United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Mechanix Wear, LLC, Appellant, Appealed From Size Determination No. 06-2020-088	SBA No. SIZ-6098 Decided: May 19, 2021

APPEARANCES

. H. Boyd Greene, IV., Esq.., Kirkland & Ellis LLP, Washington, D.C., for Appellant Mechanix Wear, LLC

heodore P. Watson, Esq., Watson & Associates, LLC, Denver, Colorado, for Intervenor HWI Gear Inc.

DECISION[1]

I. Introduction and Jurisdiction

On January 28, 2021, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2020-088 (Remand of 06-2020-041) concluding that Mechanix Wear, LLC (Appellant) is other than small for the instant procurement for failure to meet the requirements as a small business manufacturer or as a small business nonmanufacturer. On appeal, Appellant, the original protested concern, maintains that the Area Office disregarded SBA's Office of Hearings and Appeals (OHA) further remand instructions and clarifications set forth in *Size Appeal of HWI Gear, Inc.*, SBA No. SIZ-6088 (2020) (*HWI Gear II*) and instead relied solely on its own interpretation of *Size Appeal of HWI Gear, Inc.*, SBA No. SIZ-6072 (2020) (*HWI Gear I*). For the reasons discussed *infra*, the appeal is DENIED, and the size determination is 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 instant appeal within fifteen

[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.

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

This is the third time OHA has had occasion to consider Appellant's size in connection with this procurement. In *Size Appeal of HWI Gear, Inc.*, SBA No. SIZ-6072 (2020) (*HWI Gear I*), OHA granted an appeal filed by the original protestor, HWI Gear, Inc. (HWI Gear or Intervenor), and remanded the underlying size determination to SBA's Office of Government Contracting — Area VI (Area Office) for further review, as the Area Office did not articulate a valid basis to conclude that Appellant is the manufacturer of the end items being acquired, combat gloves with capacitive capability. In *Size Appeal HWI Gear, Inc.*, SBA No. SIZ-6088 (2021) (*HWI Gear II*), OHA denied HWI Gear's Petition for Reconsideration as HWI Gear had not demonstrated any error in OHA's decision.

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 500 employee size standard. (*Id.*, at 45.) Proposals initially were due August 31, 2018. (RFP Amendment 0004, at 2.) Appellant and HWI Gear submitted timely offers. The CO informed OHA that Appellant 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 the initial proposal submission, Appellant filed two pre-award bid protests at the Government Accountability Office (GAO) challenging the terms of the RFP. In the first protest, Appellant 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, which was subsequently denied. *Matter of Mechanix Wear, Inc.*, B-416704.3, May 6, 2019, 2019 CPD ¶ 171.

B. *HWI Gear I*

After the CO announced that Appellant was the apparent awardee, HWI Gear filed a protest challenging Appellant's size. On June 3, 2020, the Area Office issued Size Determination No. 06-2020-041, finding that Appellant was a small business. HWI Gear challenged Size Determination No. 06-2020-041, and on September 16, 2020, OHA issued *HWI Gear I*, granting the appeal filed by HWI Gear and remanding the underlying size determination, to the Area Office for further review.

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

First, Appellant's proposal stated that it 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 will perform the primary activities of transforming raw materials into the end items." (*HWI Gear I*, SBA No. SIZ-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 upon Appellant's proposal, as opposed to post-proposal information or argument. While Appellant's proposal indicated that Appellant would have only a single employee on-site at Pyramid's facility where production would occur, the size determination found that Appellant would be engaged in "assembling the components." (*Id.*) Additional review was needed to assess whether Appellant's post proposal statements as to its 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 NAICS code 315990, Apparel and Accessories and Other Apparel Manufacturing, according to the definitions in the NAICS Manual.[2] (*Id.*, at 10.) However, the NAICS Manual explains elsewhere that both "cut and sew apparel contractors" and apparel manufacturers engage in cutting and sewing. Cutting and sewing are integral to all types of apparel manufacturing. The distinction between the types of establishments turn on whether a concern produces its own fabric before performing other manufacturing tasks. (*Id.*)

Finally, OHA held that the Area Office's analysis of the manufacturing question would be "crucial to the resolution of the case" because it is "doubtful that [Appellant] 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 determined as of the date of final proposal

[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.

revisions. (*Id.*) In the size determination, the Area Office found that Appellant was no longer a small business under the 500-employee size standard as of July 15, 2019, well before Appellant submitted its final proposal revisions on March 12, 2020. (*Id.*)

D. *HWI Gear II*

On October 6, 2020 Appellant filed a Petition for Reconsideration (PFR) of the SBA OHA decision *HWI Gear I*. On January 14, 2021, OHA denied the PFR, stating that Appellant had not shown a clear error of fact or law in *HWI Gear I*. (*Size Appeal of HWI Gear, Inc.*, SBA No. SIZ-6088, at 4 (2021).)

Specific to Appellant's first argument that OHA erred by overlooking correspondence between Appellant and the Area Office, in which Appellant outlined the role it expected to play in the manufacturing process. OHA explained that it had considered such correspondence but expressed concern as to whether Appellant's post-proposal submissions and arguments were consistent with Appellant's underlying proposal. (*Id.*) Additionally, at least some of the work Appellant 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.*) As such, OHA determined it appropriately concluded that additional review would be necessary to determine whether Appellant is the manufacturer of the end items. (*Id.*)

Appellant further argued that the case precedent cited by OHA in *HWI Gear I* is distinguishable 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. (*Id.*) OHA found that such arguments failed because OHA in *HWI Gear I* did not decide whether Appellant is the manufacturer of the end items. Instead, OHA remanded that question to the Area Office for further review and investigation. (*Id.*) OHA explained that if Appellant 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 Appellant is the manufacturer, Appellant is free to make such arguments on remand and/or in any subsequent size appeal. (*Id.*)

Appellant also argued that OHA erred in its discussion of the NAICS Manual. OHA explained that in *HWI Gear I*, OHA discussed the NAICS Manual only because the Area Office, in the size determination, relied upon the NAICS Manual as authority that firms engaged in the physical tasks of cutting and sewing are not conducting apparel manufacturing. (*Id.*) OHA stated that the Area Office 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. (*Id.*) As such, Appellant did not establish that there was any error in OHA's discussion of the NAICS Manual in *HWI Gear I*. (*Id.*)

Appellant further claims OHA improperly raised the nonmanufacturer rule in *HWI Gear I*, and that, if Appellant is not the manufacturer of the combat gloves, then no other concern is likely to qualify, either. (*Id.*, at 5.) OHA again explained that it did not make a ruling in *HWI Gear I* as to whether Appellant is the manufacturer of the combat gloves. (*Id.*) OHA did remark that "if [Appellant] is not the manufacturer," Appellant may have difficulty qualifying as a nonmanufacturer. (*Id.*) Read in context, 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.*)

Finally, OHA found Appellant's argument that OHA should have deferred to the size determination to be meritless. 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 such circumstances, it would have been improper, and inconsistent with OHA's role as an independent forum, for OHA to defer to the size determination. (*Id.*; citing *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)).)

E. Remand Size Determination No. 06-2020-088

On January 28, 2021, the Area Office issued Size Determination No. 06-2020-088. (Remand Size Determination.) The Area Office noted the direction in OHA's remand decision to review whether Appellant qualifies as the manufacturer of the items being procured to the government. The Area Office found that product design and engineering and quality control management and logistics are not part of manufacturing, based on *HWI Gear I*. (*Id.*, at 9.) The Area Office found that the material components Appellant obtained would be cut, sewn, and assembled into combat gloves by Pyramid's employees using Pyramid's plant, machinery, and equipment. Pyramid would perform the activities which transformed components into a finished product and represented about [minority]% of the value of the contract. Accordingly, Pyramid, not Appellant, is the manufacturer of the gloves. (*Id.*) The Area Office further found Appellant did not qualify as a nonmanufacturer, because it, together with its affiliate Gryphon, had more than 500 employees. (*Id.*, at 11.)

The Area Office determined Appellant to be other than small for the procurement for failure to meet the requirements as a manufacturer or as a nonmanufacturer under 13 C.F.R. § 121.406(a). (*Id.*)

F. The Appeal

On February 5, 2021, Appellant filed the instant appeal arguing the Area Office completely disregarded OHA's remand instructions and clarifications set forth in *HWI Gear II* and instead relied solely on its own interpretation of *HWI Gear I*. (Appeal, at 1.)

