Cite as: *Size Appeals of Master Boat Builders, Inc., Steiner Constr. Co.*, SBA No. SIZ-6198 (2023)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEALS OF:

Master Boat Builders, Inc.,
Steiner Construction Company, Inc.,

Appellants,

RE: Birdon America, Inc.

Appealed From
Size Determination Nos.
05-2022-029, 05-2022-030

Solicitation No. 70Z02321RPRT00300

The United States Coast Guard

SBA No. SIZ-6198

Decided: March 15, 2023

APPEARANCES

Karl Dix, Jr., Garrett E. Miller, Smith, Currie & Hancock LLP, Cary A. Des Roches, Atlanta, GA, for Steiner Construction Company, Inc.

Samuel S. Finnerty, Meghan F. Leemon, Katherine B. Burrows, Jacqueline K. Unger, Eric Valle, PilieroMazza PLLC, Washington, DC, for Master Boat Builders, Inc.

W. Jay DeVecchio, James A. Tucker, Alissandra D. Young, Morrison & Foerster, LLP, Washington, DC, for Birdon America, Inc.

Sarah E. Marsiglia, Contracting Officer, The United States Coast Guard

DECISION[1]

I. Introduction and Jurisdiction

On October 4, 2022, the U.S. Small Business Administration (SBA) Office of Government Contracting - Area V (Area Office) issued Size Determinations Nos. 05-2022-029 and 05-2022-030, finding Birdon America, Inc. (Birdon) an eligible small business for United States Coast Guard Solicitation No. 70Z02321RPRT00300. On October 19, 2022, the SBA Office of Hearings and Appeals (OHA) received appeal petitions from Master Boat Builders, Inc. (MBB), and Steiner Construction Company, Inc. (Steiner). These appeals involve the same solicitation and the same challenged concern and thus, were consolidated on October 25, 2022. On appeal, Appellants contend that the Area Office's determinations were a clear error of fact and law, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the Area Office's decisions. For the reasons discussed *infra*, the appeals are GRANTED, and the size determinations are REMANDED.

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. Appellants filed the instant appeals within fifteen days of receiving the size determinations, so the appeals are timely. 13 C.F.R. § 134.304(a).

II. Background

A. The RFR Solicitation, Protests and Response

On April 30, 2021, the U.S. Coast Guard issued Request for Requisition (RFR) Solicitation No. 70Z02321RPRT00300 for Indefinite Delivery Indefinite Quantity Fixed-Price with Economic Price Adjustment contract. (Statement of Work (SOW) Amendment 00003, at 1.) The purpose of the RFR is "to acquire an estimated 16 River Buoy Tender Variant cutters (WLR) and an estimated 11 Inland Construction Tender Variant (WLIC) cutters, collectively called WCCs under this contract, which are to be fully operational and sustainable over a projected 30-year life cycle." (*Id.*, at 7.) The WCC Program will replace the capability provided by the Inland Tender Fleet. (*Id.*) The Contracting Officer (CO) set aside the procurement entirely for small businesses and assigned North American Industry Classification System (NAICS) Code 336611, Ship Building and Repairing, with a corresponding 1,250 employee size standard. (*Id.*) Initial offers were due August 30, 2021, with final proposal revisions due May 31, 2022. (Solicitation, Part IV, Section L, at 5; Solicitation Amendment 00007.) Birdon submitted its initial offer on August 30, 2021, and submitted a revised final proposal on May 31, 2022.

On August 30, 2022, the CO notified unsuccessful offerors that Birdon was the apparent successful offeror. On September 6, 2022, Steiner filed a size protest and asserted numerous

[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

grounds. Steiner alleged, among other things, that (1) Birdon is other than small for the subject procurement; (2) Birdon is not the manufacturer of the vessels; and (3) Birdon is unduly reliant on Gulf Coast Shipyard as well as affiliated with the shipyard under the ostensible subcontractor rule. (Steiner Protest, at 3-5.)

Similarly on September 7, 2022, MBB filed a size protest and asserted, among other things, that (1) Birdon did not comply with the nonmanufacturer rule; and (2) Birdon was other than small for the procurement because of its affiliations with other firms. (MBB Protest, at 37.)

On September 16, 2022, Birdon filed a consolidated response to all allegations raised in the size protest. Birdon confirmed that it will manufacture the vessels that are the end products of the procurement and perform the primary manufacturing activities. (Birdon Response to Size Protests, at 4-9). Birdon also asserted that it will manufacture the items in a leased facility. (*Id.*, at 9-11.) Birdon confirmed that it is not affiliated with Bollinger Shipyards, LLC (Bollinger) under the ostensible subcontractor rule because Birdon will perform the primary and vital requirements of the solicitation and is not unduly reliant on Bollinger. (*Id.*, at 11-18.) Birdon further contended that there is no affiliation between Birdon and Bollinger under the totality of the circumstances and the size of Birdon and affiliates combined does not exceed the 1,250-employee size standard. (*Id.*, at 19-23.)

B. Size Determination Nos. 05-2022-029 and 05-2022-030

On October 4, 2022, the Area Office issued the Size Determinations Nos. 05-2022-029 and 05-2022-03, denying Appellants' protests and finding Birdon to be an eligible small business concern for the procurement. (Size Determinations Nos. 05-2022-029 and 05-2022-03). The Area Office used the date Birdon submitted its size representation with its initial offer including price to determine size. (*Id*. at 2, citing 13 C.F.R § 121.404(a).) Because Birdon submitted its initial offer including price on August 30, 2021, the Area Office used this date to determine size for this procurement. (*Id*.)

First, the Area Office determined Birdon's number of employees, including those of 18 affiliates, for the 24 months preceding August 30, 2021 did not exceed the 1,250-employee size standard. (*Id.*, at 2-3.) Further, even if the nonmanufacturing size standard of 500 employees applied, Birdon's average number of employees, including the 18 affiliates, over the last 24 months does not exceed the 500-employee size standard. (Id.)

Second, the Area Office addressed whether Birdon will be the manufacturer of items to be procured here. (*Id.*, at 4.) The rule is:

> (i) SBA will evaluate the following factors in determining whether a concern is the manufacturer of the end item:
>
> (A) The proportion of total value in the end item added by the efforts of the concern, excluding costs of overhead, testing, quality control, and profit;

> (B) The importance of the elements added by the concern to the function of the end item, regardless of their relative value; and
>
> (C) The concern's technical capabilities; plant, facilities and equipment; production or assembly line processes; packaging and boxing operations; labeling of products; and product warranties.

(*Id*, at 5, citing13 C.F.R. § 121.406(b)(2)(i).)

The Area Office found that Birdon met the first factor of the applicable SBA regulations because Birdon "intends to perform a significant portion of the work for the end product." (*Id.*, at 5.) Specifically, Birdon is primarily responsible for the design and production process. According to the Proposal, Birdon will "install equipment, outfit the vessels, test, train and oversee quality on-site." (Id.) Further the Area Office observed that Bollinger will add approximately 16% of total value to the contract (excluding overhead, testing, quality control, and profit cost); while Birdon intends to add 62.3% of total value to the contract. (*Id.*)

The Area Office reviewed Birdon's Proposal and the solicitation and determined Birdon met factor two of the applicable SBA regulations because the "manufacturing process demonstrates that [Birdon] is involved in and responsible for key components of producing the end product." (*Id.*, at 7.) Specifically, the Area Office observed that Birdon plans to manufacture the superstructure of the cutters, Bollinger will manufacture the bare steel hull and steel pipework under Birdon's oversight and supervision. (*Id.*) Birdon will then turn the bare hull into a cutter with the assistance of other subcontractors. (*Id.*) This process includes, but is not limited to, "installing engines, z-drive propulsors, generators, exhaust systems, cooling systems, piping, pumps" as well as "[installation of fire systems, heating, and cooling systems, water systems, windows, deck equipment, the crane, etc." by subcontractors. (*Id.*, at 6.) Turning to an analysis of the solicitation, the Area Office determined that the solicitation "does not specifically distinguish which elements are the 'key' elements for the manufacturing of the end product." (*Id.*, at 7.) The Area Office determined that Birdon adequately demonstrated its involvement in key aspects of producing the end product, does not appear to only add substances, parts or components to an existing product, and does not appear to only modify the end product's performance. (*Id.*)

The Area Office determined Birdon met factor three of the applicable SBA regulations because of Birdon's technical capabilities; and the Teaming Agreement between Birdon and Bollinger establish an intent to lease, occupy and control Bollinger Facilities. (*Id.*, at 8.) The Area Office considered Birdon's technical capabilities as a prime contractor and found them to be adequately supported by the proposal's past performance section. (*Id.*) The Area Office noted Birdon's intent to execute a lease agreement with Bollinger based upon the terms of the Teaming Agreement and sworn Declarations from officials of both Birdon and Bollinger. (*Id.*) The Area Office observed that the solicitation does not require Birdon to own the facilities where the manufacturing will take place and the Teaming Agreement clearly shows that "if [Birdon] is successful with its response for the project and awarded the contract, Bollinger will provide services which include the provision of occupancy and control of the facilities specified." (*Id.*) The Area Office further determined that Birdon's Proposal demonstrates an

understanding that Birdon will lease, occupy, and control facilities supplied by Bollinger. (*Id.*, at 8-9.) The Area Office concludes that the Teaming Agreement with the intent to execute a lease, coupled with the solicitation's requirement that the contractor merely have access and control over facilities is sufficient to determine Birdon to be a manufacturer for this procurement. (Id.) Thus, the nonmanufacturer rule does not apply here. (*Id.*, at 9, citing 13 C.F.R. § 121.406(b).)

Lastly, the Area Office noted that the ostensible subcontractor rule is not applicable to contracts assigned a manufacturing NACIS code, and thus the Area Office did not consider whether Birdon's proposal was complaint with it. (*Id.*, at 9-10.)

C. Appellant Steiner's Appeal

On October 19, 2022, Steiner filed an appeal and asserts the Area Office based Size Determination 05-2022-029 on an error of fact and law. Steiner contends that Birdon is not eligible for the solicitation and the Area Office failed to consider Birdon's lack of a current lease or rental agreement. (*Id.*, at 7-8.) Specifically, Birdon did not hold a binding and enforceable lease or agreement to demonstrate that it held a "current right to occupy and control the shipyard facilities required in the Solicitation." (*Id.*, at 9.) (emphasis added by Steiner) In support, Steiner relies on *Size Appeal of Technology Assocs., Inc.*, SBA No. SIZ-5814 (2017), where OHA determined a shipbuilder's failure to present a lease arrangement with its proposal precluded that concern from establishing the ability to utilize its own facilities; and *Size Appeal of Superior Optical Labs, Inc.*, SBA No. SIZ-6066 (2020), where OHA determined a lease for a manufacturing facility "must be in place at the time of the final proposal." (*Id.*) Steiner maintains that Birdon's Teaming Agreement does not satisfy the solicitation's requirement for the concern to present "current 'build and construction facilities'," and thus the Area Office erred in determining Birdon's "future possible lease" was sufficient. (*Id.*, at 11.) Steiner further contends that Birdon's lease is invalid under Louisiana law because Birdon's Proposal fails to include a present and enforceable lease with Bollinger. (*Id.*, at 11.) Steiner points to Louisiana law requirements on leaseholds and asserts the Size Determination "offers scant details of [Birdon's] future lease of an unidentified portion of a Bollinger shipyard." (Id., at 12.) Steiner notes that the Area Office omits an analysis of the lease facility, lease specifics on Birdon's manufacturing work separate from Bollinger's own shipbuilding operations, and omits rental payment obligations. (*Id.*) Although the Area Office determined that the Teaming Agreement satisfied the "own facilities" requirement in 13 C.F.R. § 121.406, Steiner rejects this determination and asserts "the Area Office lacked the specifics necessary to evaluate and confirm whether the applicable state law requirements for a conditional contract of lease were satisfied" because the Teaming Agreement lacks "essential terms necessary for binding effect." (*Id.*, at 13-14.) Steiner maintains that the Teaming Agreement is "nothing more than 'an agreement to agree' on a lease." (*Id.*, at 14.) Steiner alleges that Birdon is not licensed in Louisiana, failed to occupy and control the necessary facilities, and thus, had no intent to conduct business in Louisiana unless awarded the contract. (*Id.*, at 15.) According to Steiner, any business activity conducted by Birdon in Louisiana is prohibited under Louisiana law until Birdon obtains a certificate from Louisiana's Secretary of State. (*Id.*) Steiner maintains that Birdon's failure to obtain a certificate prior to submitting its proposal "is consistent with its failure to secure a right to possess and control the facilities necessary to qualify as a ship manufacturer." (*Id.*, at 15-16.)

Next, Steiner contends the Area Office disregarded Steiner's arguments that Birdon violates the ostensible subcontractor rule and failed to determine size under the correct date for the nonmanufacturer rule. (*Id.*, at 16.) Specifically, the Area Office's decision to find the Teaming Agreement sufficient "resulted in its flawed conclusion" and "prompted the Area Office to entirely forego consideration of Steiner's protest arguments regarding Birdon's ostensible subcontractor relationship." (Id.) Steiner further alleges that the Area Office's decision to consider Birdon as a manufacturer led "to its application of the wrong timeline for its size evaluation of [Birdon]." (*Id.*, at 17.) According to Steiner, Birdon does not qualify as a manufacturer but a nonmanufacturer; and under the nonmanufacturer rule, size is determined at the final proposal revisions under 13 CFR § 121.404(a). (*Id.*) Thus, the Area Office should have determined Birdon's size from the date of its final proposal submission in May 2022, as opposed to submission of its initial offer on August 30, 2021. (*Id.*)

Steiner further asserts the Area Office disregarded Steiner's affiliation argument. (*Id.*) Specifically, the determination "does not appear to include the Birdon Group, an Australian conglomerate of companies nor is there a statement that the list is complete and exhaustive." (*Id.*) Further, the statements in the determination are conclusions and "does not include the supporting data the regulations require for determining a protested offeror's number of employees." (*Id.*, at 17.) Steiner argues that the Area Office's determination that Birdon will perform 51.7% of the total value "cannot be supported, verified or assessed based upon the information in the Size Determination." (*Id.*, at 18.) Steiner asserts that remand is necessary because the percentage "appears wholly unreasonable." (*Id.*)

Within its appeal, Steiner submits a motion to admit new evidence, citing that the evidence provides additional details regarding Birdon's performance that was not included in the Size Determination. (*Id.*, at 19.)

D. Appellant MBB's Appeal

On October 19, 2022, MBB filed an appeal and asserts the Area Office based Size Determination No. 05-2022-030 on an error of fact and law. MBB maintains Birdon does not qualify as a manufacturer under SBA regulations. (MBB Appeal, at 8, citing 13 C.F.R. § 121.406(a); § 121.406(b)(2).) MBB contends that "the Area Office committed a clear error of law in determining that an intent to enter into a lease is sufficient to demonstrate that [Birdon] will perform activities with its own facilities." (*Id.*, at 7.) MBB alleges that any work performed by Birdon will occur alongside Bollinger's employees and other ongoing manufacturing at Bollinger's facility. (*Id.*) As a result, "[Birdon] cannot have control over the facilities." (*Id.*, at 8.)

Next MBB alleges the Area Office's analysis under the first factor of the three-part test at 13 C.F.R. § 121.406(b)(2)(i), is "flawed and inconsistent." (*Id.*) MBB argues that "contributions to the design and engineering of the end item are not relevant to determining whether the concern is the manufacturer." (*Id.*, citing *Size Appeal of HWI Gear, Inc.*, SBA No. SIZ-6072 (2020) (citation omitted).) MBB states that it is unclear who will perform the assembly of the vessels and even if Birdon intends to perform the majority of the work, "this is not dispositive that [Birdon] is the manufacturer." (*Id.*, at 9.) MBB alleges that regardless of the dollar value added by Birdon, Birdon cannot be a manufacturer because it will not contribute the key elements of

the end product. (*Id.*) According to MBB, Birdon fails to meet the second factor under § 121.406(b)(2)(i)(B) because the work to be performed by Birdon will not contribute to the important requirements of the solicitation. (*Id.*, at 9-10.) MBB also alleges that Birdon fails to meet the third factor under § 121.406(b)(2)(i)(C) because Birdon does not hold the "Technical Capabilities or Plant, Facilities or Equipment" needed to perform the contract. (*Id.*, at 13.) Specifically, "[Birdon] does not have any experience or capabilities in building vessels with similar size, performance, construction, or length to the ones being procured here." (Id.) Based on its analysis, MBB concludes that Birdon is not a manufacturer for the subject procurement. (*Id.*) MBB further notes that Birdon also cannot qualify as a nonmanufacturer under 13 C.F.R. § 121.406(b)(1) for the following reasons: (1) Birdon exceeds the 500 employee size standard under 13 C.F.R. § 121.406(b)(1)(i); (3) Birdon is not primarily "engaged in the retail or wholesale trade and normally sells the type of item being supplied" under 13 C.F.R. § 121.406(b)(1)(ii); and (3) the manufacturer, Bollinger, is not a small business concern as required under 13 C.F.R. § 121.406(b)(1)(iv). (*Id.*, at 14.)

Secondly, MBB contends that the Area Office failed to investigate all of Birdon's affiliates and "the possibility that [Birdon], a corporation, may have others that control, either through affirmative or negative control, and that these individuals may also own and/or control other entities." (*Id.*, at 15.) MBB asserts that the Area Office failed to consider Birdon's affiliation with the parent company Birdon Global Ptd Ltd, and the possibility of negative control. (*Id.*) MBB asserts that the Area Office erred when it limited its affiliation analysis to two individuals and failed to confirm that these individuals alone control or have the ability to control Birdon. (*Id.*, at 16.) MBB also alleges that the Area Office failed to consider MBB's argument that Birdon and Bollinger are affiliated under the totality of the circumstances. (*Id.*) According to MBB, the Area Office misinterpreted this argument as being under the ostensible subcontractor rule. (*Id.*)

Lastly, MBB alleges Area Office miscalculated Birdon's size when it utilized a 24-month period, instead of a 12-month period. (*Id.*, at 16-17.) The regulation in effect when drafting the size determination was 13 C.F.R. § 121.106(b) (2021), which determines the number of employees using a 12-month period. (*Id.*) The change in the term of months used to determine size was not in effect until July 6, 2022, which was after the date used to determine size. (*Id.*, at 18.) Thus, the Area Office made a clear error of law in using a 24-month period. (*Id.*)

E. Birdon's Response to Appeals

On November 9, 2022, Birdon filed a response in opposition to the appeals. Birdon asserts that the Area Office properly determined the Teaming Agreement between Bollinger and Birdon reflected an agreement that Birdon will lease Bollinger's facilities. (Birdon Response, at 4.) Birdon references a sworn declaration from Bollinger's President and CEO, and asserts that "Birdon has already secured these facilities from Bollinger at a quoted firm-fixed price." (*Id.*, at 6.) According to Birdon "[t]his declaration is not some post-hoc explanation that was conveniently drafted as a result of the size protests." (*Id.*) Examples from Birdon's Proposal explains that a main requirement for selecting a subcontractor was the ability for Birdon to utilize its own workforce while working at the facility. (*Id.*, at 6.) Birdon chose Bollinger because of its "'willingness to integrate facilities under Birdon management and

personnel."' (*Id.*, citing PR Vol. II, 1.2 System Design and Production Approach at 34-35. (emphasis added by Birdon).) Further, Birdon's Proposal included a diagram that illustrates Birdon's use of Bollinger's Shops 4, 6, and the Wetdock, as well as a map with the location of these facilities, "distinct from one another, each performing different elements of the manufacturing process." (*Id.*, at 7-8.) Birdon notes that each workstation has a specific production activity that is "distinct and separate from the Bollinger-occupied shops at the facility." (*Id.*) The buildings of the facility "allow the flexibility to integrate multiple, separate projects while also maintaining separation from other buildings." (*Id.*, at 8.) Birdon rejects Appellants' argument that a "fully executed, enforceable" lease agreement must be in place at the time of the final proposal submission, and contends that Appellants' analysis of OHA precedent is "misleadingly" asserted. (*Id.*, at 10.) Specifically, *Size Appeal of Superior Optical Labs, Inc.*, SBA No. SIZ-6066, states a lease must be in place at the final proposal, but "this is merely dicta and does not create a new rule for what is sufficient evidence of a lease for SBA's purposes." (Id.) Further, *Size Appeal of Technology Assocs., Inc.*, SBA No. SIZ-5814, is distinguishable here because Birdon submitted enough evidence regarding the lease arrangement with Bollinger. (*Id.*, at 10-11.) Citing to OHA precedent, Birdon contends that OHA's use of future tense in *Size Appeal of Lynxnet, LLC*, SBA No. SIZ-5971, suggest that "as long as there is sufficient evidence of the agreement to lease as of the time of proposal submission, there is no further need for the concern already to have executed the lease or otherwise to have taken possession of the manufacturing facilities by that time." (*Id.*, at 12.)

Birdon further rejects Appellants' argument that the Teaming Agreement is not evidence of an agreement, and asserts that the solicitation permits offerors to leverage teaming arrangements. (*Id.*, at 14.) Second, Steiner's attempt to distinguish OHA's decisions in *In the Matter of Mistral, Inc.*, SBA No. SIZ-5877 and *Lynxnet, LLC*, SBA No. SIZ-5971 is "incorrect." (*Id.*, at 15.) Birdon rejects Steiner's assertion that the solicitation mandates offerors have "current build and construction facilities" and asserts the provisions of the solicitation do not require the offeror to own the facility nor mandate that an offeror provide evidence of an executed lease agreement at the time of the proposal. (*Id.*) Birdon further rejects Steiner's argument that it failed to register in the state of Louisiana and asserts registration has "no bearing upon whether it had an agreement with Bollinger." (*Id.*, at 16.) Further, Louisiana Civil Code "recognizes the validity of conditional obligations" and does not require that a concern is "registered to do business in the state for an agreement to be deemed enforceable." (*Id.*, at 1617.)

Birdon further contends that the Area Office did not err in law or fact when it determined Birdon qualified as a manufacturer under 13 C.F.R. § 121.406(b)(2)(i). (*Id.*, at 18.) Specifically, the Area Office properly determined that Birdon met the first prong of the three-part test because Birdon would perform 51.7 % of the contract value, excluding costs of overhead, testing, quality control, and profit. (*Id.*, at 18, citing 13 C.F.R. § 121.406(b)(2)(i).) While Bollinger will add approximately XX% total value to the contract. (*Id.*) Second, the Area Office properly determined that Birdon met the second prong of the three-part test. (*Id.*, at 19.) Birdon acknowledges the Area Office's determination that "there is no singular 'most fundamental' element for manufacturing the end product," but instead a vast number of systems make the item a functioning WCC. (*Id.*, at 21.) Birdon asserts that it is responsible for the majority of the manufacturing process. (*Id.*, at 22-23.) Specifically, Birdon will manufacture the aluminum superstructure; Bollinger will complete the bare hull and will weld the aluminum superstructure

to the steel hull, all under Birdon's oversight and supervision. (*Id.*, at 23.) Further Birdon will turn the steel hull into a fully functioning cutter. (*Id.*) Although Birdon has some assistance from other non-Bollinger subcontractors, Birdon "has complete oversight over the work those subcontractors are performing in the Shops Birdon is leasing." (*Id.*) (citation omitted) (emphasis added by Birdon).) According to Birdon, the individual additions by the subcontractors, "represent only a small fraction of the contract value" that is "insufficient, by themselves, to turn the fabricated assemblies into the fully functioning cutters being procured." (*Id.*, at 25.) Thus, Birdon reasoned that the Area Office correctly determined that Birdon is primarily responsible and integral in the manufacturing process and in producing the end product. Citing OHA precedent, Birdon contends that the facts of this appeal are similar to *Size Appeal of NMC/Wollard, Inc.*, SBA No. SIZ-5668 (2015), where OHA determined the offeror was the manufacturer because the offeror would "design, assemble, and install a new cargo bed for the vehicles to meet significant requirements of the solicitation." (*Id.*, at 26.) Similarly, Bollinger is responsible for the cutters' hulls; however, the hulls alone cannot function as a cutter without additional work by Birdon. (*Id.*, at 26). Lastly, the Area Office properly determined that Birdon met the third prong of the three-part test because "Birdon's Proposal included two separate past performance references of its own, demonstrating Birdon's own successful experience on relevant prior projects." (Id., at 27.)

Birdon further contends that the Area Office properly determined that the ostensible subcontractor rule does not apply; and OHA should deem any errors in the size determinations as harmless error. (*Id.*, at 28-29.) Specifically, it was harmless error for the Area Office to use the 24-month period, even though the 12-month period was the time frame in effect when the Area Office determined size. (*Id.*, at 30.) Birdon acknowledges that Appellants' analysis is correct; however, Birdon asserts that this is harmless error because Birdon remains below the 1,250-employee size standard using the 24-month or 12-month period. (*Id.*) Lastly, Birdon argues that additional arguments regarding affiliation made by Appellants are without merit, do not demonstrate any specific error of fact or law by the Area Office, and harmless to not include a sentence rejecting the affiliation arguments. (*Id.*, at 33-37.)

F. Appellant Steiner's Supplemental Appeal

On November 9, 2022, after its counsel reviewed the Area Office file under the terms of the OHA protective order, Steiner moved to supplement its appeal. Accordingly, for good cause shown, Steiner's motion is GRANTED, and the Supplemental Appeal is ADMITTED. *E.g., Size Appeal of Crew Training Int'l, Inc.*, SBA No. SIZ-6128, at 16 (2021).

In its Supplemental Appeal, Steiner contends that Birdon failed to provide an executed lease with Bollinger. (*Id.*, at 3-4.) Steiner cites to evidence in the Area Office file and asserts that "[Birdon's] admission that it did not execute a lease with Bollinger, coupled with its failure to produce an executed lease for the Bollinger facility, is fatal under the instant Size Determination based on OHA's ruling in *Technology Assoc*." (*Id.*, at 4.) Comparing the facts in *Technology Associates, supra*, Steiner argues that Birdon failed to mention a lease for areas of Bollinger's shipyard. (*Id.*, at 5.) Although Birdon intends to execute a lease contingent upon the contract award, the Teaming Agreement suggests that the parties were not contractually bound until they executed a written subcontract agreement addressing Bollinger's labor cost. (*Id.*, at 56.) Steiner

concludes that absent a subcontract regarding labor costs, there is no enforceable agreement regarding rental payments by Birdon to Bollinger. (Id., at 6.)

Steiner further asserts that Birdon failed to hold an enforceable shipyard lease under Louisiana law. (Id.) Steiner contends that the choice of law under the Teaming Agreement is Louisiana law and there is a distinction under Louisiana law between "'contract of lease,' versus a 'contract [] to lease."' (*Id*. at 7, citing *Progressive Waste Sols. of La, Inc. v. Lafayette Consol. Gov't*, No. CIV.A. 12-00851, 2015 WL 222396, at *5 (W.D. La. Jan. 14, 2015).) Steiner asserts that Birdon did not have a lease contract with Bollinger in place when it submitted its proposal, nor did Birdon hold a lease option. (*Id.*, at 7.) Steiner rejects Birdon's assertion that it established an intent to lease Bollinger's shipyard facility, and provides the following comments: (1) Bollinger's prices are nonbinding because there is no subcontract to enforce labor costs; (2) the Teaming Agreement failed to mention lease or rental payment obligations; (3) the Teaming Agreement is not a binding lease contract under Louisiana law; and (4) the Declarations provided by Birdon and Bollinger failed to confirm that the parties entered into a legally binding contract and cannot "form the basis of a legally enforceable lease or lease option in favor of [Birdon]." (*Id.*, at 8-11.)

Steiner further asserts that Birdon will not have possession, occupancy and control of Bollinger's facility. (*Id.*, at 11.) According to Steiner, the Area Office file contains "only vague details of contingent plans to procure portions of Bollinger's build and construction facilities in Lockport." (Id.) Steiner observes that "aerial imagery of the building housing Shops 4, 5 and 6 on the Bollinger property shows that Birdon's work plan calls for it to perform its work *under the same roof* as Bollinger." (*Id.*, at 12.) (emphasis added by Steiner.) Steiner notes that the Teaming Agreement is also silent on how Birdon would maintain occupancy and control over portions of the manufacturing warehouse. (Id.)

Steiner also contends that Bollinger is the primary contractor and manufacturer. (*Id.*) Birdon's calculation that Bollinger is only responsible for XX% of the pricing to manufacture the vessels is "misleading and not credible as a measure of who is the primary manufacturer of the vessels." (*Id.*) Steiner further asserts that the calculation fails to consider other manufacturing efforts conducted by Bollinger in Birdon's Proposal. (*Id.*, at 13.) Specifically, according to Steiner, "Birdon planned to XXXXXXXXXXXXXXXXXXX XXXXXXXXXXXX, use the Bollinger facilities, manufacture the hull and piping, paint the ships, electrical engineering, XXXXXXXXXXXX as well as many other factors." (*Id.*, at 15.)

Steiner asserts that Birdon and Bollinger are affiliated, and the Teaming Agreement suggests Bollinger's intent to provide Birdon with substantial assistance for the procurement. (Id.) Citing provisions from the Teaming Agreement, Steiner contends that "[b]ut for Bollinger's participation in this procurement, Birdon would have had no chance for award of this contract." (*Id.*, at 16.)

Lastly, Steiner asserts that the CO's statement that the solicitation "'was not concerned with the ownership of a facility, but that it would consider the capability of the facility proposed to construct the vessels,"' counters the solicitation requirements and evaluation of Steiner's proposal. (*Id*. at 17, citing CO Statement.) According to Steiner, the CO's statement is irrelevant

to SBA regulations that a lease must exist at the time size is determined to qualify as a manufacturer. (*Id.*) Steiner further alleges that the CO's statement "focused on planned facilities while completely disregarding the Solicitation requirement for Birdon to demonstrate its nonexisting, current build and construction facilities." (*Id.*, at 18.) (emphasis added by Steiner.) Steiner request that OHA strike the CO's statement or provide additional time for Steiner to respond to the assertions. (*Id.*)

G. Appellant MBB's Supplemental Appeal

On November 9, 2022, after its counsel reviewed the Area Office file under the terms of the OHA protective order, MBB moved to supplement its appeal. Accordingly, for good cause shown, MBB's motion is GRANTED, and the Supplemental Appeal is ADMITTED. *E.g., Size Appeal of Crew Training Int'l, Inc.*, SBA No. SIZ-6128, at 16 (2021).

In its Supplemental Appeal, MBB contends that the Area Office erred in determining that Birdon will perform the primary activities of the procurement with the intent to enter into a lease. (*Id.*, at 2.) MBB observes that Birdon did not have a lease and the Teaming Agreement failed to mention a lease contract. (Id.) MBB notes that Birdon acknowledges that "there is no lease, but merely an intent," and MBB asserts that OHA precedent has determined the "'lease, however, must be in place at the time of the final proposal."' (*Id*. at 3, citing *Size Appeal of Superior Optical Labs, Inc.*, SBA No. SIZ-6066 (2020) (emphasis added by MBB) (citation omitted).)

MBB further asserts that evidence from Birdon's Proposal confirms Bollinger as the manufacturer. (*Id.*, at 3.) MBB rejects Declarations submitted by Birdon which state that Bollinger will provide the "metal frame." (*Id*. at 4, citing Ducker Declaration at — 4.) According to MBB, Bollinger will be "constructing, erecting and outfitting the vessels," more than a "metal frame." (Id.) MBB notes that based on the Teaming Agreement, Bollinger XXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXX. (Id., at 5.) MBB further notes that Bollinger's labor hours XXXXXXXXXXXXXXXXXX. (*Id.*) Based on the Teaming Agreement and XXXXXXXXXX, MBB asserts "it is not accurate to state that Bollinger's role is limited to manufacturing the bare steel hull in parts." (*Id.*) Although Birdon considered itself responsible for design and engineering, MBB asserts that "contributions to the design and engineering of the end item are not relevant to determining whether the concern is the manufacturer." (*Id*. at 6, citing *Size Appeal of HWI Gear, Inc.*, SBA No. SIZ-6072 (2020); *Size Appeal of Camp Noble, Inc.*, SBA No. SIZ-5644 (2015).) Citing Birdon's Proposal, MBB argues that Birdon does not qualify as a manufacturer, and thus must meet the requirements under the nonmanufacturer rule. (*Id.*, at 6-7.)

Lastly, MBB contends that the Area Office failed to consider additional affiliates. (*Id.*, at 7.) MBB specifically emphasizes Birdon (Qld) Pty Ltd, established in March 2022. (*Id.*) Considering the timeline requirements for the nonmanufacturer rule, MBB argues that Birdon (Qld) Pty Ltd and two additional entities, acknowledged by Birdon and established prior to the date of the final proposal revisions, are relevant when considering affiliation. (Id.) MBB also points to two individuals identified in the record and argues that the Area Office did not consider whether "these individuals have critical influence over Birdon." (*Id.*, at 8.)

H. Contracting Officer's Statement

On November 9, 2022, the CO filed a statement to provide additional insight on the procurement. The purpose of the solicitation is to replace the current fleet of vessels used for missions related to inland waterways commerce. (CO Statement, at 1.) According to the CO, the design process focuses on "development of preliminary, functional, and transitional designs." (*Id.*, at 2.) While the solicitation requires offerors to submit designs, "the initial phase of the contract is dedicated to finalizing and detailing the designs to full maturity before the vessels can begin production." (Id.)

The evaluation factors are as follows: (1) Technical Approach; (2) Systems Design and Production Capability; (3) Management Approach; (4) Past Performance; and (5) Price. (*Id.*) The CO designated Technical Approach, the evaluation of proposed designs, as the most important factor. (*Id.*, at 3.) The three key performance requirements for proposed designs were cutter hull draft, cutter seed, and cutter endurance. (*Id.*) Citing the solicitation, the CO asserts that "[n]one of these key performance requirements (draft, speed, endurance) are easily fixed to any single component, but rather relate back to the overall consideration of whether the designs were 'sound, convergent, balanced, internally consistent, accurate, and feasible.'" (*Id.*, citing Solicitation, Part IV, Section M). "In short, each of these key performance requirements was examined holistically in the Agency's evaluation, taking into account many components and inputs to achieve the performance required." (*Id.*, at 3.) The CO reasoned that the concepts are evaluated holistically because "singling any one of them out in an isolated evaluation would not result in the best solution for the future of the WCC program." (*Id.*, at 4.) Specifically, the design of the vessels was a "multifaceted, integrated process" that involves "constructing portions of the end item, with numerous elements and systems which are individually manufactured and ultimately assembled and installed based upon the offeror's proposed approach." (*Id.*)

Regarding the second factor, systems design and production capability, the CO cites to the solicitation and asserts that offerors are evaluated based on their ability to construct cutters "when the initial design phase is completed, and the production phase can begin. (*Id.*) According to the CO, the solicitation does not require "an offeror to be pre-equipped with the requisite production facilities in order to be eligible for award." (*Id.*) The CO maintains that the solicitation is less concerned with the ownership of the facility and is more interested in the capability of the facility proposed to construct the vessels. (Id.)

The CO further asserts that the solicitation includes an initial design phase, and thus offerors were able to improve the proposed facilities to produce the procured item. (Id.) The CO notes that proposed improvements and planned upgrades will be evaluated for risk assessment. (*Id.*, at 4-5.) The offeror was required to "propose sufficient capability that would be available at the time of production (18 months after award) and the plans to attain it prior to the production phase of the contract." (Id.) Thus, the Agency considered proposed facilities and "whatever future plans for those facilities" presented by offerors to meet production needs. (*Id.*, at 5.)

In conclusion, the CO states (1) the Agency holistically considered this procurement, (2) designs are evaluated as complete systems and not individual pieces, and (3) an offerors ability to construct the vessels is considered at an appropriate time, based on the means of production. (*Id.*, at 5.)

I. Birdon's Reply to Appellants' Supplemental Appeals

On November 30, 2022, OHA issued an order granting motions to file supplemental appeals and reopening the record solely to provide Birdon and the Agency the option to file a response to Appellants' supplemental appeals by December 9, 2022. (Order 11.30.2022, at 2.)

On December 9, 2022, Birdon filed a response in opposition to Appellants' supplemental appeals and asserts that the Area Office did not err in law or fact when it determined Birdon and Bollinger's "agreement to lease Bollinger's facilities qualified as Birdon performing the primary activities with its own facilities." (Birdon Reply, at 4.) Birdon rejects MBB's argument that Birdon neglected to use the phrase "lease," and asserts that the Teaming Agreement and Proposal read in its entirety proves that "regardless of the absence of the word 'lease,' the Teaming Agreement does show that the parties had an agreement that Bollinger would provide Birdon the use of specific and separate shops as part of services it would provide to Birdon, which Birdon would in turn pay for." (*Id.*, at 5.) Birdon further rejects Steiner's argument that it lacks occupancy and control of Bollinger's facilities and asserts that Steiner cannot cite to OHA case law that requires a manufacturer to "lease the entire property" to perform on the contract. (*Id.*, at 6.) "Nor would there be any economic rationale for a shipbuilder to execute and begin a lease of shipbuilding facilities at proposal submission—many months or even years before the company knows whether it would be successful in the competition . . . ." (*Id.*) Birdon reiterates the irrelevance of Louisiana state law and references OHA precedent to assert that "OHA has previously ignored the same arguments of lease enforceability under state law when finding a concern would manufacture the end item 'with its own facilities.'" (*Id*. at 8, citing *Matter of Mistral, Inc.*, SBA No. SIZ-5877, at 5-6, 12-13 (2018).)

Birdon rejects Steiner's motion to enter the teaming agreement from *Technology Associates, Inc., supra*, as relevant evidence in this matter. (*Id.*, at 9.) Birdon alleges that "[i]t is unclear from the face of OHA's decision in Technology Associates what role, if any, the teaming agreement played in OHA's analysis." (*Id.*) Analyzing OHA's determination in *Technology Associates, Inc., supra*, Birdon observes that OHA found appellant's proposal and a letter from its subcontractor insufficient; however, "OHA did not state whether the teaming agreement was part of the proposal, whether the teaming agreement was attached to the letter or submitted as evidence of an arrangement to lease, whether the parties briefed on the teaming agreement, or whether OHA even looked at the teaming agreement." (Id., at 10.) Birdon further notes that in *Technology Associates, Inc., supra*, OHA determined the subcontractor to be a manufacturer. Birdon surmises the decision in *Technology Associates, Inc., supra*, as "proposition that insufficient evidence of an arrangement to lease cannot turn an entity that did not propose to perform manufacturing activities into the manufacturer." (*Id.*, at 11.)

Next, Birdon asserts that the sworn Declarations provided in response to the size protest are supported by the contents of the Teaming Agreement and Birdon's Proposal; and Birdon

alleges that MBB attempts to mischaracterize their contents and suggests Bollinger will perform more work than explained in the Proposal. (*Id.*, at 12.) Birdon rejects MBB's claims and provides a detail description of the work Birdon will perform. (*Id.*, at 13.) Bollinger is responsible for the hull fabrication, which is "the cutting, bending and welding, and forming of piece parts (in Bollinger's case, steel pieces) into larger metal structures that form modules (in Bollinger's case, the steel hull)." (*Id.*) Birdon notes that none of the activities cited by MBB includes Bollinger "fabricating the three-story aluminum superstructure or outfitting the vessel." (Id., at 14.) Birdon reconfirms that Bollinger's responsibilities are limited to providing "a steel frame of the hull that is devoid of any outfitting, which is necessary to create the end product." (*Id.*) The Teaming Agreement does not state Bollinger will "weld the two superstructure modules together prior to welding the fabricated superstructure to the fabricated hull." (*Id.*, at 15.) Birdon also reconfirms that it will fabricate the entire superstructure. (*Id.*)

Bridon perceives Appellants' arguments to be "mere disagreement with SBA's regulations, and are thinly veiled attempts at making ostensible subcontractor arguments." (*Id.*, at 20-21.) Birdon rejects Appellants' allegations that Bollinger is the manufacturer and asserts that "it is impossible for Bollinger to be considered the manufacturer" because "Bollinger's steel hull frame, which would sink to the bottom of the river on its own . . . is nowhere close to being the cutter that is the end product here [and] Bollinger has no involvement in the fabrication of the equally critical aluminum superstructure, nor does it have any involvement in the outfitting of the vessel . . . ." (*Id.*, at 21-22.)

Further, Birdon asserts that Appellants' affiliation arguments are "wholly without merit and should be dismissed." (*Id.*, at 22.) Specifically, Steiner raises the argument that Birdon is affiliated with Bollinger and CHAND under the totality of the circumstances for the first time in it supplemental appeal. (*Id.*) Birdon deduces that this argument is untimely and thus "any new arguments raised by Steiner in its supplemental appeal on the basis of affiliation under the totality of the circumstances cannot possibly show the Area Office committed clear error." (*Id.*, at 23.) Birdon asserts that despite its untimeliness, this argument remains meritless because language in the Teaming Agreement "in no way indicates Birdon paid [Bollinger] or CHAND as consultants to help Birdon develop its proposal or to write it for Birdon." (*Id.*, at 24.)

Lastly, Birdon contends that although the Appellants' affiliation arguments were not discussed in the size determinations, "the record is robust enough for OHA to see the information the Area Office reviewed and the compelling evidence that led it to reject appellants' protest allegations, even if the Area Office's explanations had been somewhat short in places." (Id., at 24.) Birdon acknowledges the size determinations failure to list to Birdon (Qld) Pty Ltd. as one of Birdon's affiliates, and considers that harmless error. (*Id.*) Further, the two additional entities established in March 2022 are irrelevant to the date to determine size because when the offeror is the manufacturer of the end product, size is determined at the date of initial proposal, which was August 2021. (*Id.*, at 24-25, citing (citing *Size Appeal of Lynxnet, LLC*, SBA No. SIZ-5971, at 11 (2018).) Birdon reiterates that the Chairman of an informal Advisory Board to the Birdon entities does not hold any control over Birdon; and the record confirms that additional individuals also do not hold the power to control Birdon. (*Id.*, at 22-25.)

III. Discussion

A. Standard of Review

Appellants have the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, the Appellants must prove 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 finding of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. New Evidence

On October 19, 2022, with its appeal, Steiner moved to admit new evidence concerning "Contract award announcement on Birdon's corporate website." (Steiner Appeal, at 19.) Steiner asserts that there is good cause to admit this evidence because this evidence details "Birdon's planned performance that were not present in the Size Determination"; and also "establishes that Louisiana law governs the real property issues addressed in this appeal and does not unduly enlarge these issues." (*Id.*)

On November 9, 2022, with its supplemental appeal, Steiner filed a second motion to admit new evidence. (Steiner Motion, at 19.) Steiner specifically seeks to admit the (1) teaming agreement between Technology Associates, Inc. and Gulf Island Shipyards, LLC; (2) the Declaration of Anil Raj, President of TAI Engineers, LLC, the predecessor company to Technology Associates, Inc.; and (3) an aerial view of the Bollinger Shipyards facility in Lockport, Louisiana. (Id., at 1-2.) Steiner asserts that there is good cause to admit this evidence because the teaming agreement reviewed by OHA *in Size Appeal of Technology Assocs., Inc.*, SBA No. SIZ-5814 (2017) is similar to the agreement at issue in this appeal and the declaration is included for authentication purposes. (Id.) Steiner further asserts there is good cause to admit the aerial view because it "provides a better illustration of the actual layout of the buildings referenced." (*Id*, at 2.)

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not first presented to the Area Office is generally not admissible and will not be considered by OHA. E.g., *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) ("I cannot find error with the Area Office based on documents the Area Office was unable to review."). New evidence may be admitted on appeal at the discretion of the administrative judge if "[a] motion is filed and served establishing good cause for the submission of such evidence." 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that "the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on appeal." *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 5 (2009). OHA "will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review." *Size Appeal of Project Enhancement Corp*, SBA No. SIZ-5604, at 9 (2014).

I find that Steiner has not shown good cause to admit new evidence. The proffered teaming agreement between Technology Associates, Inc. and Gulf Island Shipyards, LLC was reviewed by the Area Office for a different solicitation. This agreement was not submitted to the Area Office for consideration in this size protest. The Teaming Agreement confirms Birdon and Bollinger's choice of law as Louisiana and thus, the website announcement is excessive and unnecessary. Lastly, the Area Office received an aerial view of the Bollinger Shipyards facility in Lockport, Louisiana in Birdon's Proposal and Birdon's response to the size protest, and I thus find an additional aerial view superfluous. Accordingly, the new evidence is EXCLUDED from the record and has not been considered for purposes of this decision.

B. Analysis

I agree with the Appellants that the Area Office erred in fact and law when it determined Birdon is a manufacturer for the subject procurement. As a result, it is appropriate to remand this matter for further review.

First, the ostensible contractor rule is not applicable for this procurement and need not be addressed. This is a procurement for manufactured products, the ships in question. Section II.A, *supra*. OHA has repeatedly held that the ostensible subcontractor rule does not apply to procurements for manufactured products. *Size Appeal of Invisio Communications, Inc.*, SBA No. SIZ-6084, at 10 (2020); *see also., Size Appeal of HWI Gear, Inc.*, SBA No. SIZ-6072, at 11 (2020); *Size Appeal of Superior Optical Labs, Inc.*, SBA No. SIZ-6068, at 9 (2020); *Size Appeals of ProActive Techs., Inc. et al.*, SBA No. SIZ-5772, at 26 (2016); *Size Appeal of Marwais Steel Co.*, SBA No. SIZ-3884, at 7 (1994). SBA has explained that a determination that a prime contractor meets the requirements of the nonmanufacturer rule resolves whether it is compliant with the ostensible subcontractor rule. 76 Fed. Reg. 8222, 8225 (Feb. 11, 2011). Thus, I find this matter concerns the nonmanufacturer rule, and the ostensible subcontractor rule is not applicable.

Second, Appellants also argue that the Area Office used the wrong date to determine size, because it used the date of Birdon's initial offer, including price, which is the general rule for the date to determine size. 13 C.F.R. § 121.404(a). The nonmanufacturer rule is an exception, setting the date to determine size as of final proposal revisions, for determining size under 13 C.F.R. § 121.406(b)(1). 13 C.F.R. § 121.404(d). However, whether a concern is a manufacturer is determined under 13 C.F.R. § 121.406(b)(2), and so that determination is made as of the date of a concern's initial offer including price. *Size Appeal of Lynxnet, LLC*, SB A No. SIZ-5971 (2018); *Size Appeal of HWI Gear, Inc.*, SBA No. SIZ-6072 (2020). Accordingly, the Area Office did not err in its choice of date to determine size.

Third, I find the Area Office's application of the 24-month average employee count rather than the 12-month average to be harmless error. The National Defense Authorization Act for Fiscal Year 2021 changed the time period used to determine a concern's average number of employees from 12 months to 24 months. Public Law 116-283. SBA implemented this change by amending 13 C.F.R. § 121.106(b)(1), effective July 6, 2022. 87 Fed. Reg. 34094, 34120 (June 6, 2022). Therefore, when determining Birdon's size as of August 30, 2021, the date of its initial offer including price, the Area Office should have used the 12-month average of its employees, because the rule in effect at that time required the use of a 12-month average. The Area Office

instead used a 24-month average. Section II.B, supra. OHA has determined that "[a]n area office's error is harmless when rectifying the error would not have changed the result." *See Size Appeal of Lukos, LLC*, SBA No. SIZ-6047, at 17 (*2020*), *citing Size Appeal of Melton Sales & Service*, SBA No. SIZ-5893, at 14 (2018); *Size Appeal of Automation Precision Tech., LLC*, SBA No. SIZ-5850, at 17 (2017). The misapplication of the applicable regulations remains harmless error if it would not have affected the result, and if there is no reasonable uncertainty as to its impact on the judgment. *See E.g., Size Appeal of OSG, Inc.*, SBA No. SIZ-5718, at 14 (2016); *Size Appeal of OSG, Inc.*, SBA No. SIZ-5728, at 6-9 (2016). Here, the Area Office erred when it applied the 24-month review period as opposed to the 12-month review period in effect at the time of the date to determine size; however, this was harmless because applying either timeframe does not change the outcome. Section II.B, *supra*. Birdon is considered small under either review period. *Id.*

I must now consider whether Birdon met the three evaluation factors which determine whether it is the manufacturer of item the Government is procuring. 13 C.F.R. § 121.406(b)(2). In determining whether a business concern is a manufacturer, the Area Office must determine that business concern will be "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 resolving the question of whether the facilities the business concern will use for its work may be categorized as "its own," it is not necessary the business concern own the facilities. OHA has held:

> [T]here is no basis for holding that the phrase in the regulation "its own facilities" requires a contractor to outright own in fee simple absolute the facilities it will use to manufacture the product to be sold to the procuring agency. Business frequently rent or lease facilities in order to manufacture products. The facility used by a business is usually owned by another entity, even if the realty-owning entity has the same owners as the operating company. I conclude that, in the absence of a requirement in the solicitation, **the phrase "its own facilities" in the regulation means that the contractor need only occupy and control the facilities, if not as an owners, then as a lessor or tenant**.

Size Appeal of Mistral, Inc., SBA No. SIZ-5877, at 12 (2018) (emphasis added).

In the present case, it is undisputed that Birdon does not own a shipyard. The issue then is whether Birdon's Proposal confirms that Birdon will occupy and control those facilities as a lessor or tenant. Appellants argue there must be a formal lease in place at the time of the final proposal revisions, relying on *Size Appeal of Superior Optical Labs, Inc.*, SBA No. SIZ-6066, at 9 (2022). There, the challenged concern had purchased a firm, which originally was to be its subcontractor in manufacturing eyeglasses, including the existing leases of that firm. In reviewing the case, OHA stated "[t]he lease, however, must be in place at the time of the final proposal." Appellants also rely upon *Size Appeal of Technology Associates, Inc.*, SBA No. SIZ-5814 (2017) in support of the argument that there must be a fully executed enforceable lease agreement in place at the time of the proposal in order to say that the challenged concern will occupy and control the facilities to be used to manufacture the procured end items. In that case, there were no agreements of any kind in place at the time of the proposal. *Technology*

Associates, Inc., SBA No. SIZ-5814, at 12. OHA found the proposal wanting because there was "no lease or other evidence . . . demonstrating that such an arrangement existed prior to the date of final proposals" establishing an arrangement for lease or rental of the manufacturing facilities. *Id.* (emphasis added). Conversely, in *Size Appeal of Lynxnet, LLC*, SBA No. SIZ-5971 (2018), a transition agreement that provided the challenged concern would take possession of the facilities to be used was found to be compliant with the regulation. *Lynxnet, LLC*, SBA No. SIZ-5971, at 10-11.

I thus conclude that to determine a challenged concern's proposal met the "its own facilities" requirement, a fully executed lease of the proposed premises for manufacturing need not be in place at the time of the proposal. However, there must be some agreement in writing between the challenged concern and its prospective landlord in place at the time of the proposal for the challenged concern to occupy and control the facilities it will use to manufacture the end item-if not as an owner, then as a tenant.

In the present case, Birdon submitted a Teaming Agreement with its proposal and asserts that the solicitation permits offerors to leverage teaming arrangements and does not require a lease be in place at the time of the proposal. Section II.A, *supra*. The Area Office also determined that the Teaming Agreement between Birdon and Bollinger reflects the parties' intent to enter into a lease for Bollinger's facilities. Section II.B, *supra*. The Teaming Agreement explicitly states that Birdon will "manage production activities in shops," and that Bollinger will provide "adequate segregated Warehouse area for Birdon operation to include Outfit Staging Warehouse, Wetdock Staging Warehouse, and existing fabrication stage." Section II.A, *supra*. However, I find Birdon's Proposal and the Teaming Agreement insufficient. *Id.* Birdon's Proposal did not present a written agreement to lease from Bollinger the facilities in which it would carry out the manufacture of the WCCs (the cutters). *Id.* The Teaming Agreement includes a chart which illustrates Shops 4, 6 and the Wetdock as areas designated for Birdon to perform under the contract, but it does not state that Bollinger agrees to lease these premises to Birdon. *Id.*

Birdon observes that its Proposal makes many references to the Bollinger facilities, and how it selected Bollinger as the best available facilities for the construction of the WCCs. Section II.E, *supra*. Birdon further identifies statements in its Proposal that the vessels will be constructed at the Bollinger shipyard, that there is a Teaming Agreement between Birdon and Bollinger, and Bollinger will provide the facilities. *Id.* I find Birdon's argument insufficient. On question of Birdon's right to use the facilities, the Teaming Agreement offers nothing more than an agreement to come to an agreement. OHA precedent does not require that there be a fully executed lease. *Size Appeal of Mistral, Inc.*, SBA No. SIZ-5877, at 12 (2018). However, there must be an explicit written agreement that Birdon, seeking to be counted as the manufacturer of the end item to be procured, will occupy and control the premises where it will perform the process of transforming substances into the item to be procured. *Size Appeal of Technology Associates, Inc.*, SBA No. SIZ-5814 (2017); *Size Appeal of Lynxnet, LLC*, SBA No. SIZ-5971 (2018) (emphasis added). The only clear indication of a lease arrangement was the sworn Declarations from Birdon and Bollinger CEO and President. Section II.A, *supra*. However, these declarations were prepared during the course of the size investigation, and thus do not establish that Birdon and Bollinger had any lease arrangement as of the date to determine size. *Size Appeal*

of Technology Associates, Inc., SBA No. SIZ-5814 (2017). Thus, I find the Teaming Agreement and the Birdon's Proposal insufficient to meet the "own facilities" factor in the nonmanufacturer rule. 13 C.F.R. § 121.406(b)(2).

Further, apart from the issue of written agreement to lease, remand also is warranted here because the size determination did not articulate valid grounds for rejecting Appellants' affiliation arguments. Section II.B, *supra*. *See Size Appeal of C2 Alaska, LLC*, SBA No. SIZ-6149, at 12 (2022). In analyzing issues of affiliation, an area office must consider factors such as ownership, management, previous relationships with or ties to another firm, and contractual relationships. 13 C.F.R. § 121.103(a)(2). OHA has remanded size determinations because the area office did not "articulate its reasoning in the size determination itself'. *Size Appeal of Acelrx Pharmaceuticals, Inc.*, SBA No. SIZ-5501, 4 (2013) (citing *Size Appeal of Tri-Ark Indus.*, SBA No. SIZ-4200, at 5 (1996); *Size Appeal of DynaLantic Corp.*, SBA No. SIZ-5125, at 11 (2010). Here, the Area Office did not articulate grounds for rejecting the affiliation arguments regarding the parent company Birdon (Qld) Pty Ltd as well as the two additional entities established in March 2022 (Birdon NE LLC and Birdon Property LLC), as of the date of final proposal revisions. Section II.B, *supra*. As a result, additional review is necessary.

On remand, the Area Office is also directed to address affiliation between Birdon and Bollinger under the totality of circumstances argument raised by the Appellants. Absent a single factor to constitute affiliation, and area office may find affiliation under the totality of circumstances where "connecting relationships between firms are so suggestive of dependence as to render them affiliated." *Size Appeal of Superior Optical Labs., Inc.*, SBA No. SIZ-6158, at 11 (2022) citing *Size Appeal of B.L. Harbert Int'l LLC*, SBA No. SIZ-4525, at 11 (2002). OHA has repeatedly held that "in order to determine affiliation through the totality of the circumstances, 'an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other."' *Size Appeals of Med. Comfort Sys., Inc. et al.*, SBA No. SIZ-5640, at 15 (2015) (quoting *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 10 (2007)). Here, the Area Office failed to address whether Birdon and Bollinger are affiliated under the totality of circumstances, and thus additional review is also necessary.

I therefore must conclude that the Area Office erred when it identified Birdon as a manufacturer for the purpose of this solicitation, and the size determinations do not articulate a basis for rejecting the affiliation arguments made by the Appellants. Accordingly, the appeal is REMANDED to the Area Office for further review. The size protests pertain to compliance under the nonmanufacturer rule, and thus size is determined "as of the date of the final proposal revision for negotiated acquisitions and final bid for sealed bidding." 13 C.F.R. § 121.404(d).

IV. Conclusion

For the above reasons, the appeals are GRANTED, Size Determination Nos. 05-2022-029 and 05-2022-030 are VACATED, and the matters are REMANDED to the Area Office for new size determinations.

CHRISTOPHER HOLLEMAN
Administrative Judge