United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: HWI Gear, Inc., Appellant, RE: Mechanix Wear, LLC Petition for Reconsideration of SBA No. SIZ-6072	SBA No. SIZ-6088 Decided: January 14, 2021

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ORDER DENYING PETITION FOR RECONSIDERATION[1,2]

I. Background

A. Prior Proceedings

On October 6, 2020, Mechanix Wear, LLC (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 Appeal of HWI Gear, Inc.*, SBA No. SIZ-6072 (2020) ("*HWI Gear I*"). In that decision, OHA granted an appeal filed by the original protestor, HWI Gear, Inc. (HWI Gear), and remanded the underlying size determination, No. 06-2020-041, to SBA's Office of Government Contracting — Area VI (Area Office) for further review.

OHA explained that the Area Office did not articulate a valid basis to conclude that Petitioner is the manufacturer of the end items being acquired, combat gloves with capacitive capability. More specifically, OHA found the size determination flawed for three reasons.

First, Petitioner's proposal stated that Petitioner would partner with another concern, Pyramid Case Company, Inc. (Pyramid), to produce the gloves, but the size determination did not "resolve the central question of which concern ([Petitioner] or Pyramid) will perform the primary activities of transforming raw materials into the end items." *HWI Gear I*, SBA No. SIZ-

[1] OHA issued a protective order in this case on June 22, 2020, which remains in effect for the PFR.

[2] This decision was originally 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. No redactions were requested, and OHA now issues the entire decision for public release.

6072, at 9. The size determination indicated that Petitioner would be responsible for "product design and engineering" as well as "testing and quality control," but such work is not manufacturing under OHA case precedent and applicable regulations. *Id.*

Second, OHA found it unclear to what extent the Area Office based its decision on Petitioner's proposal, as opposed to post-proposal information or argument. Although Petitioner's proposal seemingly indicated that Petitioner would have only a single employee on-site at Pyramid's facility where production would occur, the size determination found that Petitioner would be engaged in "assembling the components." *Id.* Additional review was needed to assess whether "[Petitioner's] purported role in manufacturing can be reconciled with its actual proposal." *Id.*

Third, OHA found that the Area Office incorrectly assumed that firms engaged in the physical tasks of cutting and sewing could not be conducting apparel manufacturing. The Area Office reached this conclusion because "cut and sew apparel contractors" are not included within North American Industry Classification System (NAICS) code 315990, Apparel Accessories and Other Apparel Manufacturing, according to the definitions in the *NAICS Manual. Id.* at 10. The *NAICS Manual* elsewhere explains, however, that both "cut and sew apparel contractors" and apparel manufacturers engage in cutting and sewing, and that the distinction between these types of establishments instead turns upon whether a concern produces its own fabric before performing other manufacturing tasks. *Id.*

OHA lastly opined that the Area Office's analysis of the manufacturing question would be "crucial to the resolution of the case" because it is "doubtful that [Petitioner] could qualify as a nonmanufacturer, if it is not the manufacturer." *Id.* To qualify as a nonmanufacturer, a concern may have no more than 500 employees, and size is assessed as of the date of final proposal revisions. *Id.* In the size determination, the Area Office found that Petitioner was no longer a small business under a 500-employee size standard as of July 15, 2019, well before Petitioner submitted its final proposal revisions on March 12, 2020. *Id.*

B. PFR[3]

In its PFR, Petitioner contends that OHA erred, first, by overlooking correspondence between the Area Office and Petitioner, which occurred between May 27, 2020 and May 29, 2020, and which led the Area Office to conclude that Petitioner's "employees would be preparing the design concept, developing, reviewing and testing of the initial prototype, securing raw materials, managing and tracing supply chain and quality control." (PFR at 14, quoting Size Determination at 9.) Although OHA suggested in *HWI Gear I* that such work may not constitute manufacturing, the specific cases cited by OHA are not controlling here. *Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815 (2017) is distinguishable because the NAICS code at

[3] Petitioner originally filed its PFR on October 6, 2020, but moved to amend the PFR on October 13, 2020 so as to correct certain typographical and clerical errors. No party objected to Petitioner's motion. Accordingly, pursuant to 13 C.F.R. § 134.207(a), Petitioner's motion to amend its PFR is granted. Citations throughout this decision are to the amended version of the PFR.

issue in that case "did not expressly except types individual industry manufacturing activities." (*Id.* at 15.) The NAICS code in *Size Appeal of Camp Noble, Inc.*, SBA No. SIZ-5644 (2015) did except individual industry manufacturing activities, but neither the NAICS code nor the *NAICS Manual* were at issue in that case. (*Id.*)

Next, Petitioner contends that OHA erred by focusing narrowly on which concern will primarily perform the "conversion of raw materials into end items." (*Id.*) Pursuant to 13 C.F.R. § 121.406(b)(2)(i), the Area Office was required to weigh three factors in deciding whether Petitioner is the manufacturer of the end items: "the proportion of the value added by the contractor, the relative importance of the added elements to the end product's ultimate functionality, and the technological capabilities of the manufacturing concern." (*Id.*) OHA improperly reduced the matter to only the "central question" of which firm "will perform the primary activities of transforming raw materials into end items." (*Id.* at 16.)

Petitioner contends that OHA erred in its discussion of the *NAICS Manual*. Contrary to OHA's reasoning in *HWI Gear I*, the Area Office relied upon the "express language" of the *NAICS Manual*, which states that "cut and sew apparel contractors" do not fall within NAICS code 315990, Apparel Accessories and Other Apparel Manufacturing. (*Id.*) Although OHA may disagree with the NAICS code chosen for this procurement, the time period for any challenge to the assigned NAICS code has long since expired. (*Id.* at 17.)

Petitioner asserts that OHA also erred as a matter of law by raising the nonmanufacturer rule. (*Id.*) According to Petitioner, if Petitioner cannot qualify as the manufacturer, "then no business concern who exclusively met the manufacturing qualifications under NAICS [code] 315990" could qualify either. (*Id.* at 18.) Such a result would be "chaotic" because "the NAICS code established at the outset of the set-aside would be unreliable for purposes of the award and performance of the contract resulting from the solicitation." (*Id.*)

Lastly, Petitioner argues that OHA erred by failing to defer to the Area Office's decision. (*Id.* at 18-19.) The Area Office's conclusion that Petitioner is the manufacturer of the combat gloves was "not only plausible" but also "rational and logical," so OHA should have refrained from disturbing the size determination. (*Id.* at 19.)

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 on the twentieth day after service of *HWI Gear 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 Appeals of Dehler Mnfg. Co., Inc.*, SBA No. SIZ-5995, at 2 (2019) (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 clear error of fact or law in *HWI Gear I*. Therefore, this PFR must be denied.

Petitioner contends, first, that OHA erred by overlooking correspondence between Petitioner and the Area Office, in which Petitioner outlined the role it expected to play in the manufacturing process. Section I.B, *supra*. OHA, though, did consider such correspondence, but expressed concern as to whether Petitioner's post-proposal submissions and arguments were consistent with Petitioner's underlying proposal. Section I.A, *supra*. Further, at least some of the types of work that Petitioner claimed it would perform — such as product design and quality control — did not appear to constitute "manufacturing" within the meaning of SBA regulations and OHA case precedent. *Id.* OHA therefore appropriately concluded that additional review would be necessary to determine whether Petitioner is the manufacturer of the end items.

Petitioner next argues that the case precedent cited by OHA in *HWI Gear I* can be distinguished from the instant case, and that OHA erred by not addressing the three-factor test, set forth at 13 C.F.R. § 121.406(b)(2)(i), utilized in determining whether a concern is the manufacturer of end items. Section I.B, *supra*. These arguments fail because OHA in *HWI Gear I* did not decide whether Petitioner is, or is not, the manufacturer of the end items; rather, OHA remanded that question to the Area Office for further review and investigation. Section I.A, *supra*. Accordingly, insofar as Petitioner believes the instant case is distinguishable from prior OHA precedent, or that application of the three-factor test would weigh in favor of concluding that Petitioner is the manufacturer, Petitioner is free to voice such arguments on remand and/or in any subsequent size appeal.

Petitioner additionally contends that OHA erred in its discussion of the *NAICS Manual*. As explained in *HWI Gear I*, though, OHA discussed the *NAICS Manual* only because the Area Office, in the size determination, relied upon the *NAICS Manual* for the proposition that firms engaged in the physical tasks of cutting and sewing are not conducting apparel manufacturing. Section I.A, *supra*. The Area Office's conclusion was mistaken, because the *NAICS Manual* instead identifies two similar types of establishments: (1) "cut-and-sew" apparel contractors, defined as those establishments engaged in "purchasing fabric and cutting and sewing to make a garment" and (2) apparel manufacturers, which "first knit fabric and then cut and sew the fabric into a garment." *Id.* Accordingly, both "cut-and-sew" apparel contractors and apparel manufacturers perform the physical tasks of cutting and sewing, and the Area Office incorrectly assumed that apparel manufacturing does not encompass such work. Petitioner has shown no error in OHA's discussion of the *NAICS Manual* in *HWI Gear I*.

Petitioner also maintains that OHA improperly raised the nonmanufacturer rule in *HWI Gear I*, and that, if Petitioner is not the manufacturer of the combat gloves, then no other concern is likely to qualify, either. Section I.B, *supra*. Again, OHA made no ruling in *HWI Gear I* as to whether or not Petitioner is the manufacturer of the combat gloves. Section II.A, *supra*. OHA did

remark that "if [Petitioner] is not the manufacturer," Petitioner may have difficulty qualifying as a nonmanufacturer. *Id.* Read in context, though, OHA's comment merely explained why further analysis of the manufacturing question would be "crucial to the resolution of the case," and why the Area Office's initial, flawed consideration of the matter could not be disregarded as harmless error. *Id.*

Lastly, I see no merit to Petitioner's claim that OHA should have deferred to the size determination. While it is true that OHA will not disturb a size determination unless the appellant proves that the size determination is clearly erroneous, HWI Gear did make such a showing in the instant case. *Id.* Under those circumstances, it would have been improper, and inconsistent with OHA's role as an independent forum, for OHA to defer to the size determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 9-10 (2006) (OHA will grant an appeal under a clear error standard of review when it has a "definite and firm conviction" that "key findings" of fact or law are mistaken) (citing *Easley v. Cromartie*, 532 U.S. 234 (2001)).

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 demonstrated any error in OHA's decision. I therefore DENY the PFR and AFFIRM the decision in *Size Appeal of HWI Gear, Inc.*, SBA No. SIZ-6072 (2020).

KENNETH M. HYDE
Administrative Judge