

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

Ceres Environmental Services, Inc.,

Appellant,

Appealed From
Size Determination No. 4-2012-8

SBA No. SIZ-5342

Decided: March 30, 2012

APPEARANCES

Karl H. Dix, Esq., Garrett E. Miller, Esq., Smith, Currie & Hancock, LLP, for Appellant

Alison M. Mueller, Esq., Office of General Counsel, for the Small Business Administration

DECISION

This is an appeal of a size determination in which the Area Office concluded that Appellant had represented itself as a small business concern in its submission of its offer on an unrestricted procurement, and that Appellant was other than small. I vacate the Area Office Size Determination and grant the appeal.

I. Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the Area Office clearly erred in concluding that Appellant had represented itself as a small business concern, and thus that the Area Office had authority to render a size determination. *See* 13 C.F.R. § 134.314.

III. Background

A. Ceres I

On July 20, 2011, the U.S. Army Corps of Engineers issued Solicitation No. W912ES-11-R-1000 (Solicitation No. 1000) for removal and proper disposal of emergency levees as a small business set-aside. The Contracting Officer (CO) assigned to the procurement North

American Industry Classification System (NAICS) code 237990, Other Heavy and Civil Engineering Construction, with a corresponding \$33.5 million annual receipts size standard.

On July 30, 2011, the U.S. Army Corps of Engineers issued Solicitation No. W912ES-11-R-0020 (Solicitation No. 0020), for removal of emergency levees, rock and rubble, also as a small business set-aside under NAICS code 237990. Also on July 30, 2011, the CO issued Amendment No. 5 to Solicitation No. 1000, changing that procurement from a small business set-aside to an unrestricted procurement.¹

On August 9, 2011, Ceres Environmental Services, Inc. (Appellant) submitted its offer on Solicitation No. 1000. Appellant's Proposal includes a five-page Small Business Subcontracting Plan. There, Appellant states that every effort will be made to identify and utilize local business for such key areas of the recovery effort as trucking and hauling, office and temporary housing service, cleaning and supplies, and general laborers. Appellant notes it had successfully utilized several hundred small business firms during the response to Hurricanes Katrina and Rita, and that local subcontractors accounted for 59.5% of subcontracting dollars. Appellant also introduces its primary subcontractor, Bluestone Construction, Inc., a small business located in Minot, North Dakota.

On August 10, 2011, the CO awarded contracts arising from both solicitations to Appellant. On August 17, 2011, Coughlin Construction Co. filed size protests against both awards alleging Appellant is not a small business concern.

On September 6, 2011, the Small Business Administration (SBA) Office of Government Contracting — Area IV (Area Office) in Chicago, Illinois, issued as a single decision Size Determination No. 4-2011-58 for Solicitation No. 1000 and Size Determination No. 4-2011-59 for Solicitation No. 0020 (the First Size Determination). In its decision, the Area Office characterized both Solicitation No. 1000 and Solicitation No. 0020 as small business set-asides, and did not acknowledge Amendment No. 5 to Solicitation No. 1000. The Area Office found Appellant to be an other than small business concern and thus ineligible for both procurements.

On September 23, 2011, Appellant appealed the First Size Determination to the SBA Office of Hearings and Appeals (OHA). Appellant challenged the Area Office's computation of Appellant's annual receipts. On September 26, 2011, Appellant filed a Notice of Partial Withdrawal of Appeal and Motion for Partial Dismissal. Appellant withdrew the portion of its appeal contesting the Area Office's substantive findings as to its annual receipts, Appellant's only ground of appeal from Size Determination No. 4-2011-59. Nevertheless, Appellant reasserted that Size Determination No. 4-2011-58 was invalid as beyond the Area Office's authority because Solicitation No. 1000 was unrestricted.

On November 8, 2011, I granted Appellant's motion to withdraw its appeal of Size Determination No. 4-2011-59, and dismissed that portion of the appeal. *Size Appeal of Ceres*

¹ Amendment 5 changed this procurement to unrestricted in a sentence included in the text of a paragraph describing changes to the scope of work, and did not reference this change on the Standard Form (SF) 30.

Environmental Services, Inc., SBA No. SIZ-5299 (2011) (*Ceres I*). I further found that, as to Solicitation No. 1000, Appellant had not certified itself as a small business. I vacated Size Determination No. 4-2011-58, and remanded the matter to the Area Office, without prejudice to the Area Office's processing of a new size determination, and without prejudice to Appellant's presentation of additional evidence and argument to the Area Office and Appellant's right to appeal any resulting adverse size determination. *Ceres I*.

B. Size Determination No. 4-2012-8

On December 7, 2011, the Area Office issued Size Determination No. 4-2012-8 (the Instant Size Determination), finding Appellant was not a small business.

1. The Area Office Found Appellant Had Certified Itself As Small

The Area Office first noted that neither the protestor nor Appellant had informed it that the Army had changed Solicitation No. 1000 to an unrestricted procurement. The Area Office then found that Appellant had represented itself as a small business concern in its offer in response to Solicitation No. 1000.

The Area Office found that FAR 4.1102(a) requires that businesses register in the Central Contractor Registration database (CCR) prior to receiving award of any contract. The regulation also requires that "prospective contractors" register in the Online Representations and Certifications Application (ORCA), a database designed to replace the paper based Representations and Certifications (Reps and Certs) process. FAR requires business concerns to update the representations and certifications as necessary. Formal certification of ORCA data occurs when an offeror signs a solicitation. Then the offeror is certifying that the data in ORCA is current, accurate, and complete. FAR requires that contracting officers verify that a prospective contractor is registered in CCR prior to award. FAR 4.1103(a)(1).

The Area Office further stated that FAR 4.1105 directs contracting officers to insert FAR clause 52.204-7 into solicitations. This clause provides that by submission of an offer, the offeror acknowledges the requirement that a prospective awardee be registered in the CCR prior to award. The Area Office further points to FAR 4.1202's direction to contracting officers to insert clause FAR 52.204-8, "Annual Representations and Certifications". Also, when clause 52.204-9 is included, FAR 52.219-7, Small Business Program Representations", should be omitted, because the CCR profile takes its place. The Area Office concluded that businesses seeking to do business with the Government are required to register in both CCR and ORCA.

On remand, the Area Office reported that the CO had found no ORCA listing for Appellant prior to award on August 10, 2011. The CO found Appellant listing itself in ORCA as small under NAICS code 237990 only for the period August 17 to 24, 2011. The CO transmitted to the Area Office a copy of a CCR listing for Appellant, where it had certified itself as a small business concern for NAICS code 237990. This certification was made on July 5, 2011, and not modified until September 14, 2011, after the issuance of the First Size Determination. The Area Office found that because Appellant signed its offer for both procurements on the same date, it is not possible to have certified itself as small for the procurement under Solicitation No. 0020 and

not for Solicitation No. 1000.

The Area Office further concluded that my finding in *Ceres I*, that Appellant did not certify itself as a small business, was not a formal finding and was, in any event, dicta. Further, my order reflects a misunderstanding of the certification process. The Area Office further concluded the law requires contracting officers to rely on CCR and ORCA, and a business certifies itself as small, incorporating CCR and ORCA by reference, when it signs its proposal. The Area Office further found that Appellant had certified itself as small in its proposal in response to Solicitation No. 0020, which it signed on the same day as its proposal in response to Solicitation No. 1000. The Area Office found it not credible that Appellant would certify itself as small for the one procurement and not for the other, when Appellant had signed both on the same date.

The Area Office found that, based on: (1) the information contained in CCR between July 5, 2011, and September 14, 2011, (2) the information contained in ORCA for the week beginning August 17, 2011, and (3) Appellant's certification in response to Solicitation No. 0020, Appellant had represented itself as a small business for this procurement.

2. Appellant's Size

The Area Office then repeated its findings in the First Size Determination, that David McIntyre is Appellant's majority shareholder. Mr. McIntyre is also the controlling shareholder in a number of other entities.² One of these entities, Vesta Equity, LLC, owns a majority interest in several other entities, thus creating affiliation with Appellant.³ The Area Office found Appellant conceded it was affiliated with all of these entities. The Area Office thus formally found Appellant affiliated with all the identified concerns.

The Area Office then reviewed Appellant's receipts, together with those of its affiliates, and found Appellant other than small.

C. The Appeal

On December 30, 2011, Appellant filed the instant appeal. Appellant argues, first, that the Area Office disregarded the relevant law on unrestricted procurements. Appellant asserts that SBA lacks authority to decide a size protest arising from an unrestricted procurement, citing *Size Appeal of Clean America, Inc.*, SBA No. SIZ-3213 (1989). Appellant concedes that there is an exception to this rule where a concern has represented itself as a small business concern.¹³ C.F.R. § 121.1001(a)(7).

² Ceres Caribe, Inc., Ceres Environmental of Haiti, S.A., Vesta Equity, LLC and McIntyre Florida Properties, LLC.

³ Vesta Equity, LLC; Vesta Windward, LLC; Vesta Redigton Grand, LLC; Catalina Grand, LLC; Vesta Minnesota Properties, LLC; VE Belaire Boca Holdings, LLC; VE Palmetto Holdings, LLC, Vesta Mortgage Holdings, LLC; VE Real Estate Holdings, LC; VE Perimeter ATL, LLC; VE Bello MCO, LLC; Vesta Texas Properties, LLC, and Vesta Lakewood Professional Center.

Appellant concedes that FAR 4.1105 requires the use of FAR clause 52.204-7 as was done for this Solicitation No. 1000 prior to Amendment No. 5. Appellant agrees that when FAR 52.204-7 is included in a solicitation FAR 4.1202 instructs that certain certifications, including FAR 52.219-1, are to be omitted. However, Appellant asserts the Area Office mischaracterizes the law when it states that the CCR profile takes the place of separate representations and certifications. Appellant argues that even a cursory reading of FAR 4.1202 reveals the Area Office's explanation for the deletion of FAR 52.219-1 is wrong. Nowhere in the regulation does it state that an entity's CCR information takes the place of separate representations and certifications.

Appellant asserts that there is no authority supporting the contention that ORCA representations made after submission of an offer constitute a representation that a firm is a small business for the procurement for which the offer was submitted.

Appellant asserts it made no representation in its offer that it was small. Appellant asserts the Area Office references hearsay from the CO regarding investigations conducted after the remand ordered by *Ceres I*. Appellant asserts that none of the CO investigation items referenced in the Size Determination are documented with exhibits or an affidavit, giving Appellant no opportunity to independently investigate. There is no explanation why actions taken by the CO months after award are relevant. Appellant asserts that the CO's post-award inquiries at the Area Office's request demonstrate that Appellant's size played no role in the contract award.

Appellant argues that because Solicitation No. 1000 was an unrestricted procurement, and Appellant did not represent itself as small, the Area Office should have dismissed the size protest. Appellant also contends that *Ceres I* was a formal decision on the question of Appellant's certification.

D. The Agency Response

On January 30, 2012, SBA responded to the Appeal. SBA asserts first, that SBA's Area Offices have authority to conduct size determinations in any unrestricted procurement where the apparent successful offeror or awardee has represented itself as a small business concern, citing 13 C.F.R. § 121.1001(a)(7). SBA points out the many benefits available to a small business concern even in an unrestricted procurement, such as exemption from the requirement to submit a small business subcontracting plan. FAR 19.702(b).

SBA then asserts that Appellant represented itself as a small business concern. SBA argues that FAR requires small business representations of every offeror on every solicitation exceeding the micropurchase threshold to be performed in the United States. FAR 19.202-5. FAR directs contracting officers to insert clause 52.219-1, Small Business Program Representation. FAR 19.309(a)(1). This provision calls upon offerors to represent whether or not they are small business concerns. SBA argues that concerns are required to represent whether they are small or not.

SBA further asserts that FAR requires prospective contractors to be registered in the CCR database prior to award of a contract and to complete electronic annual representations and certifications at <http://orca.bpn.gov> in conjunction with the required CCR registration. FAR 4.1102 & 4.1201(a). SBA asserts FAR states the CCR database is the primary Government repository for contractor information, and ORCA serves a narrower purpose as primary repository for contractor submitted representations and certifications. FAR 2.101, 4.1102, 4.1201(a). SBA asserts that CCR and ORCA are complementary systems, the vendor completes the reps and certs with the understanding that with each solicitation it is certifying to current, complete and accurate information, citing ORCA FAQ, <http://orca.bpn.gov/misc/Faq.aspx#FAQ5>. SBA asserts that this is why FAR provides that when clause FAR 52.204-7, the CCR clause, is included, the contracting officer does not include clause FAR 52.219-1, citing FAR 4.1202, because otherwise there would be the submission of duplicative information. SBA further asserts that by submission of an offer, the offeror acknowledges the requirement that a prospective awardee shall be registered in the CCR database. FAR 4.1202, 52.204-7(b)(1). The CCR clause provides that the contractor is responsible for the accuracy and completeness of the CCR data, and for any liability resulting from the Government's reliance on inaccurate or incomplete data. FAR 52.201-7(f). SBA thus concludes that because Solicitation No. 1000 was a procurement in the United States which exceeded the micropurchase threshold, Appellant was required to represent whether or not it was a small business on the CCR, and responsible for the accuracy of the information it presented on the CCR database.

SBA argues that ORCA representations are not the exclusive manner by which an offeror can certify it is small. SBA cites the Small Business Act, which provides that certain specific actions are intentional certifications of small business status: submission of a proposal for a small business set aside, submission of a proposal for Federal contract which in any way encourages a Federal agency to classify the bid or proposal as an award to a small business concern, or registration on Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement or cooperative research agreement as a small business concern. 15 U.S.C. § 632(w)(2).

SBA further argues that GAO has found that ORCA is not the exclusive method by which an offeror may represent that it is a small business concern, but that the contracting officer may use other representations to make that determination. *Matter of S4, Inc.*, B-299817, Aug. 23, 2007. SBA argues GAO's decision demonstrate that small business representations are not limited to the specific act of checking boxes, citing also *Riverwood of Mississippi, Inc.*, B-280448, Sept. 30, 1998, at 2; *Cal-Tex Limber Co., Inc.*, B-277705, Sept. 24, 1997; *Insinger Mach. Co.*, B-234622, Mar. 15, 1989.

SBA asserts that Appellant was registered on the CCR database as a small business as of the dates of offer and award, August 9 and 10, 2011. SBA further asserts that in the absence of contradictory information, the contracting officer had no reason to question Appellant's representations, citing FAR § 19.301-1(b). SBA cites to another GAO decision *Fidelity Technologies Corporation*, B-276425, May 30, 1997. In that case, an offeror had marked the boxes on its form indicated it was not small and not a Small Disadvantaged Business (SDB) concern, but had also executed another box indicating it was an SDB. The offeror argued that it had made a clerical error in its proposal, and presented evidence that its past performance

information identified it as an SDB, and the contracting officer had personal knowledge of its SDB status. GAO held that the offeror had presented credible evidence the contracting officer was aware of its SDB status, and that an agency may take into account its knowledge in evaluating proposals and making awards.

SBA asserts, based upon the statements in Appellant's Proposal which stated "Ceres Environmental Services, Inc. is a small business enterprise" and "Ceres Environmental Services, Inc. is a small business" and Ceres Environmental Services is a small business under NAICS code 237990" were small business representations. SBA thus argues that, based upon these representations, and: (1) the information contained in CCR between July 5, 2011, and September 14, 2011, (2) the information contained in ORCA for the week beginning August 17, 2011, and (3) Appellant's certification in response to Solicitation No. 0020, Appellant had represented itself as a small business for this procurement. Accordingly, the Area office had authority to perform a size determination on Appellant in Solicitation No. 1000.

IV. Discussion

A. Timeliness and Standard of Review

Appellant filed its appeal within fifteen days of receiving the Size Determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Size Determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Size Determination only if the Judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Ceres I

SBA asserts that I did not find that Appellant had not represented itself as a small business in *Ceres I*, or if I had, it was dicta, and that *Ceres I* was in error in such a finding. *Ceres I* clearly held: "Appellant did not certify that it was small business." and this holding was the basis for the decision to remand the matter to the Area Office:

This [the finding Appellant had not represented itself as small] was based on Appellant's failure to check the boxes for the Small Business Program Representations at Clause 52.219-1 and Offeror Representations and Certifications at Clause 52.212-3. In its Response and Motion for Remand SBA maintains Appellant did in fact certify itself as a small business, based upon a statement Appellant made in the cover letter to its proposal, and a statement Appellant made at the beginning of the Small Business Subcontracting Plan submitted with its proposal. However, a statement in a cover letter is not a self certification. Neither is a prefatory statement in a subcontracting plan, where, as

here, an offeror submits a full subcontracting plan although the solicitation does not require a subcontracting plan from small businesses.

Ceres I, at I, fn. 1.

Accordingly, the threshold issue here is whether *Ceres I* was correct in its finding that Appellant had not certified itself as a small business.

C. Appellant's Certification

SBA is correct that the Area Office has authority to perform size determinations in unrestricted procurements in which an offeror has represented itself as a small business. 13 C.F.R. § 121.1001(a)(7). OHA has recognized this authority. *Size Appeal of Coyol International Group*, SBA No. SIZ-5261, at 2 (2011). There is no question of this authority, or of the very real benefits which can flow to a small business in an unrestricted procurement. The issue here is, whether Appellant represented itself as a small business in its offer submitted in response to Solicitation No. 1000.

The Size Determination's finding that contrary to the decision in *Ceres I*, Appellant represented itself to be a small business, rests upon three grounds: (1) the information contained in CCR between July 5, 2011 and September 14, 2011; (2) the information contained in ORCA for the week beginning August 17, 2011; and (3) Appellant's certification in response to Solicitation No. 0020, Appellant had represented itself as a small business for this procurement.⁴

The Area Office's reliance upon Appellant's ORCA submissions is misplaced. A concern's size is determined as of that date of the challenged concern's submission of its initial offer, including price. 13 C.F.R. § 121.404(a). Here, Appellant's ORCA submissions had not been made at the time of its submission of its offer, or even by the time of award. Therefore, they were not in place as of the date for determining size, and cannot be considered here. While it is true that GAO has held that small business certifications may be submitted after award (*Insinger Mach. Co.*, B-234622, Mar. 15 1989), those cases concerned concerns correcting clerical mistakes in proposals. Conversely, a size determination is made as of the date of the challenged concern's initial offer, and developments which took place after that date cannot be considered. *Size Appeal of Hallmark-Phoenix 8, LLC*, SBA No. 5046 (2009); *Size Appeal of Picazo Constructors, Inc.*, SBA No. SIZ-3964 (1995). Accordingly, I hold that because Appellant had no ORCA filings in place at the time it submitted its offer, there are no ORCA filings to consider in this case, and ORCA filings are not at issue here.

SBA argues first, the Small Business Act is determinative here.

⁴ SBA's argument on appeal adding the statements made in Appellant's cover letter and the introduction to its subcontracting plan is a *post hoc* rationalization and thus cannot be considered here. *Matter of NuGate Group*, SBA No. VET-132, at fn. 1 (2008). Further, this argument is an attempt to relitigate the findings of *Ceres I*, *supra*.

Deemed Certifications — The following actions shall be deemed affirmative, willful, and intentional certifications of small business size and status:

(a) Submission of a bid or proposal for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement reserved, set aside, or otherwise classified as intended for award to small business concerns.

(b) Submission of a bid or proposal for a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement which in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to a small business concern.

(c) Registration on any Federal electronic database for the purpose of being considered for award of a Federal grant, contract, subcontract, cooperative agreement, or cooperative research agreement, as a small business concern.

15 U.S.C. § 632(w)(2).

SBA argues that the statute makes clear that an ORCA registration is not the only manner in which an offeror may certify itself as small. This is clearly true, but I do not find this statutory language applicable here. Subsections (a) and (b) are not applicable here because Solicitation No. 1000 is an unrestricted procurement, and nothing in Appellant's submission in any way encouraged the Army Corps of Engineers to change the designation of the procurement it had only recently redesignated as unrestricted. Subsection (c) refers to a concern registering on a database for the purpose of being considered for award as a small business concern. But here, there is the question of whether Appellant was seeking to be considered for award as a small business concern. Appellant asserts that it was not, and if so, then subsection (c) is inapplicable. The general provision of subsection (w)(2) cannot be applied to individual procurements where a concern is not seeking an award as a small business concern. This is reinforced by the next subsection of the Small Business Act.

Certification by Signature of Responsible Official

(A) In General — Each solicitation, bid, or application for a Federal contract, subcontract, or grant shall contain a certification concerning the small business size and status of a business concern seeking the Federal contract, subcontract, or grant.

(B) Content of Certification — A certification that a business concern qualifies as a small business concern of the exact size and status claimed by the business concern for purposes of bidding on a Federal contract or subcontract, or applying for a Federal grant, shall contain the signature of an authorized official on the page on which the certification is contained.

15 U.S.C. § 632(w)(3).

The Small Business Act thus clearly requires that in the case of specific offers or proposals on specific contracts, there must be a certification as to the offeror's size status on that particular offer or proposal, signed by a responsible official of the concern making the offer or proposal. It is this certification that must control in each particular case. Otherwise, subsection

(w)(3) would be superfluous. If only the database certifications were effective, there would be no need for the individual, contract-specific signed certifications required by subsection (w)(3). I must conclude then that the Small Business Act does require individual certifications as to size status on each offer or proposal. The question here is whether Appellant made a certification that it was small on its offer for Solicitation No. 1000.

SBA is correct when it asserts FAR 19.202-5(a) and 19.309(a)(1) require each prospective offeror to represent whether it is a small business through FAR clause 52.219-1, Small Business Program Representations. Concerns are required to certify themselves as small or other than small. Appellant failed to certify itself as small in its response to clause 52.219-1 in its offer.

FAR 4.1105 also requires the use of FAR clause 52.204-7 (Central Contractor Registration), as was done in Solicitation No 1000. This clause informs offerors they must be registered in CCR, instructs them on registration, and informs them they are responsible for the accuracy and completeness of the information they submit. It does not however, have any language that informs offerors that they are making representations and certifications when registering on CCR.⁵

SBA also correctly stated that FAR 4.1102 requires that contractors be registered in the CCR. Appellant had registered in the CCR, and SBA attached a copy of that registration, in which, as of July 5, 2011, Appellant had identified itself as small for the \$33.5 million size standard. However, as Appellant notes, the CCR website and printout contain a clear disclaimer: “Not to be used as certifications and representations.” This clear disclaimer contradicts SBA's argument that CCR registration takes the place of separate representations and certifications. Further, while SBA has made this assertion, it cannot point to any authority which explicitly states CCR takes the place of representations and certifications in a proposal, rather than simply bring a repository of contractor information.

SBA's reference to FAR 19.301-1(b) is inapposite, because while this requires a contracting officer to accept an offeror's representations unless challenged, it refers to “a specific bid or proposal”, where the issue here is whether Appellant made such a representation. SBA's argument that CCR registration can be used to take the place of representations and certifications as to size is simply not supported by any authority.

SBA further argues that there is Government Accountability Office (GAO) case law which supports the argument that checking the appropriate boxes in ORCA and the offer is not the only way in which a concern may represent that it is a small business concern. In *Matter of S4, Inc.*, B-299817, Aug. 23, 2007, GAO found a concern had certified as small despite the fact that it had not listed the NAICS code for the procurement in question in its ORCA listing. GAO held that a contracting officer may use other information to supply the necessary information

⁵ It is true that FAR 4.1202 instructs that when FAR 52.204-7 is used, FAR 52.219-1 is to be omitted. This does not mean that the CCR Representations take the place of the representations and certifications. FAR does not state that.

where the relevant NAICS code is not listed. The offeror's other ORCA information indicated that it was small, and its submission of an offer for an 8(a) set aside was itself a representation that it was small.

In *Fidelity Technologies Corporation*, B-276425, 97-1 CPD ¶ 197, 1997 WL 284732, May 30, 1997, GAO declined to limit its inquiry into whether a concern had certified itself as small to the four corners of the proposal. The proposal contained inconsistent information as to whether the offeror at issue had certified itself as an SDB. However the offeror was submitting an offer on an SDB procurement, and the contracting officer knew it had performed as an SDB on previous awards. GAO held that the agency should take account of its knowledge of a concern in evaluating proposals and making awards. Some information is too close at hand for an agency not to consider it. In *Riverwood of Mississippi, Inc.*, B-280448, Sept. 30, 1998, an offeror submitted an offer without the required certificate of small business status, GAO found the offeror had certified by submitting its signed bid. In *Cal-Tex Limber Co., Inc.*, B-277705, Sept. 24, 1997, an offeror submitted its certification of small business status late, and GAO found this requirement redundant because by submitting a bid for a small business set-aside, the offeror had certified itself as small. In *Insinger Mach. Co.*, B-234622, Mar. 15, 1989, an offeror failed to complete the required small business certifications, and GAO found that failure to certify as small did not affect a bid's responsiveness.

I disagree with the SBA's assertion the GAO decisions stand for the proposition that an incomplete certification can be read as a complete certification. To the contrary, these GAO decisions stand for that proposition only when the offeror also has presented evidence of its original intent to submit a complete certification. GAO consistently permitted offerors to present evidence of their original intent as to certification of small business status after award, and had accepted offerors' explanations for clerical errors in their certifications. Such is not the case here. Instead, Appellant, the offeror here, has clearly stated it did not intend to self-certify as a small business. In addition, the procurements in the GAO cases were set-asides of one type or another, so that mere act of submitting a bid or proposal could be found to be a certification that the offeror was small. (This precept is now codified at 15 U.S.C. § 632(w)(2)(A).) Conversely, here Appellant asserts that it did not certify that it was a small business, and its lack of certification should be seen as just that, a failure to certify that it was small. Therefore, I conclude the SBA's reliance on the GAO decisions is unavailing.

As to the issues of Appellant's CCR registration, while the FAR requires offerors to register in CCR, it does not provide that such registration is a representation or certification of an offeror's size status, and the CCR website and printouts specifically provide that such information is not to take the place of representations or certifications. Therefore, Appellant's CCR listings do not establish that it certified itself as a small business.

I turn to the fact that Appellant had represented itself as small for Solicitation No. 0020. The Area Office states that Appellant could not have certified for the one procurement and not for the other. This is simply not true. There was no need to certify as small for Solicitation No. 1000, as there was for Solicitation No. 0020, because Solicitation No. 1000 was an unrestricted procurement. The two offers therefore need not have carried the same certification. Further, as I found in *Ceres I*, as to Appellant's other statements that it was small contained in its cover letter

and subcontracting plan, these statements do not constitute a representation. In addition, it is Appellant itself who is arguing that it did not certify that it was small, and is attempting to clarify the confusion concerning its proposal. Under the GAO precedent SBA itself relies upon, Appellant's attempts at clarification as to its certification (or lack thereof) should be permitted.

Rather, in reviewing Appellant's offer, I find that it fails to contain any formal signed certification that Appellant was small, as required by 15 U.S.C. § 632(w)(3)(b), and as I found in *Ceres I*. Solicitation No. 1000 itself gave offerors the option of either submitting written certifications or of relying upon online certification. Solicitation No. 1000, FAR clause 52.204-(d) at 21. Appellant had no online certifications posted at the time it submitted its offer, and thus relied upon its written offer, which did not indicate that it was a small business (*Ceres I*).

SBA's position would not permit offerors any flexibility in bidding. Merely because an offeror submitted a bid as small on a small business set aside, it should not be prohibited from not certifying itself as small on an unrestricted procurement. Appellant did not so certify here. Appellant failed to include any representation that it was small with its offer as discussed in *Ceres I*. Indeed, Appellant submitted a detailed subcontracting plan, as businesses which are not small are required to do. *See* FAR 52.219-9(a). Appellant failed to submit any certification with its proposals, and there was no other certification that it was small in effect on August 9th, the date Appellant submitted its offer. Appellant had not yet made any ORCA posting. Appellant's CCR listings are not to be used as certifications. Appellant certifications as to Solicitation No. 0020 are inapplicable to Solicitation No. 1000. The absence of any other certification that it was small meant that Appellant did not affirmatively represent itself as a small business in submitting a bid on Solicitation No. 1000. Appellant was thus not entitled to any of the preferences or other benefits of being a small business on Solicitation No. 1000.⁶ Further, Appellant was not ineligible for that procurement, because it was unrestricted.

I therefore conclude that Appellant did not represent itself as small in its offer in response to Solicitation No. 1000, and the Area Office erred by conducting a size determination on an apparent successful offeror in an unrestricted procurement who had not represented that it was small. I conclude that I must grant the appeal and reverse the size determination.

V. Conclusion

The record on appeal does not support the Area Office's conclusion that Appellant represented itself as a small business. The Size Determination is VACATED and the Appeal is GRANTED.

⁶ Of course, the determination that Appellant is not a small business for NAICS code 237990 remains in place, because that was the conclusion of Size Determination No. 4-2011-59, the appeal of which was dismissed at Appellant's request in *Ceres I*. Size Determination No. 4-2011-59 thus remains undisturbed.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge