United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: TISTA Science and Technology Corporation, Appellant, RE: Addx Corporation Appealed From Size Determination No. 2-2013-118	SBA No. SIZ-5529 Decided: January 28, 2014

APPEARANCES

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DECISION[1]

I. Introduction and Jurisdiction

This appeal arises from a size determination in which the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) concluded that Addx Corporation (Addx) is an eligible small business for the subject procurement. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under

[1] This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to request redactions to the published decision. No redactions were requested, and OHA now publishes the decision in its entirety.

the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. The record reflects that the size determination was issued September 9, 2013, but not received by Appellant until October 18, 2013. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. RFQ and Protest

On December 21, 2012, the U.S. Department of Veterans Affairs (VA) issued Request for Quotations (RFQ) No. VA798-13-Q-0012 for "Strategic Management Group (SMG) Oversight and Program Management Support Services." The RFQ stated that VA planned to award a task order through the U.S. General Services Administration (GSA) Federal Supply Schedule (FSS) contracts. The Contracting Officer (CO) set aside the procurement entirely for Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBCs), and assigned North American Industry Classification System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding size standard of $14 million average annual receipts.

The CO forwarded the RFQ to fifteen firms holding contracts under Schedule 874, Mission Oriented Business Integrated Services (MOBIS), and/or Schedule 70, Information Technology. According to the RFQ, offerors "shall have at least one active schedule under the GSA Schedules 874-1 (Consulting Services), 874-2 (Facilitation Services) or 70-132-51 (Information Technology Professional Services)." (RFQ § E.1.C.)

On January 9, 2013, the CO issued amendment A00003 to the RFQ, responding to questions from prospective offerors. The amendment included the following questions and answers pertinent to this appeal:

6	Must eligible bidders be VA [Center for Veterans Enterprise (CVE)] Verified SDVOSB with size under $14M?	Currently, for solicitations issued against GSA/Federal Supply Schedules, VA CVE verification is not required. Per [Federal Acquisition Regulation (FAR)] 19.301-1(b) Contractors must be certified in [System for Award Management (SAM)] as an SDVOSB and a SB under NAICS 541611.
7	Does a[n SDVOSB] have to be in the Veterans Administration CVE database to bid on this opportunity or will the fact that they are an SDVOSB on their GSA MOBIS Schedule be satisfactory?	See Government response to question no. 6.

23	[Standard Form (SF)] 1449 specifies a NAICS code of 541611 which is not applicable to GSA Schedule 70-132-51. Will you verify that a small business under GSA Schedule 70-132-51 is eligible to submit a proposal? If a SB does not meet the 541611 but is small under [Schedule] 70, will they be allowed to submit a qualified bid?	Small businesses under GSA schedule 70-132-51 are eligible to submit a proposal considering they are also a small business under NAICS code 541611.

Quotations were due January 18, 2013. On March 28, 2013, the CO announced that Addx had been selected for award.

On April 5, 2013, an unsuccessful offeror, TISTA Science and Technology Corporation (Appellant) filed a bid protest with the U.S. Government Accountability Office (GAO) challenging the award to the Addx. Among other allegations raised during the course of the bid protest litigation, Appellant contended that the VA should have referred Addx to SBA for a size review. Appellant maintained that the instant RFQ required size recertification, and that, at the time of proposal submission, Addx was no longer small business under NAICS code 541611. On July 3, 2013, the Area Office initiated a size protest against Addx pursuant to 13 C.F.R. § 121.1101(a)(8)(iii). GAO subsequently dismissed Appellant's size allegations as academic.

B. Size Determination

On September 9, 2013, the Area Office issued Size Determination No. 2-2013-118 finding that Addx is a small business for the instant RFQ. The Area Office explained that the key issue in the case is what date should be used to assess Addx's size. Pursuant to 13 C.F.R. § 121.404(g), a concern which qualifies as a small business at the time an FSS contract is awarded is generally considered to be a small business throughout the life of the contract. (Size Determination at 4-6.) A procuring agency may, however, request recertification in conjunction with a particular task or delivery order. (*Id.*)

The Area Office found that Addx was still a small business under its MOBIS Schedule contract at the time Addx submitted its response to the RFQ in January 2013. Specifically, Addx was awarded its MOBIS Schedule on April 17, 2003. (*Id.* at 1.) The contract had a five-year base period and two five-year option periods, for a maximum potential period of performance of 15 years. Addx was required to recertify its size prior to the exercise of each option, and on March 19, 2008, Addx recertified itself as small under NAICS code 541611 for the first option period. (*Id.*) The first option period began on April 17, 2008 and concluded on April 16, 2013.

Next, the Area Office considered "whether the CO here requested recertification for the subject [order]." (*Id.* at 4.) The Area Office stated that "[i]f the CO made an explicit request for a size certification for the task order the date of offer for the task order would be used" to determine Addx's size. (*Id.* at 6.)

The Area Office addressed Appellant's contention that RFQ amendment A00003 — and

particularly the responses to questions 6, 7, and 23 — required recertification. The Area Office found, however, that these responses did not refer directly to the instant task order. (*Id.* at 7-8.) Furthermore, the CO advised the Area Office that VA did not intend to require a size recertification for the order. (*Id.* at 4.) The Area Office concluded that "[t] here was no explicit language [in the RFQ] that an entity had to submit a size certification for the instant procurement." (*Id.* at 8.)

The Area Office also considered Appellant's contention that Addx is not currently a small business under NAICS code 541611. The Area Office found that "[t]his is not an issue as long as Addx was a small business at the time of its initial offer on the original FSS contract from which the instant task order evolved." (*Id.*) According to the Area Office, "[i]t is quite possible that a firm listed as small for a GSA FSS, [Government-Wide Acquisition Contract], or other long term contract vehicle is listed as other than small on a current SAM profile." (*Id.* at 7.)

The Area Office concluded that Addx's size should be determined as of March 19, 2008, the date Addx most recently recertified for its MOBIS Schedule contract. (*Id.* at 9.) Addx's average annual receipts did not exceed the size standard as of March 19, 2008, so Addx is an eligible small business for this RFQ. (*Id.* at 10.)

C. The Appeal

On November 4, 2013, Appellant filed this appeal. Appellant does not dispute that Addx was a small business under NAICS code 541611 as of March 19, 2008. Nevertheless, in Appellant's view, "[t]he Area Office erred by finding that the solicitation did not require a size certification under NAICS code 541611 before submission of proposals, and by failing to apply the deemed certification provisions of [15 U.S.C. § 632(w)(2)]." (Appeal at 4.)

Appellant argues that the Area Office incorrectly concluded that the RFQ did not require recertification. Appellant emphasizes that, in RFQ Amendment A00003, the VA's response to question 6 stated that offerors "must be certified in SAM as an SDVOSB and a SB under NAICS 541611." Appellant argues that, because this response was phrased in the present tense, it cannot be understood as requiring only that offerors previously were certified as small businesses on their GSA Schedules. Thus, the Area Office's interpretation of the response is faulty, as it "completely reads out from the solicitation the requirement to be certified in SAM as a small business under the NAICS code." (*Id.* at 7.) In addition, Appellant maintains, the responses in RFQ Amendment A00003 repeatedly referred to offerors' proposals, so it is evident that those responses did pertain to this particular task order. (*Id.* at 7-8.) Appellant insists that the Area Office irrationally concluded that "despite the fact that offerors were asking questions and submitting bids against the instant task order, the answers submitted by the VA did not relate to the instant task order." (*Id.* at 6-7.)

Appellant acknowledges that the CO has asserted that recertification was not required for this RFQ. Appellant argues, however, that the CO's position is a ""*post hoc* rationalization" adopted for litigation purposes, and is contradicted by the express language of RFQ Amendment A00003. (*Id.* at 8.) Therefore, Appellant asserts, the CO's opinion "lacks credibility and should be given no weight." (*Id.*) Furthermore, even supposing that the CO did not intend to request

recertification, this would not necessarily establish that no such request actually occurred. (*Id.* at 8-9.)

Appellant also argues that 2010 amendments to the Small Business Act provide that a certification is "deemed" to have occurred by submitting a proposal for a procurement that is set aside for small businesses. (*Id.* at 9-10, citing 15 U.S.C. § 632(w)(2).) The instant RFQ was set aside, so Appellant urges that Addx should be deemed to have certified itself as a small business, irrespective of whether the RFQ required recertification. Appellant asserts that "there is only one fact question: Was Addx's proposal dated January 18, 2013 a proposal for a contract set aside for a small business concern? The answer is yes." (*Id.* at 10.) As a result, "[p]er the plain meaning of the statute, the law made Addx's proposal a deemed certification." (*Id.*) Appellant contends that Congress could have authorized an exception for task orders under long term contracts, if Congress had intended to exempt such instruments from the scope of 15 U.S.C. § 632(w)(2). In addition, Appellant cites *Size Appeal of Professional Project Services, Inc.*, SBA No. SIZ-5411 (2012) for the proposition that 15 U.S.C. § 632(w)(2) may apply to orders under long-term contracts.

D. SBA Comments

By order of November 12, 2013, OHA requested that SBA address the issues raised in the appeal. SBA submitted its comments on November 22, 2013.

SBA maintains that the Area Office "reasonably, correctly, and in accordance with SBA regulations, analyzed Addx's size as of March 19, 2008, because the VA Task Order was issued against a long-term contract and the CO did not make an explicit request for recertification of size for the VA Task Order." (SBA Comments at 4.) SBA asserts that "[o]n January 18, 2013, the date of Addx's offer for the [order], Addx was still within the first option period of its GSA contract and therefore able to rely upon its size certification of March 19, 2008." (*Id.* at 3.) Furthermore, in SBA's view, the instant RFQ contained no specific language requiring recertification.

With regard to 15 U.S.C. § 632(w)(2), SBA contends that "the submission of a proposal for a Federal contract that is set aside for small businesses is a certification of size status," but that "the statute does not apply to the mere proposal for a small business set-aside task order that is awarded pursuant to an existing contract." (*Id.* at 4-5.) SBA observes that 15 U.S.C. § 632(w)(2) does not specifically discuss task and delivery order awards. (*Id.* at 5.) In addition, interpreting the statute as imposing a deemed certification for each set-aside order "would render 13 C.F.R. § 121.404(g)(3)(v) moot," because procuring agencies would no longer have any reason to request recertification in conjunction with particular orders. (*Id.*)

E. VA's Response

On November 29, 2013, VA responded to the appeal. VA concurs with SBA's comments and maintains that the size determination is "reasonably sound and without error." (VA Response at 2-3.) VA urges OHA to deny the appeal.

F. Addx's Response

On December 2, 2013, Addx responded to the appeal.

Addx asserts that Appellant "utterly failed to adhere to the timeliness requirements to file its own size protest of Addx." (Addx Response at 4.) According to Addx, Appellant could have ascertained that Addx was not listed in SAM as a small business under NAICS code 541611 at the time of task order award. (*Id.* at 2.) Appellant, though, did not promptly pursue a size protest against Addx, and instead raised the issue several weeks later during the course of the bid protest litigation at GAO. Although the Area Office eventually initiated its own size protest against Addx, the Area Office was not obliged to expand the scope of its review to consider arguments raised in Appellant's bid protest. As a result, Addx maintains, "[a]ny complaint that the Area Office 'did not address critical elements of [Appellant's] challenge to Addx's size' is irrelevant to the merits of this appeal." (*Id.* at 4.)

Addx supports SBA's position that 15 U.S.C. § 632(w)(2) does not render any proposal submitted for a set-aside order a recertification of small business status. Addx observes that 15 U.S.C. § 632(w)(2) specifies five types of instruments for which proposal submission constitutes a deemed certification, but that "task orders are not included in this laundry list." (*Id.* at 6.) Addx thus reasons that "§ 632(w)(2) applies to proposals for *contracts*, not task orders, and is inapplicable to this Solicitation." (*Id.* at 5 (emphasis in original).) Addx further asserts that Appellant misconstrues OHA's decision in *Size Appeal of Professional Project Services, Inc.*, SBA No. SIZ-5411 (2012). According to Addx, "OHA made no affirmative statement [in *Professional Project Services*] that proposals submitted for task orders do in fact serve as recertifications absent any explicit request from the contracting officer." (*Id.* at 6.)

Addx argues that "[b]ecause [15 U.S.C. § 632(w)(2)] does not mandate that every proposal submission under a task order set aside for small businesses serve as a recertification, the question becomes whether *this Solicitation* required offerors to recertify their small business status at the time of proposal submission." (*Id.* at 8 (emphasis in original).) In Addx's view, the RFQ here did not require that offerors recertify their small business status. Rather, the second sentence in the answer to question 6 of amendment A00003, which serves as the foundation of the appeal, required only that offerors be "(1) certified in SAM as an SDVOSB; and (2) qualify as an SB under NAICS code 541611." (*Id.* at 9.) Addx contends that its interpretation of the answer is consistent with the CO's opinion that the RFQ did not require recertification. (*Id.* at 11.) In addition, insofar as Appellant believed the RFQ to be unclear on the issue of recertification, it was Appellant's responsibility to seek clarification prior to the deadline for receipt of proposals. (*Id.* at 10-11.)

G. Appellant's Response

On December 2, 2013, Appellant responded to SBA's comments.

Appellant strongly disagrees with SBA's view that the RFQ did not require that offerors be certified in SAM as small businesses under NAICS code 541611. According to Appellant:

[SBA's] position is that the answer to Question 6 [of amendment A00003] actually reads: 'Per FAR 19.301-1(b) contractors must have been certified in SAM as an SDVOSB and a SB under NAICS Code 541611, unless they have a legacy certification under that NAICS code which is not listed in SAM, in which case they may use such legacy certification and are not required to be certified in SAM as small under NAICS Code 541611.' That's not how the answer is written, and to reach that interpretation requires a wholesale rewrite of the answer as shown. (Appellant's Response at 4.) Appellant emphasizes that, at the time of proposal submission, Addx was not certified in SAM as a small business under NAICS code 541611. (*Id.* at 2.)

Appellant attacks SBA's argument that 15 U.S.C. § 632(w)(2) applies to contracts but not to orders. Appellant maintains that SBA's position "conflicts with the FAR," because FAR 2.101defines "contract" as including "orders" and other "types of commitments that obligate the Government to an expenditure of appropriated funds." (*Id.* at 6.) Further, several tribunals have interpreted FAR 2.101 to mean that task orders may be contracts. (*Id.*) Appellant observes that 15 U.S.C. § 632(w)(2) does not expressly authorize any exception for task orders. Therefore, "[u]ntil the time that Congress sees fit to amend [15 U.S.C. § 632(w)(2)] to include an exemption for tasks orders, [OHA] has no choice but to apply the facial language of the statute." (*Id.* at 7.)

Appellant contends that applying 15 U.S.C. § 632(w)(2) to task orders would not prevent procuring agencies from requesting recertifications, and therefore would not moot existing SBA regulations, as SBA claims. (*Id.* at 9.) Moreover, if the statute and regulations were irreconcilable, the statute would take precedence. Appellant asserts that "[s]tatutes change previously applicable law all the time, and changes to regulations often lag behind." (*Id.* at 10.) Appellant asserts that public policy also supports applying 15 U.S.C. § 632(w)(2) to task orders. According to Appellant, 15 U.S.C. § 632(w)(2) "may represent a Congressional judgment that the 'life of the contract' rule needed some more limits when it came to task orders under multiple award contracts." (*Id.* at 11.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Analysis

In seeking to overturn the size determination, Appellant advances two principal arguments. First, Appellant maintains that, pursuant to 15 U.S.C. § 632(w)(2), Addx should be deemed to have recertified its size for the instant order because Addx chose to compete for an order that was set-aside exclusively for SDVOSBs. Appellant's argument stems from 2010 amendments to the Small Business Act, which require that "[s]ubmission of a bid or proposal for

a Federal grant, contract, subcontract, cooperative agreement, or cooperative research and development agreement" that is set-aside for small businesses "shall be deemed [an] affirmative, willful, and intentional certification[] of small business size and status." 15 U.S.C. § 632(w)(2). Second, Appellant contends that, even if OHA determines that Addx is not deemed to have recertified by operation of law, Addx still was ineligible for this award because the RFQ itself required that Addx be certified in SAM as a small business. As discussed *infra*, Appellant has not established clear error in the size determination with respect to either of these issues. As a result, the appeal is denied and the size determination is affirmed.

1. 15 U.S.C. § 632(w)(2)

The initial question presented is one of statutory construction, specifically whether the scope of 15 U.S.C. § 632(w)(2) includes task and delivery orders placed under long-term contracts. I agree with SBA and Addx that 15 U.S.C. § 632(w)(2) does not apply in this situation. Several factors bolster this conclusion.

Statutory construction begins with the plain language of the statute. *E.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the language of the statute."). Here, as both SBA and Addx observe in their responses, 15 U.S.C. § 632(w)(2) identifies five types of instruments — grants, contracts, subcontracts, cooperative agreements, and cooperative research and development agreements — for which offerors are "deemed" to certify as small businesses by submitting a proposal. The statute, however, omits any mention of task or delivery orders. Based on the plain language of the statute, then, it would seem that 15 U.S.C. § 632(w)(2) does not apply to orders under long-term contracts.[2] In addition, 15 U.S.C. § 632(w)(2)expressly addresses certification, but does not address how, or when, recertification occurs for firms which already certified as small for the underlying base contract. The omission of recertification is notable because SBA regulations pertaining to recertifications under long-term contracts were promulgated several years before 15 U.S.C. § 632(w)(2) was enacted. The regulatory history of SBA's rules reflects that SBA originally contemplated frequent recertifications, such as annually, but ultimately adopted the approach that recertification should be required only every five years or if the CO requests recertification. *See generally* 71 Fed. Reg. 66,434 (Nov. 15, 2006); *Size Appeals of Safety and Ecology Corporation*, SBA No. SIZ-5177, at 21 (2010). Thus, given that 15 U.S.C. § 632(w)(2) is silent on the issue of recertifications, there is no indication that Congress intended to overrule SBA's preexisting regulatory approach and replace it with a rule that recertification occurs for every order that is set-aside or restricted to small businesses.

It is true, as Appellant observes, that FAR 2.101 defines "orders" as a type of "contract". *See* Section II.G, *supra*. Thus, use of the word "contract" in 15 U.S.C. § 632(w)(2) arguably could be understood as encompassing task and delivery orders. Nevertheless, I find this contention unpersuasive for two reasons. First, the FAR's definition of "contract" is quite broad, and includes a variety of instruments involving expenditure of appropriated funds, such as bilateral contract modifications, which typically would not contain small business certifications.

[2] The same five types of instruments, again excluding task orders, are repeated in SBA regulations implementing 15 U.S.C. § 632(w)(2). *See* 13 C.F.R. § 121.108.

It would make little sense, and fundamentally alter existing law, to conclude that size certification or recertification occurs whenever a small business executes a bilateral contract modification. It therefore appears that Congress likely did not to use the word "contract" in the broad FAR sense of the term. Second, the same legislation which gave rise to 15 U.S.C. § 632(w)(2) also contained provisions on the set-aside of orders. *See* Small Business Jobs Act of 2010, Pub. L. 111-240 § 1331 (amending 15 U.S.C. § 644(r)). Thus, Congress was fully capable of distinguishing "contracts" and "orders," and did so elsewhere in the same legislation. This further supports the notion that the drafters of 15 U.S.C. § 632(w)(2) did not intend the word "contract" to encompass orders placed against existing contracts.

An additional obstacle for Appellant is that, even if OHA were to conclude that 15 U.S.C. § 632(w)(2) does apply to orders, it is not evident that the statute conflicts with SBA regulations, as set forth at 13 C.F.R. § 121.404(g). In particular, although the statue makes clear that certification is "deemed" to occur through submission of a bid or proposal on a set-aside contract, it does not specify when such certification, or recertification, is deemed to have occurred. In an analogous case, *Size Appeals of BA Urban Solutions, LLC, et al.*, SBA No. SIZ-5521 (2013), OHA found that 15 U.S.C. § 632(w)(2) does not specify whether certification is deemed to have occurred at time of initial proposals or at the time of final proposals. As a result, SBA regulations, which required that the date of initial proposals be used to assess size, were controlling. *BA Urban*, SBA No. SIZ-5521, at 13. Similarly, in the instant case, 15 U.S.C. § 632(w)(2) does not address when recertification occurs for firms which have already certified as small for their underlying base contract. Insofar as the statute is silent as to the timing of certification and/or recertification, the statute is not inconsistent with SBA's regulatory approach that certification occurs at the contract level and remains in effect for five years, unless and until the procuring agency requests recertification in conjunction with a particular order.

Lastly, Appellant also relies upon a footnote in *Size Appeal of Professional Project Services, Inc.*, SBA No. SIZ-5411 (2012), in which OHA remarked that offerors that submitted proposals for an order "may have certified themselves as small businesses, even in the absence of an express requirement to self-certify." *Professional Project Services*, SBA No. SIZ-5411, at n.5. As Addx correctly observes, however, recertification through 15 U.S.C. § 632(w)(2) was not at issue in *Professional Project Services*, and OHA took no position on whether recertification had actually occurred. Thus, *Professional Project Services* does not require a contrary result here.

2. The RFQ

The second issue presented in this case is whether the instant RFQ required that Addx be certified in SAM as a small business at the time of proposal submission. I agree with SBA, Addx, and VA that such certification was not required. Appellant emphasizes that the CO's response to question 6 in amendment A00003 stated that "Per FAR 19.301-1(b) Contractors must be certified in SAM as an SDVOSB and a SB under NAICS 541611." This response, however, can reasonably be understood as requiring that offerors be certified in SAM as SDVOSBs, and that offerors must qualify as small businesses under NAICS code 541611. Stated differently, under this reading, offerors must qualify as small businesses under NAICS code 541611, but need not be certified in SAM as small businesses. This interpretation draws support from the response to question 23, which likewise did not require SAM certification but only that offerors

"are also a small business under NAICS code 541611." *See* Section II.A, *supra*.

The Area Office found, and Appellant does not dispute, that Addx was a small business as of March 19, 2008, the date Addx most recently recertified for its MOBIS Schedule contract. Under 13 C.F.R. § 121.404(g), Addx was permitted to rely on its 2008 certification unless the instant RFQ required recertification for the instant order. Accordingly, the Area Office properly concluded that Addx was an eligible small business for this order.

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge