018. The proposal described Mechanix as a small business specializing in the "design, sourcing, production and distribution of highly engineered professional gloves for use in the tactical, industrial, automotive maintenance and racing, construction, and other specialty markets." (Initial Proposal, Cover Letter at 1.) For the instant contract, Mechanix will partner with another small business, Pyramid Case Company, Inc. (Pyramid), to produce the gloves. (*Id.*, Vol. 1 at 2.) The proposal stated that production would occur at Pyramid's facility in Providence, Rhode Island. (*Id.*, Cover Letter at 2.) This same facility is where gloves would be "inspected, packaged, packed and shipped." (*Id.* at 3.) Mechanix brings to the contract "its longstanding

experience in material sourcing, supply chain management, subcontractor oversight, quality management and electronic commerce." (*Id.*, Vol. 1 at 3.)

The proposal stated that Pyramid has 125 full-time employees, and that its capabilities include "[c]ut and sew, silk screening, pad print, heat transfer, thermoforming, seam taping, high frequency welding, [and] heat sealing." (Initial Proposal, Vol. 1 at 2.) Pyramid's production equipment includes "150 sewing machines-single needle, double needle, walking feet, post machines, overlock and zig-zag stitch." (*Id.*) The proposal stated that, for the instant procurement:

> [Mechanix] will have an on-site employee at the Pyramid facility to oversee the flow of materials and production processes for the [instant contract], assuring full compliance with all material, design and finishing requirements. In-process and lot sample quality control testing of finished gloves will be conducted under [Mechanix's] direct supervision to assure full compliance with all requirements of [the Army] and [the RFP].

(*Id.*) Mechanix submitted an "Operational Process Flow Chart" with its proposal, outlining the respective roles of Mechanix and Pyram*Id.* (*Id.* at 1, 4.) Mechanix would be responsible for "design[ing] and engineer[ing] unique problem solving gloves for the targeted market," sourcing and "[i]corporating the best materials," "[e]ngaging capable subcontractors that can comply with [Mechanix's] exacting production and quality requirements," and performing quality assurance inspections at the manufacturing facilities. (*Id.* at 1.)

C. Protest

On April 22, 2020, the CO informed unsuccessful offerors, including Appellant, that Mechanix was the apparent awardee. On April 28, 2020, Appellant filed a size protest challenging Mechanix's size.

In the protest, Appellant alleged that Mechanix is not small due to affiliation with Pyramid and with Gryphon Investors (Gryphon), a private equity firm. (Protest at 1.) Appellant maintained that Pyramid will function as Mechanix's ostensible subcontractor for the instant procurement, in contravention of 13 C.F.R. § 121.103(h)(4). (*Id.*) Dun and Bradstreet reports indicate that Pyramid has 531 employees, which by itself would exceed the 500-employee size standard applicable to this procurement. (*Id.*)

Appellant further contended that Gryphon has made "a significant investment" in Mechanix, and has "installed a new President and COO" at Mechanix. (*Id.*) Gryphon holds investments in a portfolio of other companies and is not a small business. (*Id.*)

The CO forwarded the protest to the Area Office for review.

D. Size Determination

On June 3, 2020, the Area Office issued Size Determination No. 06-2020-041, finding that Mechanix is a small business. The Area Office first explained that size normally is determined as of the date a concern submits its initial offer, including price. (Size Determination at 2, citing 13 C.F.R. § 121.404(a).) Here, Mechanix submitted its initial offer for the procurement on August 29, 2018. (*Id.*) Therefore, the Area Office examined Mechanix's size and affiliates as of this date. (*Id.*)

The Area Office found that, as of August 29, 2018, Mechanix was [XXX]% owned by [XXXXX]. (*Id.* at 4.) [XXXX] had the power to control Mechanix by virtue of her ownership interest. (*Id.*) Other [XXXXX] family members also held ownership interests in Mechanix, collectively owning an [XXXX]% interest in Mechanix. (*Id.*) The Area Office found an identity of interest between [XXXXX] and [XXXXXX]. (*Id.*)

The Area Office next determined that, as of August 29, 2018, Mechanix was affiliated with Mechanix Wear Canada, Inc. (MW Canada), [XXXXX], and MW Asia Pacific Pty Ltd. (MW Asia), based on common ownership. (*Id.* at 5-6.) The Area Office explained that [XXXXX] held a majority interest in [XXXXX] and members of the [XXXXX] family collectively held a [XXXX]% interest in MW Canada and a [XXXX]% interest in MW Asia. (*Id.*) The combined employees of Mechanix and these affiliates, though, did not exceed the size standard. (*Id.* at 15.)

The Area Office found that Mechanix is not affiliated with [XXXXX], which held a [minority] interest in MW Canada. (*Id.* at 4-5.) [XXXXX] is owned equally by a husband and wife, [XXXXX]. Further, aside from MW Canada, there are no other joint investments between [XXXXX] and [XXXXX]. (*Id.*)

The Area Office addressed Appellant's protest allegation that Gryphon, a large business, made a substantial investment in Mechanix. (*Id.* at 6-7.) Under SBA's "present-effect rule," 13 C.F.R § 121.103(d)(1), an agreement to merge, including an agreement in principle, may be given present effect in analyzing size. (*Id.*) In the instant case, the Area Office gave present effect to a Letter of Intent (LOI) stating that Gryphon planned to acquire Mechanix, MW Canada, and MW Asia, which Mechanix signed on July 15, 2019. (*Id.* at 6.) The Area Office thus concluded that Mechanix was affiliated with Gryphon as of July 15, 2019, and that Mechanix consequently was no longer small as of that date. (*Id.*) However, because "the LOI had not been drawn up and was not in effect" as of the date of Mechanix's initial proposal, August 29, 2018, the Area Office found no affiliation between Mechanix and Gryphon as of the earlier date. (*Id.* at 7.)

The Area Office considered whether Mechanix will be the manufacturer of the combat gloves for the instant procurement. (*Id.* at 8.) According to the initial proposal, Pyramid, not Mechanix, will be responsible for "cutting and sewing operations," which will occur at Pyramid's facility in Providence, Rhode Island. (*Id.* at 8-9.) The Area Office "requested clarification" from Mechanix as to "the exact duties that would be performed by [Mechanix]." (*Id.* at 9.) In response, Mechanix represented that it would have "control over each element of the

manufacturing process." (*Id.*) More specifically, Mechanix would be responsible for "preparing the design concept, developing, reviewing and testing of the initial prototype, securing raw materials, managing and tracing supply chain and quality control." (*Id.*) Mechanix characterized Pyramid's role as "limited to cutting and sewing processes," and contended that such work would represent approximately [XX]% of the contract value. (*Id.*)

The Area Office explained that under 13 C.F.R. § 121.406(b)(2), there can be only one manufacturer of an end item. Here, the Area Office found, Mechanix is the manufacturer because it "will be in charge [of] not only the design of the combat gloves, but also the securing of raw materials and components, assembling the components, and the transformation of such components into the gloves being acquired by [DLA]." (*Id.*)

The Area Office also noted that, according to the *NAICS Manual*,[2] "cut and sew apparel contractors" are "specifically excluded from the NAICS [code] assigned to this procurement." (*Id.* at 9-10.) The Area Office found it "rational to conclude that greater weight must be given to the manufacturing activities presented under NAICS [code] 315990 and that such activities more closely describe the activities that would be performed by [Mechanix]." (*Id.* at 10.)

Having concluded that Mechanix itself is the manufacturer of the gloves, the Area Office found that Mechanix need not also demonstrate compliance with the nonmanufacturer rule. (*Id.*)

The Area Office next found that Pyramid is a small business for this procurement. (*Id.* at 12.) Pyramid is [XXXX]% owned by [XXXX], who controls the company. [XXXX] also holds controlling interests in three other companies, and these are affiliated with Pyramid. (*Id.* at 13.) In addition, [XXXXXXXXXX] holds a majority interest in a fourth company. (*Id.*) The combined size of Pyramid and these four affiliates, however, does not exceed the size standard. (*Id.* at 14.) The Area Office found no affiliation between Pyramid and two Chinese concerns, Pyramid Chuang Jie Factory and Pyramid Wuxi Xinya Micro Fibrous, Ltd. Although Pyramid has permitted these concerns to use the name "Pyramid" for marketing purposes, neither Pyramid nor the [XXXX] family holds any ownership or managerial interest in those companies, and Pyramid has derived less than [XXX]% of its revenues from the two concerns. (*Id.* at 13.)

The Area Office concluded its analysis by stating that there is no violation of the ostensible subcontractor rule. (*Id.* at 14.) Mechanix will be performing the primary and vital requirements of the procurement (*i.e.*, "manufacturing of the combat gloves"), and Mechanix and Pyramid in any event are "similarly situated entities" under 13 C.F.R. § 125.1. (*Id.*)

E. Appeal

On June 17, 2020, Appellant filed the instant appeal. Appellant contends that the size determination is marred by several significant errors, and should be reversed or remanded.

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[2] Executive Office of the President, Office of Management and Budget, North American Industry Classification System-United States (2017), available at http://www.census.gov.

Appellant first argues that the Area Office did not adequately explore whether [XXXXXXX] has the power to control MW Canada. (Appeal at 7.) The issue is significant, Appellant maintains, because the Area Office found that Mechanix is affiliated with MW Canada. (*Id.*) Further, according to Appellant, the Area Office failed to analyze the relationship between Mechanix and [XXXXXX] under the totality of the circumstances. (*Id.*) Appellant maintains that the Area Office erred in calculating the combined employees of Mechanix and its affiliates, because [XXXXXXXXX] were not included in the calculations. (*Id.* at 8.)

Next, Appellant submits that the Area Office conducted a "mechanical" review of the relationship between Mechanix and Gryphon. (*Id.* at 9-11.) Although the Area Office found that the LOI should be given present effect as of July 15, 2019, Appellant contends that Gryphon must have been planning to assume control of Mechanix much earlier, "long before [Mechanix] submitted its offer to DLA" for the instant procurement. (*Id.* at 9.) Appellant adds that the "present effect rule does not trump the totality of the circumstances requirements." (*Id.* at 10.) Further, Mechanix may have enjoyed an unfair competitive advantage in this procurement, because Mechanix had "access to Gryphon's large-business financial and other support." (*Id.*)

Appellant complains that the Area Office assessed size only as of August 29, 2018, the date of Mechanix's initial proposal. (*Id.* at 14.) For purposes of the ostensible subcontractor rule and the nonmanufacturer rule, though, size must be determined as of the date of final proposal revisions. (*Id.*, quoting 13 C.F.R. § 121.404(d).) Based on the "possibility that the nonmanufacturer rule and/or the ostensible subcontractor rule" may apply in this case, the Area Office should have examined size as of the date of final proposal revisions. (*Id.*)

Appellant attacks the Area Office's conclusion that Mechanix is the manufacturer of the gloves for this procurement. (*Id.* at 11-13.) Contrary to the Area Office's reasoning, cutting and sewing are essential to the manufacturing process, and such work will occur entirely at Pyramid's facility. (*Id.* at 12.) Appellant argues that because cutting and sewing are, in effect, assembly of the final end item, the Area Office should have found that Pyramid is the manufacturer of the gloves. (*Id.* at 12-13.)

Appellant alleges that Mechanix is violating the ostensible subcontractor rule because Pyramid, not Mechanix, is performing the "primary and vital" contract requirements. (*Id.* at 13.) Specifically, the Area Office did not explain "how the cutting and sewing of the gloves would not be 'assembling the components' and 'transformation into gloves'," and overlooked the fact that "transformation of the [raw] material into gloves would actually be done by Pyramid at Pyramid's facilities." (*Id.*) Mechanix cannot perform the instant contract "without Pyramid's facility and its employees doing the cutting and sewing of the gloves." (*Id.*)

Appellant asserts that the Area office erred by not finding Pyramid affiliated with Mechanix. (*Id.* at 14-15.) The Area Office did not inquire into whether Pyramid or its affiliates have the power to control Mechanix. The Area Office also did not adequately consider whether the two Chinese companies are affiliated with Pyramid. (*Id.*)

Finally, Appellant maintains that the Area Office erred in finding that Mechanix and Pyramid are similarly situated entities. (*Id.* at 15.) Under 13 C.F.R § 125.1, a similarly situated

entity must be small under the NAICS code that the prime contractor assigned to the subcontract. (*Id.*) Here, the Area Office found Pyramid to be small under NAICS code 315990, but also concluded that Pyramid would perform work that is excluded from this NAICS code. The Area Office did not assess whether Pyramid is small under the NAICS code assigned to the subcontract. (*Id.* at 15-16.)

F. Mechanix's Response

On July 6, 2020, Mechanix responded to the appeal. Mechanix maintains that the Area Office properly determined that Mechanix is the manufacturer of the gloves for the contract. Therefore, the Area Office was not required to inquire into the nonmanufacturer rule or the ostensible subcontractor rule. Mechanix asserts that the Area Office also properly applied the present effect rule and utilized the correct date for determining Mechanix's size. Therefore, the appeal should be denied.

Mechanix argues, first, that the Area Office properly found that Mechanix is the manufacturer of the gloves, after performing an in-depth analysis that "went far beyond merely reviewing [Mechanix's] proposal" by also considering "additional information such as a product flow chart, project evolutions, and other responsive information." (Response at 10, 15.) The Area Office correctly determined that Mechanix "will perform the essential design, material acquisition, and production coordination at [Mechanix's] manufacturing facilities." (*Id.* at 18.) Further, as the Area Office recognized, the NAICS code assigned to the procurement, 315990, Apparel Accessories and Other Apparel Manufacturing, excludes "cut and sew apparel contractors." (*Id.* at 13.) Pyramid should not be considered the manufacturer when it will perform only "tasks that according to this NAICS code . . . are not key to manufacturing this type of product." (*Id.* at 14.) Mechanix urges that "there is no error in the Area Office's decision to accord the cutting and sewing efforts lesser weight when determining the manufacturer of gloves under NAICS code 315990, as the description of the NAICS code expressly excludes firms engaged in cutting and sewing operations." (*Id.* at 15.)

Mechanix observes that Appellant could have appealed the NAICS code designation, but chose not to avail itself of this opportunity. (*Id.*, n.5.) Moreover, any error with regard to the NAICS code assigned to the subcontract would be harmless, because the NAICS code Appellant advocates for the subcontract has a larger, 750-employee size standard. (*Id.* at 18, n.6.)

Mechanix maintains that, because the Area Office found that Mechanix is the manufacturer of the gloves, the Area Office correctly declined to invoke the nonmanufacturer rule. (*Id.* at 16-17.) Pursuant to 13 C.F.R. § 121.406, the nonmanufacturer rule is inapplicable when the small business prime contractor is the manufacturer in the first instance. (*Id.* at 16.)

Similarly, having concluded that Mechanix is the manufacturer of the gloves, the Area Office was not required to also analyze the relationship between Mechanix and Pyramid under the ostensible subcontractor rule. (*Id.* at 17.) OHA has explained that it would be "futile" to explore whether the challenged concern has an ostensible subcontractor after determining that the challenged concern is the manufacturer. (*Id.*, quoting *Size Appeal of Mistral, Inc.*, SBA No. SIZ-5877, at 13 (2018).) Further, the assignment of a manufacturing NAICS code to this

procurement clearly denotes that the "primary and vital" contract requirements are manufacturing. (*Id.* at 17-18.)

Mechanix argues that the Area Office properly applied the present effect rule to determine that Gryphon and Mechanix were not affiliated as of August 29, 2018. (*Id.* at 19.) The Area Office found that Mechanix and Gryphon had an agreement in principle embodied in an LOI dated July 15, 2019, and Appellant offers absolutely no evidence of any supposed agreement prior to July 15, 2019. (*Id.* at 19-20.)

Mechanix contends that the Area Office correctly used August 29, 2018, the date that Mechanix submitted its initial offer including price, as the date to determine Mechanix's size. (*Id.* at 20-21.) It is well-settled that "events occurring after the date to determine size are not relevant in a size determination." (*Id.* at 21, citing *Size Appeal of Global Dynamics, LLC*, SBA No. SIZ-6012 (2019) and *Size Appeal of Precision Asset Mgmt. Corp. et al.*, SBA No. SIZ-5781 (2016)). Appellant's suggestion that the Area Office should have based its decision on the date of final proposal revisions is meritless. (*Id.* at 21-22.) OHA has held that where an Area Office determines that the challenged concern is the manufacturer of the end items under 13 C.F.R. § 121.406(b)(2), size is determined "as of the date of its self-certification, submitted with its initial offer, including price." (*Id.* at 22, quoting *Size Appeal of Lynxnet, LLC*, SBA No. SIZ-5971, at 11 (2018).)

Mechanix disputes Appellant's contentions that the Area Office failed to conduct a thorough review of affiliation questions. Appellant's allegations are no more than "vague assertions unsupported by evidence." (*Id.* at 23.) The Area Office correctly found that [XXXXXXX] is not affiliated with Mechanix, and correctly found that Pyramid is not affiliated with the two Chinese companies. (*Id.* at 23-25.) Further, the Area Office correctly calculated employee counts. Although the size determination did not specifically address the employee count of [XXXXX], this entity is "an intermediary holding company that owns part of MW Canada, so it has no employees." (*Id.* at 23.)

Finally, Mechanix contends that additional analysis under the totality of the circumstances test was unnecessary. Appellant did not raise this allegation in its size protest, and Appellant in any event misconstrues the test. (*Id.* at 25.) "[Appellant's] arguments fail because they lack specificity and factual support, and do not demonstrate—nor even allege—control by any specific entity, nor that such supposed control existed on the date to determine size (August 29, 2018)." (*Id.* at 26.)

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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-4775, at 11 (2006).

B. Analysis

The Area Office in this case found that Mechanix, rather than Pyramid, is the manufacturer of the end items, the combat gloves. Section II.D, supra. As Appellant correctly observes in its appeal, however, the size determination does not articulate a valid supporting rationale for this conclusion. Accordingly, I find it appropriate to remand this question for further review.

The analysis set forth in the size determination is incomplete or flawed for several reasons. First, it is unclear from the size determination what role Mechanix will have in the manufacturing process. Although the Area Office observed that Mechanix will be responsible for product design and engineering, OHA has repeatedly explained that such work is not manufacturing. *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*., SBA No. SIZ-5644 (2015). The Area Office similarly found that Mechanix will perform testing and quality control, but such work, again, does not constitute manufacturing. 13 C.F.R. § 121.406(b)(2)(i)(A). The size determination thus does not resolve the central question of which concern (Mechanix or Pyramid) will perform the primary activities of transforming raw materials into the end items.

Second, it is unclear to what extent the Area Office based its decision on Mechanix's proposal, as opposed to post-proposal information or argument. Mechanix itself acknowledges that the Area Office "went far beyond merely reviewing [Mechanix's] proposal" by also considering "additional information such as a product flow chart, project evolutions, and other responsive information." Section II.F, supra. It is well-settled law, however, that "documents created in response to a protest may not be used to contradict an offeror's proposal." *Coulson*, SBA No. SIZ-5815, at 10; *Size Appeal of Tech. Assocs., Inc*., SBA No. SIZ-5814, at 12 (2017); *Size Appeal of M1 Support Servs., LP*, SBA No. SIZ-5297, at 9 (2011). Here, Mechanix's proposal seemingly indicated that Mechanix would have only a single employee on-site at the facility where production would occur, yet the size determination suggests that Mechanix would be involved in "assembling the components." Sections II.B and II.D, *supra.* Accordingly, additional review is needed to determine whether Mechanix's purported role in manufacturing can be reconciled with its actual proposal.

Third, the Area Office based its decision, in part, on the notion that "cut and sew" contractors are excluded from the NAICS code assigned to the instant procurement. Section II.D, supra. This reasoning, though, reflects a misunderstanding of the NAICS Manual. In the context of apparel manufacturing, the NAICS Manual draws a distinction between two types of establishments: (1) "cut-and-sew" contractors, defined as those establishments engaged in "purchasing fabric and cutting and sewing to make a garment" and (2) "establishments that first knit fabric and then cut and sew the fabric into a garment." *NAICS Manual* at 172. Both types of

establishments, then, cut and sew fabrics to make garments; the difference is whether an establishment first produces its own fabric. The Area Office therefore clearly erred in assuming that firms engaged in the physical tasks of cutting and sewing are not conducting apparel manufacturing. On the contrary, cutting and sewing are integral to all types of apparel manufacturing.

Nor can I conclude that the Area Office's analysis of the manufacturing question was mere harmless error. It is true, as Mechanix observes in its response to the appeal, that in determining whether the challenged firm is the manufacturer of the end item, size is assessed as of the date of the initial offer including price. *Size Appeal of Lynxnet, LLC*, SBA No. SIZ-5971, at 11 (2018). For purposes of the nonmanufacturer rule, though, size is determined as of final proposal revisions. 13 C.F.R. § 121.404(d). Moreover, in order to qualify as a nonmanufacturer, a concern may have no more than 500 employees. *Id.* § 121.406(b)(1). Here, the CO has informed OHA that Mechanix submitted final proposal revisions on March 12, 2020, and the Area Office expressly determined that Mechanix was no longer a small business, under a 500-employee size standard, as of July 15, 2019. Sections II.A and II.D, *supra*. It thus appears doubtful that Mechanix could qualify as a nonmanufacturer, if it is not the manufacturer. The issue of whether Mechanix is the manufacturer of the combat gloves therefore is crucial to resolution of this case.

Apart from the question of whether Mechanix is the manufacturer of the end items or qualifies as a nonmanufacturer, Appellant has not met its burden of demonstrating error in the size determination. The record reflects that the Area Office reviewed Appellant's protest allegations and found them to be meritless. Sections II.C and II.D, *supra*. Although Appellant speculates that Gryphon may have been planning to assume control of Mechanix prior to the submission of initial proposals, Appellant offers no factual support for this allegation. Appellant similarly has not shown that Pyramid or [XXXXX] have the power to control Mechanix, or that the Area Office committed any error(s) in computing size. The ostensible subcontractor rule is not applicable to procurements, such as found here, for manufactured products. Size Appeal of *Superior Optical Labs, Inc*., SBA No. SIZ-6068, at 9 (2020). Accordingly, Appellant has not shown any valid basis to disturb these portions of the Area Office's decision.

IV. Conclusion

For the above reasons, the appeal is GRANTED with respect to whether Mechanix is the manufacturer of the end items or qualifies as a nonmanufacturer, and I REMAND that question to the Area Office for further review. Appellant has not otherwise shown clear error in the size determination. I therefore DENY the appeal and AFFIRM the size determination with regard to all other findings.

KENNETH M. HYDE
Administrative Judge