Appellant first argues the Area Office erred in failing to analyze Appellant's argument that it is the manufacturer under NAICS code 315990. (*Id.*, at 8.) Appellant points out that in *HWI Gear II*, OHA invited Appellant to make the argument that its case was distinguishable from the precedents OHA cited, or that it could pass the test for determining whether it was a manufacturer. Appellant points to the preamble to one of the rules promulgating SBA size standards which said that two factors to consider in whether a concern was a manufacturer were the proportion of total monetary value added by its efforts and the importance of its elements added by the firm to the function of the end product, regardless of their value. (*Id.*, at 9, citing 52 Fed. Reg 32870, 32875 (Aug. 31, 1987).) Appellant characterizes *HWI Gear II* as retreating from the emphasis on the activities of transforming materials into the end item in *HWI Gear I* and emphasize the three-factor test. Appellant argues it qualifies as a manufacturer under that test. (*Id.*, at 10.) Appellant maintains that it performs all of the fundamental manufacturing activities covered by NAICS code 315990. It performs all the entrepreneurial functions related to manufacturing the gloves, e.g., concept design, product development, designing and preparing samples, sourcing, and procurement of raw materials, arranging for apparel to be made from these materials. (*Id.*, at 10.)

Appellant maintains the only overhead, testing, quality control and profit are excluded in determining the value added by a concern. Adjusting for this, Appellant's efforts contribute [majority] % of product value. (*Id.*, citing 13 C.F.R. § 121.406(b)(2)(i)(a).) Appellant maintains its design and material selection provide the foundation for the high performance of the gloves. Appellant's technical capabilities include sophisticated expertise in pattern making and development for fit and function of the gloves as well as analyses to enhance durability and performance. Thus, Appellant maintains it passes the three-part test. (*Id.*, at 11.) Appellant further refers to both OHA and the Area Office's reliance on *Size Appeal of Coulson Aviation USA, Inc.*, SBA No. SIZ-5815 (2017) (*Coulson*) and *Size Appeal of Camp Noble, Inc.*, SBA No. SIZ-5644 (2015) (*Camp Noble*) for the proposition that design, engineering, and quality control did not constitute manufacturing as misplaced because neither case involved a NAICS code which included design among the covered functions. Appellant argues there is no authority allowing SBA to avoid the express language in a NAICS code in determining whether a concern is a manufacturer. (*Id.*, at 11-13.)

Second, Appellant argues that the Area Office committed clear error by failing to consider its argument that no other NAICS code applied to instant procurement. (*Id.*, at 13.) Appellant points to language in *HWI Gear II* explaining that OHA had only addressed the issue of NAICS codes because the Area Office, in the first size determination, had mistakenly held, based on NAICS code definitions, that firms engaged in cutting and sewing were not conducting apparel manufacturing. (*Id.*, at 14.) Appellant argues that cut and sew operations are not a subset of NAICS code 315990, but rather are covered by other NAICS codes under 315210. More specifically, Appellant claims that OHA's decisions did not permit the Area Office to “jump” to a NAICS code different than the one that governs the instant solicitation, NAICS 315990, nor did OHA instruct the Area Office to ignore the hierarchy of the NAICS Manual. (*Id.*, at 14.)

Third, Appellant avers the Area Office committed clear error by failing to review its argument that the nonmanufacturer rule does not apply. (*Id.*, at 17.) Appellant refers to SBA's regulation that there can only be one manufacturer of an item. (*Id.* citing 13 C.F.R. §

121.406(b)(2).) The manufacturer must be either Appellant or Pyramid. However, Pyramid's cut and sew operations are irrelevant for the purpose of determining the manufacturer because NAICS code 315990 expressly excludes these operations, which are included in other NAICS codes. When Appellant pressed the argument that the nonmanufacturer rule could not be applied to the instant procurement again in the manner contemplated by the Area Office without an arbitrary result, Appellant claims that the Area Office refused to entertain or acknowledge the contention. (*Id.*, at 18-19.)

Finally, Appellant argues that the Area Office erred by finding that it must qualify as the manufacturer at both the time of its initial priced proposal and at the time of its final proposal. (*Id.*, at 19.)

G. Intervenor's Response

On February 9, 2021, HWI Gear moved to intervene in the appeal, arguing that it was an actual bidder and prevailed in a separate bid protest at the Court of Federal Claims. (Motion to Intervene, at 1.) As an actual bidder and continued interested party, OHA determined that HWI Gear was clearly an interested party with a direct stake in the appeal. (Order Granting Motion to Intervene, at 1.)

On February 23, 2021, HWI Gear responded to the appeal. Intervenor argues that Appellant has not met its burden of proof and that nothing in the appeal establishes an error of fact or law in the size determination. Instead, Appellant has used this forum primarily to disagree with OHA's previous rulings in *HWI Gear I* and with the Area Office's previous findings in Appellant's submitted proposal. Additionally, Appellant inappropriately uses this forum to reassert disagreements with OHA's decision in *HWI Gear I* despite its clear failure to appeal the decision to a higher court. (Intervenor Response, at 2.)

In response to Appellant's argument that the Area Office erred by failing to analyze its argument that it is the manufacturer under NAICS code 315990, HWI Gear contends the Area Office is under no obligation to analyze any new arguments presented after OHA issued its decision remanding the case back to the Area Office. (Intervenor Response, at 6; citing Appeal, at 8.) On remand, the Area Office was tasked to decide whether Appellant is, or is not, the manufacturer of the end items. (*Id.*) HWI Gear contends that the Area Office considered everything it was required to consider and properly issued a well-reasoned Remand Decision finding that Appellant is not the manufacturer of the combat gloves. (*Id.*, at 6-7.)

In response to Appellant's argument that *Coulson* and *Camp Noble* are readily distinguishable from Appellant's case on remand, HWI Gear maintains that while the NAICS code descriptions in those cases were different from the description here and are also worded differently from the manufacturing NAICS code assigned to the procurement at issue in the instant case that would be true of almost any case where manufacturing was an issue. HWI Gear requests that OHA take judicial notice of the thousands of NAICS code descriptions. However, in neither case was the NAICS code nor the wording of the NAICS code description material to the decision of whether an entity is a manufacturer. (*Id.*, at 7.)

HWI Gear argues that the cases cited as precedent, as well as the case before us, are subject to the 13 C.F.R. § 121.406 analysis, and so an analysis of the NAICS code is not required by the regulation, and in practice such wording is irrelevant. As such, HWI Gear maintains that the variations in NAICS code wording in no way operate to distinguish either *Coulson* or *Camp Noble* from the instant case and are inapplicable. (*Id.*, at 7-8.) The FAR neither contemplates nor requires that a contracting officer designate a NAICS code that is a perfect fit for a procurement. (FAR 19.102.) A requirement to parse NAICS codes could be a complex exercise which could lead to illogical or inconsistent results. Instead, Intervenor argues that the Area Office and OHA have appropriately relied on the precedents set in both *Coulson* and *Camp Noble* establishing that consideration of the language in the NAICS code description is not required and would be immaterial to the Area Office's determination of which entity, Appellant or Pyramid, is the manufacturer for the instant procurement. (*Id.*, at 9.)

HWI Gear further argues that OHA did not err in its remand instructions and the Area Office properly considered the three-factor test of 13 C.F.R. § 121.406(b). (*Id.*, at 10.) Rather, the Area Office properly excluded manufacturing and design as well as quality control management from its consideration of whether Appellant was the manufacturer because those functions are not considered manufacturing and changed its analysis from the first size determination in accordance with OHA's remand instructions to include cutting and sewing. (*Id.*, at 11.)

HWI Gear states the Size Determination shows that the Area Office considered Appellant and Pyramid's technical capabilities as they relate to planning, facilities and equipment, and production or assembly line processes, as well as the importance of the elements added by Appellant to the end items regardless of their value. (*Id.*) HWI Gear emphasizes that under Appellant's proposals, the gloves will not be assembled in its own facilities, but in Pyramid's. (*Id.*, at 13.)

HWI Gear asserts that Appellant's response letter to the Area Office serves to contradict the contents of its original proposal and thus should not be considered under OHA's holdings in *HWI Gear I*. HWI Gear rejects Appellant's argument SBA was obligated to consider its letter to the Area Office and arguments that it was the manufacturer in this procurement does nothing more than continue to contradict the proposal. (*Id.*, at 15; citing *HWI Gear I*; citing *Coulson*, SBA No. SIZ-5815, at 10; *Size Appeal of Tech. Assocs., Inc.*, SBA No. SIZ-5814, at 12 (2017).) However, the Remand Size Determination clearly referred to the original proposal submission and did not rely on Appellant's attempts to contradict the proposal, as required by OHA in its prior decision. (*Id.*, at 15.)

Intervenor further claims that the law of the case doctrine applies here in addition to *res judicata*. (*Id.*) If Appellant disagreed with OHA's legal holding in *HWI Gear I* it was required to appeal, which it did not do. As a result, *HWI Gear I* controls. "[U]nder the law of the case doctrine once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances. The purpose of this doctrine is to promote "the judicial system's interest in finality and efficient administration." (*Id.*; citing *Size Appeal of Indigo Blue Construction, LLC*, SBA No. SIZ-6081 (2020) citing *Todd & Co., Inc. v. S.E.C.*, 637 F.2d 154, 165 (3d. Cir. 1980).)

HWI Gear further argues that Appellant's failure to provide payroll information on itself and its affiliates to the Area Office when requested four months after the Gryphon transaction was completed justified the Area Office drawing an adverse inference against Appellant. (*Id.*, at 17.)

HWI Gear further claims that Appellant cannot overcome the statutory requirement that a manufacturer use its own facilities for the procurement. HWI Gear asserts the Area Office and OHA in *HWI Gear I* found Appellant did not use its own facilities, but Pyramid's. (*Id.*) Instead of pointing to evidence regarding the cutting and sewing of the gloves, Appellant argues that OHA and the Area Office misinterpreted the regulations. (*Id.*) HWI Gear asserts the Area Office relied on *HWI Gear I* in making its determination. (*Id.*, at 18; citing Remand Size Determination at 8.) As result, the Area Office found ." . . the material components obtained by [Appellant] would be cut, sewed/assembled into combat gloves by using plant, machinery and equipment that belongs to Pyramid and not to [Appellant]." (*Id.*; citing Remand Size Determination, at 7.)

Additionally, HWI Gear states that Appellant is inappropriately attempting to relitigate issues already decided by OHA. More specifically, the legal effect of OHA's denial of Appellant's PFR in *HWI Gear II* does not create new rules for the Area Office to follow. Instead, OHA maintained that the contents of its decision in *HWI Gear I* were binding. The denial further reflects on the fact that in its petition for reconsideration (PFR), Appellant failed to present a clear showing of an error of fact or law material to the decision. (*Id.*, at 19.)

Finally, HWI Gear argues that Appellant's arguments do not change the outcome of a Court of Federal Claims bid protest decision which would render the issues before OHA moot. (*Id.*, at 19; citing 13 C.F.R. § 134.316 (c).)

H. Procedural Matters

On March 11, 2021, OHA issued an Order to Show Cause regarding HWI Gear's references to a decision rendered by the Court of Federal Claims (COFC). More specifically, HWI Gear states that the COFC decision found that the procuring agency's actions did not comply with the solicitation requirements and the award to Appellant cannot stand. (Order to Show Cause, at 1; citing Intervenor Response, at 2.) Intervenor further states that the Government did not appeal this decision, and that while Appellant filed a Notice of Appeal with the Federal Circuit Court of Appeals on January 8, 2021, Appellant has since withdrawn it. (*Id.*, at 1; citing Intervenor Response, at 3.) As such, Intervenor argues there is no longer a possibility that Appellant will be able to be awarded the procurement and would not be able to obtain any meaningful relief. (*Id.*; citing Intervenor Response, at 18-19.) OHA ordered Appellant to show cause as to why the appeal should not be dismissed as moot. (*Id.*)

On March 18, 2021, Appellant responded to the Order to Show Cause. Appellant argues that it remains eligible for a new contract award under the COFC decision and that a decision by OHA to moot the appeal would be premature and at odds with OHA's obligation to hear size appeals under 13 C.F.R. § 1101(b). (Response to Order to Show Cause, at 7.)

I find that Appellant has accurately described the COFC decision. It is narrowly tailored, and Appellant could still be eligible for award. As such, this matter is not moot, and this matter must proceed.

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. Discussion

In *HWI Gear I*, OHA reaffirmed its holdings that product design and engineering do not constitute manufacturing. *HWI Gear I*, at 9; *Size Appeal of Coulson Aviation, USA Inc.*, SBA No. SIZ-5815 (2017); *Size Appeal of Camp Noble, Inc.*, SBA No. SIZ-5644 (2015). Further, the regulation explicitly excludes testing and quality control from the activities that constitute manufacturing. *HWI Gear I*, at 9; 13 C.F.R. § 121.406(b)(2)(i)(A). Therefore, Appellant's performing of these functions do not support its contention that it is the manufacturer of the gloves. Further, OHA held that the determination of whether Appellant was the manufacturer of the gloves must be based upon the proposal, and not materials subsequently submitted by Appellant to the Area Office. "[D] ocuments created in response to a protest may not be used to contradict an offeror's proposal." *HWI Gear I*, at 10; citing *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).

OHA also found, as a matter of fact, that Appellant's proposal provided that Appellant would have only a single employee on-site at the facility where production would occur, despite the size determination suggesting that Appellant would be involved in assembling the components, and therefore additional review was necessary to determine Appellant's role in manufacturing the gloves. *HWI Gear I*, at 10. OHA also found the Area Office erred in relying upon the NAICS Manual to find cutting and sewing were excluded from manufacturing, because cutting and sewing is an integral part of manufacturing apparel. *Id.*, at 10. Finally, that it was doubtful Appellant could qualify as a nonmanufacturer. *Id.*

In *HWI Gear II*. OHA denied Appellant's Petition for Review, rejecting Appellant's contention there were errors of law or fact in *HWI Gear I*. OHA reaffirmed its findings in *HWI Gear I*. OHA also explained it had only mentioned the definitions in the NAICS Manual to correct the Area Office's mistaken use of it. *HWI Gear II*, at 4-5.

These holdings constitute the law of the case. Under the law of the case doctrine once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances. The

purpose of this doctrine is to promote "the judicial system's interest in finality and efficient administration." *Size Appeal of Indigo Blue Construction, LLC*, SBA No. SIZ-6081 (2020); citing *Todd & Co., Inc. v. S.E.C.*, 637 F.2d 154, 165 (3d. Cir. 1980). Therefore, to the extent Appellant challenges any of these holdings, I reject its arguments as contrary to the established law of the case.

Further, I reject Appellant's attempts to base its argument on the definitions in the NAICS Manual. This is totally inapposite authority here. The NAICS Manual is relied upon in adjudicating NAICS code appeals. There is no authority in regulation or case law supporting a reliance upon the NAICS Manual to determine the question of whether a concern qualifies as a manufacturer of an item under SBA's regulations.

To qualify as a small business concern for a small business set-aside contract for manufactured products, an offeror must be either the manufacturer of the end item (and manufacture the item in the United States) or supply the end item of a domestic manufacturer in compliance with the nonmanufacturer rule. *Size Appeal of CymSTAR Services, LLC*, SBA No. SIZ- 5329 (2012); 13 C.F.R. § 121.406(a)-(b). There can be only one manufacturer of the end item acquired. *Id.*; 13 C.F.R. § 121.406(b)(2). Firms which perform only minimal operations upon the item being procured do not qualify as manufacturer of the end item. The manufacturer is the concern that, with its own facilities, performs the primary activities transforming substances into the end item so that it possesses characteristics it did not have before. *Id.*; citing *Size Appeal of Fernandez Enterprises, LLC*, SBA No. SIZ-4863, at 6 (2007). In determining whether a concern is a manufacturer, SBA will consider: (1) the proportion of total value in the end item added by the concern; (2) the importance of the elements added by the concern to the function of the end item; and (3) the concern's technical capabilities, *i.e.*, plant, facilities, and equipment. *CymSTAR Services*, at 14; citing 13 C.F.R. § 121.406(b)(2)(i).

Here, the Area Office reviewed Appellant's proposal, and found that Appellant will obtain the raw materials for the gloves from other sources. The assembling of these raw materials into the finished gloves will be performed by Pyramid, using Pyramid employees and equipment at Pyramid's plant and facility. Appellant will have one employee on site to ensure the flow of materials and ensure compliance with material, design and finishing requirements. The Area Office then concluded that it was Pyramid that would, with its own facilities, be performing the primary activities that transformed the raw materials into the finished gloves. Accordingly, Appellant was not the manufacturer.

I conclude the Area Office is correct. Appellant is performing none of the activities which transform the raw materials into finished products, rather it is Pyramid, using Pyramid's facilities, which will perform those activities. Appellant fails the initial test of determining whether a concern is a manufacturer. As to the test at § 121.406(b)(2)(i), all of the value Appellant is contributing has nothing to do with the function of the gloves, nor are its plant, facilities or equipment involved. Appellant has assembled an operation to obtain raw materials, design gloves, subcontract the actual making of the gloves, and produce them for its customers. But Appellant does not meet the regulatory standard of a manufacturer under SBA's rule.

Appellant also cannot meet the standard of being a nonmanufacturer. Appellant, together with its affiliates, has more than 500 employees. 13 C.F.R. § 121.406(b)(1)(i). Accordingly, Appellant is neither a manufacturer or a nonmanufacturer for this procurement and is not an eligible small business. 13 C.F.R. § 121.406(a).

IV. Conclusion

Appellant has failed to establish that the size determination is based upon any clear error of fact or law. Accordingly, I DENY the instant appeal, and I AFFIRM the size determination. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge