Cite as: *Size Appeals of Master Boat Builders, Inc., Steiner Constr. Co.*, SBA No. SIZ-6209 (PFR) (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

Petition for Reconsideration of Size Appeals of Master Boat Builders, Inc. and Steiner Construction Co., Inc., SBA No. SIZ-6198 (2023)

The United States Coast Guard

SBA No. SIZ-6209 (PFR)

Decided: April 27, 2023

APPEARANCES[1]

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.

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[1] This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received no requests for redactions. Therefore, I now issue the entire decision for public release.

ORDER DENYING PETITION FOR RECONSIDERATION

I. Background

A. Prior Proceedings

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 requested that SBA's Office of Hearings and Appeals (OHA) reverse the Area Office's decisions.

On March 15, 2023, the SBA Office of Hearings and Appeals (OHA) issued its decision in *Size Appeal of Master Boat Builders, Inc. and Steiner Construction Company, Inc.*, SBA No. SIZ-6198 (2023) (*Master Boat I*). On March 30, 2023, Birdon America, Inc (Birdon), the challenged concern in this case, filed a Petition for Reconsideration (PFR) from that decision. The factual background in this is set forth in *Master Boat I*. That decision granted the appeals and remanded the case to the Area Office for a new size determination. The PFR argues that the decision in *Master Boat I* was based upon clear error, and requests that OHA reverse it. For the reasons discussed *infra*, I DENY the PFR.

B. The PFR

On March 30, 2023, Birdon filed this PFR and argues that *Master Boat I* is based upon two errors. (PFR, at 3.) First, Birdon maintains the governing regulation does not restrict the kinds of evidence an Area Office may use to determine whether an offeror will occupy and control the facilities to be used to manufacture the item being procured. (*Id.*) Birdon maintains OHA improperly "imposed a judicially created restriction by requiring evidence of a written agreement" between the challenged concern and the owner of the facilities. (*Id.*) Second, the facts before the Area Office were more than sufficient under the regulation for the Area Office to find that Birdon proposed to lease, occupy and control the facilities with which it proposed to manufacture the end items. (*Id.*)

Birdon points out that SBA's regulation requires that for a concern to be found the manufacturer of the item to be procured, it must, with its own facilities, perform the primary activities in transforming organic or inorganic substances, including the assembly of parts and components into the end item being acquired. (PFR at 4, citing 13 C.F.R. § 121.406(b)(2).) Birdon agrees with *Master Boat I* that the requirement that a firm use "its own facilities" to perform the manufacturing does not mean that it must own the facilities outright or have a fully executed lease in place for the facilities to be used to manufacture the end items. (*Id.* at 4-5.) It is sufficient that the firm occupy and control the facilities. (*Id.*) Birdon asserts that a challenged

concern may demonstrate occupation and control by a lease or other evidence demonstrating that such an arrangement existed at the time of submission of the proposal. (*Id.*)

However, Birdon argues that *Master Boat I* erred in requiring that there must be an explicit written agreement that it would occupy and control the premises where it would perform the manufacturing. (*Id.*) Birdon asserts the regulations do not create this requirement. (*Id.*, at 6.) Contrary to the finding in *Master Boat I* that the submissions were no "more than an agreement to come to an agreement," Birdon argues there is no requirement that a legally enforceable agreement between the challenged concern and its prospective landlord be in place. (*Id.*) Teaming agreements, which Birdon asserts are no more than agreements to agree are relied upon by OHA as evidence that regulatory requirements are being met. (*Id.*) Birdon asserts that *Master Boat I* sets a higher evidentiary standard than the regulation requires. Birdon argues that there need not be a legally enforceable agreement for the challenged concern's use of the facilities which will be used to manufacture the end item being procured. (*Id.*)

Birdon asserts that SBA Area Offices and OHA have often relied upon the provisions of teaming agreements and proposals as evidence a concern did or did not fulfill a regulatory requirement. (*Id.*, at 7-8.) These agreements are not enforceable contracts. (*Id.*) It also opens the door to requiring that OHA opine on the enforceability of contracts under the vagaries of the various state laws. (*Id.*)

Birdon further argues the decision makes a nullity of SBA's rule that a product can have only one manufacturer. (*Id.*, at 8, citing 13 C.F.R. § 121.406(b)(2).) According to Birdon, if it is not the manufacturer, then there can be no manufacturer of the cutters; and this contradicts the SBA regulation that there must be one manufacturer. (*Id.*, at 8.) OHA did not disturb the Area Office's finding that Bollinger was not the manufacturer, and therefore if Birdon is not, then there can be no manufacturer. (*Id.*, at 8-11.) The appropriate standard is that there be a lease "or other evidence" of an arrangement for use of the facilities. (*Id.*, citing *Size Appeal of Technology Associates*, SBA No. SIZ-5814, at 14 (2017).) Birdon asserts that the "or other evidence" interpretation of the regulations in *Technology Associates* prevents the "impermissible anomaly and internal regulatory contradiction," whereas OHA's "new 'explicit written agreement' standard does not." (*Id.*, at 11.)

Birdon maintains the Area Office correctly determined that Birdon had submitted sufficient evidence of an agreement to occupy and control the facilities needed to manufacture the cutters. (*Id.*, at 12.) While there was no explicit agreement to lease the facilities, it was implicit in the Teaming Agreement. (*Id.*) Birdon maintains it is clear from the Proposal that Birdon will occupy and control separate work areas from Bollinger. (*Id.*, at 13.) Specifically, the proposal illustrated diagrams and maps depicting the separate elements of the manufacturing process Birdon would perform in separate facilities. (*Id.*) Birdon and Bollinger also provided declarations to clarify the intent to lease that contemporaneously underlay the proposal. (*Id.*, at 14.) They clarified that Bollinger included the price of Birdon's leasing shops in its price proposal to Birdon. (*Id.*, at 14, citing Declaration of B. Bordelon.) While *Master Boat I* stated that these declarations were unreliable because they were prepared in response to the Protest, Birdon claims this is contrary to OHA precedent, which says such declarations may be relied upon if they explain and clarify the proposal and do not contradict it. (*Id.*, at 14-15.) The

declarations establish that lease arrangements had been made prior to proposal submission. (*Id.*) It was improper for OHA not to consider these declarations. (*Id.*, at 16.) Birdon maintains *Master Boat I* was based upon clear error and should be reversed on reconsideration. (*Id.*)

C. MBB's Response

On April 17, 2023, MBB filed a response and argues that OHA should dismiss or deny the PFR. (MBB Response, at 1-2.) MBB points out that the standard for a PFR is high one of clear error in the initial decision. (*Id.*) MBB asserts Birdon is merely expressing disagreement with the decision in *Master Boat I. (Id.)* Further, OHA did not adopt a "new standard" but relied upon existing precedent. (*Id.*, at 3.)

MBB maintains dismissal is appropriate because the PFR merely repeats arguments OHA already considered in *Master Boat I. (Id.)* MBB notes Birdon admits it previously raised similar arguments presented in the appeals. Specifically, the argument that there would be no manufacturer if Birdon were found not to be an eligible manufacturer; and Birdon mentions that it raised this argument despite MBB's insistence that Birdon must have a fully executed lease. (*Id.*) Birdon argued repeatedly it had submitted sufficient evidence of its agreement with Bollinger to lease the facilities to be used to manufacture the cutters. (*Id.*, at 4.) MBB asserts that OHA has fully considered these arguments; and the only evidence that Birdon would lease the facilities were the post-hoc declarations prepared in response to the protests. (*Id.*) According to MBB, the PFR should be dismissed because its arguments have already been considered and rejected. (*Id.*, at 4, citing *Xtreme Concepts Systems*, SBA No. VET-275 (2018); *KDV, Inc.*, SBA No. VET-212 (2011).)

Birdon had previously and unsuccessfully argued it was in compliance with SBA's requirement that it use its "own facilities" to manufacture the cutters. (*Id.*, at 4.) MBB also notes that OHA will not entertain arguments raised for the first time in a PFR which might have been raised earlier in the litigation and will consider new arguments only where the party could not have anticipated the matter at issue. (*Id.*, at 4, citing *Redhorse Corp.* SBA No. VET-263 (2017); *Four Points Tech., LLC*, SBA No. VET-120 (2007).) There was no doubt the issue of compliance with the "own facilities" requirement was at issue, and this matter was briefed in detail. Thus, OHA should dismiss the PFR, as any new arguments could have been raised earlier. (*Id.*)

MBB argues that, in the alternative, the PFR should be denied because Birdon has not made a clear showing that OHA made an error of fact or law material to the decision. (*Id.*, at 5.) The PFR is nothing more than mere disagreement with OHA's application of the "own facilities" requirement. (*Id.*) OHA has held that a fully executed lease of the proposed premises for manufacturing is not required, but there must be "other evidence" establishing such an arrangement existed prior to proposal submission. (*Id.*) Here, Birdon acknowledges that the Teaming Agreement did not expressly state that the parties had agreed to execute a lease. (*Id.*) MBB asserts that Birdon "is asking OHA to read something into an agreement that does not exist" and cannot show it is error for OHA to do so. (*Id.*) Here, Birdon's proposal does not provide any evidence it will occupy and control Bollinger's facilities. (*Id.*, at 5, citing PFR at 12.)

MBB contends that it is unclear which standard Birdon advocates for in its PFR. (*Id.*, at 5-6.) According to MBB, Birdon acknowledges evidence of an agreement may be required, but argues a written agreement is not needed. (*Id.*) Rhetorically, MBB asks how else such an arrangement may be proved? MBB asserts there is nothing in the Teaming Agreement that states Birdon will lease Bollinger's facilities; and there is nothing in the Teaming Agreement to confirm a lease arrangement. (*Id.*)

MBB rejects Birdon's argument and asserts OHA's decision does not nullify the provision that there can be only one manufacturer. (*Id.*, at 6.) MBB points to *Technology Associates*, SBA No. SIZ-5814, where there was no evidence that, as of the date of proposal, the challenged concern would use its own facilities to accomplish the shipbuilding, and thus it could not be considered the manufacturer. (*Id.*) Here, Birdon cannot be the manufacturer because there was no evidence it would lease the facilities from Bollinger. (*Id.*, at 7.) The determination must be made as of the date of Birdon's initial offer, including price. Neither declaration establishes that as of August 30, 2021, there was a written agreement for Birdon to occupy and control Bollinger's manufacturing facilities as a tenant. (*Id.*) Accordingly, as in *Technology Associates*, declarations prepared during the size investigation do not establish that there was a lease arrangement as of the date to determine size. (*Id.*, at 8)

D. Steiner's Response

On April 17, 2023, Steiner filed its response to the PFR and argues that there was no error of fact or law in *Master Boat I*. (Steiner Response, at 1.) Steiner asserts that OHA is authorized to interpret the regulations and properly did so in *Master Boat I*. (*Id.*, at 2.) OHA is vested with the jurisdiction to hear appeals of Agency actions by 15 U.S.C. § 634(i). (*Id.*) Steiner notes that Birdon concurs with OHA's interpretation that the "own facilities" requirement means that the concern must occupy and control the facilities and can establish such occupation and control with a lease or other evidence. (*Id.*) Steiner argues that Birdon attempts to establish an arbitrary limit on OHA's interpretive authority when it argues OHA could not require an explicit written agreement as evidence. (*Id.*) OHA decisions create binding precedent under 13 C.F.R. § 134.226(a)(2). (*Id.*, at 3.) Steiner asserts that OHA was within its authority to make the interpretation it did. (*Id.*)

Steiner maintains Birdon's argument that the regulation requires consideration of what the offeror has proposed to do is unsupported by the text of the regulation itself. (*Id.*) Steiner argues the regulation requires evaluating the current manufacturing capacity of a challenged concern, the instant Solicitation also required offerors to submit a plat depicting their current manufacturing facilities. (*Id.* at 4, citing Solicitation at L.12(b)(1).) Steiner asserts Birdon attempts to rely on the Teaming Agreement, but this contains nothing about the relationship between Birdon and Bollinger being that of lessor and lessee, and instead characterizes them as independent contractors. (*Id.*, at 4.) Steiner also says that there is no support for a Federal common law involving defense contracts. (*Id.*, at 4-5.)

Steiner maintains the regulation and Solicitation require a concern establish its current ability to manufacture the cutters with its "own facilities." (*Id.*, at 5.) (Emphasis added by Steiner.) Without an enforceable leased arrangement, it had no legal right to manufacture the

vessel "as represented in its final proposal" and thus "ineligible for the contract award as of the date of that final proposal." (*Id.*, at 5-6.) Hypothetically, Steiner argues that if the lease arrangements fell apart after the award, Birdon would either have to find a different facility than the one proposed or default on the contract. (*Id.*, at 6.) Steiner "adamantly" disputes Birdon's argument that a decision requiring offerors to expend time and resources to negotiate binding agreements prior to award makes no commercial or economic sense. (*Id.*) Steiner contends that Birdon offers no legal authority for a proposed application of a commercial sense standard to a review of the governing regulation. (*Id.*)

Steiner further asserts Birdon's argument that *Master Boat I* results in there being no manufacturer of the cutters is itself "absurd." (*Id.*, at 7.) The decision finds that Birdon is not eligible to be considered a manufacturer because it does not meet the "own facilities" test and vacated the size determination accordingly. (*Id.*) This decision does not mean that there is no manufacturer of the cutters, but that only an eligible small business manufacturer should be considered such a manufacturer. (*Id.*)

Steiner argues the PFR fails to establish any error in OHA's interpretation of the "own facilities" requirement in *Master Boat I*. (*Id.*, at 8.) The PFR also fails to establish error in OHA's evaluation of the Area Office findings. (*Id.*) It merely repeats arguments raised before, such as that it would be "unreasonable to assume Bollinger would allow Birdon to be a freeloading squatter"; that the proposal depicted locations where Birdon's work would take place; and Bollinger included the price of Birdon's leasing in its own subcontract price. (*Id.*, at 8-9.) Steiner maintains there is no subcontract or other agreement between Birdon and Bollinger in the record. (*Id.*, at 9.) There is only the Teaming Agreement, which is insufficient to establish that Birdon will manufacture the cutters with its "own facilities." (*Id.*) There is no showing OHA misunderstood the proposal or Teaming Agreement or rendered a decision outside the adversarial issues presented. (*Id.*) The declarations which OHA did not rely on do not clarify the proposal. (*Id.*) The proposal and teaming agreement contain no reference to lease arrangements, rent to be paid, or any other indicia of the parties had agreed to a lease. (*Id.*) The declarations cannot explain or clarify information never presented. (*Id.*, at 9-10.)

II. Discussion

A. Jurisdiction and Standard of Review

A party seeking reconsideration on an OHA decision on a size appeal must file its petition for reconsideration within twenty calendar days after issuance of the decision. 13 C.F.R. § 134.227(c). Petitioner filed its PFR within twenty days of service of *Master Boat I*, so the PFR is timely. *Id.*

A PFR may be granted by OHA upon a "clear showing of an error of fact or law material to the discussion." *Id.* A PFR does not allow an unsuccessful party an additional opportunity to argue its position, and the PFR must rise from a manifest error of law or mistake of fact. *Size Appeal of Envtl. Prot. Cert. Co., Inc.*, SBA No. SIZ-4935, at 2 (2008) (PFR). "A [PFR] is appropriate only in limited circumstances, such as situations where OHA has misunderstood a party, or has made a decision outside the adversarial issues presented by the parties." *Id.*,

citing *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988) (*quoting Above The Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). Thus, "[t]he moving party's argument must leave the Administrative Judge with the definite and firm conviction that key findings of fact or conclusions of law of the earlier decision were mistaken." *Size Appeal of TKTM Corp.*, SBA No. SIZ-4905 (2008), citing *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11-12 (2006)); *Size Appeal of KVA Elec., Inc.*, SBA No. SIZ-5057 (2009).

B. Analysis

After reviewing the record, I conclude that I must deny this PFR. Birdon establishes no mistake of law or fact in the decision, points to no portion of the decision based on any fact or law outside the issues presented, and points to no understanding by OHA of its arguments. *Size Appeal of Megan-AWA 2, LLC*, SBA No. SIZ-5852 (2017). Birdon has merely repeated the arguments it made in response to the appeals. Section I.B, *supra*. A party cannot prevail on a PFR if it merely repeats arguments raised in the initial decision. *Size Appeal of WISS, Joint Venture*, SBA No. SIZ-5755 (2017).

The issue here is whether Birdon is eligible to be considered the manufacturer of the cutters under SBA's regulations. 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 *Master Boat I*, I reviewed OHA's cases considering the "own facilities" requirement for manufacturers under SBA regulation at 13 C.F.R. § 121.406(b)(2). It is undisputed that it is not necessary the business concern own the facilities. OHA has held "[T]he 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). In reviewing *Size Appeal of Technology Associates, Inc.*, SBA No. SIZ-5814 (2017) and *Size Appeal of Lynxnet, LLC*, SBA No. SIZ-5971 (2018). OHA concluded that a fully executed lease need not be in place at the time of the proposal. Accordingly, in *Master Boat I*, I concluded as follows:

> [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.

Master Boat I, at 20.

Turning to the record before us, OHA found that:

> 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*

Master Boat I, at 20.

I further note, as argued by Steiner, the Teaming Agreement describes Birdon and Bollinger as "independent contractors," not as lessor and lessee. Section I.D, *supra*, citing Teaming Agreement at 14. The Teaming Agreement does not state at any point that Bollinger will lease the facilities where Birdon will perform its work, nor that Birdon will occupy and control those facilities. *Id.* The Proposal discusses Bollinger's role at length but does not state Bollinger will lease the facilities to Birdon, or otherwise turn over control of those facilities to Birdon. *Id.*

The most apposite case here is *Size Appeal of Technology Associates, Inc.*, SBA No. SIZ-5814, at 12 (2017). This was another procurement for construction of a tugboat. *Id.*, at 1. In *Technology Associates*, the challenged concern did not own a shipyard. *Id.* The proposal stated that production would occur at another named shipyard but made no mention of leasing or renting the facility, nor did the challenged concern submit a lease or other evidence of such an arrangement to the area office demonstrating that such an arrangement existed prior to the date of final proposals. *Id.*, at 12. Accordingly, OHA found the challenged concern had not established that it would construct the tugboat in question with its "own facilities." *Id.* Thus, it is settled law that a challenged concern must submit, if not a lease, then at least "other evidence" of a rental or leasing arrangement existing prior to the date of final proposals, that it will occupy and control the facilities to be used to manufacture the item to be procured. *Technology Associates, Inc.*, SBA No. SIZ-5814, at 12; *see also Size Appeal of Lynxnet, LLC*, SBA No. SIZ-

5971 (2018); *Size Appeal of Mistral, Inc.*, SBA No. SIZ-5877, at 12 (2018). Such evidence must be written, for size determinations and appeals are decided upon the basis of a written record.

In the present case, the Proposal and Teaming Agreement simply do not contain anything explicit from Birdon and Bollinger agreeing to a lease of Bollinger's property by Birdon. Further, there is nothing in the proposal or Teaming Agreement which provides for Birdon's leasing the facilities to be used to construct the cutters so that Birdon will occupy and control them. There is no mention of a lease arrangement, rent to be paid, or any other indication the parties have reached an agreement that Birdon will lease the facilities. As in Technology Associates, not only was there no lease, but there was also no evidence of a lease. *See Technology Associates, Inc.*, SBA No. SIZ-5814, at 12.

Birdon argues that *Master Boat I* imposed an evidentiary standard unauthorized by the regulation. Section I.B, *supra*. However, this argument must fail because the regulation sets out the definition of a manufacturer. The regulation does not set an evidentiary standard for determining whether the definition of manufacturer had been met by the challenged concern beyond requiring that it is the concern whose size is challenged that has the burden of establishing its small business status. See 13 C.F.R. § 121.1009(c). OHA has the responsibility of adjudicating appeals from size determinations and its decisions set binding precedent. 15 U.S.C. § 634(i); 13 C.F.R. §§ 134.102(k); 134.226(a)(2). Thus, OHA is within its authority to determine whether a concern has met the regulatory standard for being found to be a manufacturer, and thus whether each element, including the "own facilities" element, has been met. 13 C.F.R. § 121.406(b)(2).

Birdon maintains that the declarations it submitted in response to the protest include sufficient evidence of a lease agreement. Section I.B, *supra*. Birdon relies upon OHA precedent that contends that information post-dating a proposal may properly be considered so long as it clarifies or explains the proposal and does not contradict it. *Size Appeal of Navarro Research and Engineering, Inc.*, SBA No. SIZ-6065, at 22 (2020). However, one cannot clarify or explain information never presented in the first place. In Birdon's proposal, there was no information about a lease agreement to clarify or explain. Thus, I find *Master Boat I* properly did not consider the declarations. *Technology Associates, supra*, at 19-20.

Birdon further argues that *Master Boat I* nullifies SBA's rule that there must be only one manufacturer. Section I.B, *supra*. I find this argument specious. The question here is whether Birdon is eligible to be considered the manufacturer; and the answer is no because Birdon cannot establish that it will manufacture the cutters in its own facilities.

Accordingly, I find that Birdon has failed to establish any error of fact or law material to the decision in *Master Boat I*. Accordingly, I DENY the PFR, and REAFFIRM my order REMANDING the case to the Area Office. I LIFT my Order STAYING the remand. I remind the Area Office of the grounds of the remand:

> 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).

Master Boat I, at 21.

IV. Conclusion

For the above reasons, I DENY the PFR and AFFIRM the decision in the *Size Appeal of Master Boat Builders, Inc. and Steiner Construction Company, Inc.*, SBA No. SIZ-6198 (2023).

Christopher Holleman
Administrative Judge