On June 28, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area IV (Area Office), issued Size Determination No. 04-2017-029, finding Ventech Solutions, Inc. (Ventech), is an eligible small business for U.S. Department of the Air Force Solicitation No. FA8770-16-R-0002, the procurement at issue.

Stellar Innovations and Solutions, Inc. (Appellant), contends the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the size determination and find that Ventech is not an eligible small business for the instant procurement. For the reasons discussed infra, I deny the appeal and affirm the size determination.
OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 et seq., and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen 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. The Solicitation, Award, and Protest

On March 23, 2016, the U.S. Department of the Air Force (Air Force) issued Solicitation No. FA8770-16-R-0002 (RFP) for maintenance and support services as a competitive set aside under SBA's 8(a) program. The Contracting Officer (CO) designated it under North American Industry Classification System (NAICS) code 541511, Custom Computer Programming Services, with a corresponding $27.5 million annual receipts size standard. The RFP provided the CO “will validate 8(a) status upon receipt of proposal(s) and prior to award.” (RFP § L.3.4.) Proposals were due on April 27, 2016. (RFP Amdt. 3.) Ventech submitted its initial offer on April 27, 2016. (Ventech Letter to Area Office, June 19, 2017.)

On December 22, 2016, the Air Force notified unsuccessful offerors that it had awarded the contract to Appellant. On December 28th, CompTech Computer Technologies, Inc., filed a protest of the award at the Government Accountability Office (GAO). (B-414242.) On January 30, 2017, the CO informed offerors, regarding the GAO protest:

The Government has reviewed said protest and decided to take corrective action. The corrective action will re-open discussions, seek revised final proposals from all offerors, perform a new evaluation, and make a new award determination . . . . Please stand-by for further notice of corrective action under this RFP . . . .

(AF Memorandum, Jan. 30, 2017.)

On February 16, 2017, the Air Force issued Amendment 4. The accompanying memorandum set out revisions to the period of performance (POP) and stated:

Discussions with all offerors are hereby reopened . . . . The Government requests revised proposals to reflect the above [POP] change. A separate notice will be provided individually to each offeror with Evaluation Notices (ENs), detailing any outstanding Weaknesses and Deficiencies. . . . If no changes have been made to any proposal volume, the Offeror shall state so: the Offeror shall provide either an affirmative of no change or a revised volume.

(AF Memorandum, Feb. 16, 2017.) Offerors' responses were due on February 23, 2017.

On April 26, 2017, the Air Force issued Amendment 5. The accompanying memorandum informed offerors in the competitive range that discussions “have concluded” and that they may submit final proposal revisions (FPR) by May 1, 2017. Further:
In the event an Offeror elects not to submit a [FPR] but still desires to be considered for . . . award, the Offeror summarize and reaffirm their current proposed prices. . . .

(AF Memorandum, April 26, 2017). The Air Force made additional POP revisions. The memorandum did not request or even refer to a recertification as to size, and no offeror made recertification as part of its FPR. (See id.) On June 2, 2017, the Air Force notified unsuccessful offerors it had awarded the contract to Ventech.

On June 7, 2017, Appellant filed its size protest with the CO, alleging Ventech is not an eligible small business concern. First, Appellant alleged, based upon publicly available information, that Ventech's receipts exceed the applicable size standard. (Protest at 3-5.)

Second, Appellant alleged Ventech is not eligible for award because it graduated from the 8(a) program on September 16, 2016. (Id. at 5-6.) Appellant argues that an 8(a) firm is no longer eligible to receive 8(a) contracts once it exits the 8(a) program. (Id. at 6, citing FAR 19.816(a).) An 8(a) firm which has completed its term of participation in the program may be awarded an 8(a) contract if it was eligible for award on the date specified for receipt for offers, and if it continues to meet all other applicable eligibility criteria; however, Ventech does not meet the other criteria. (Id. at 6, citing FAR 19.816(c).) Appellant argues because Ventech has graduated from the program and is no longer small, it is not eligible for award. (Id.) Further, under 13 C.F.R. § 121.404(a), a concern's size is determined as of the date of its initial offer, “or other formal response to the solicitation”. (Id.) Also, RFP § L.3.4 requires the Air Force to verify 8(a) status of offerors at time of proposal submission and prior to award. (Id.) Therefore, Appellant maintains the Air Force should have verified Ventech's status as of May 1, 2017. (Id.) The CO referred the protest to the Area Office for a size determination.

On June 15, 2017, the Area Office notified Ventech of the protest, and requested that it submit a response to the protest, a completed SBA Form 355, and certain other information as of April 27, 2016, the date of its self-certification with its initial offer including price. On June 20, 2017, Appellant, who had also received the notification letter, wrote to the Area Office arguing it was using the wrong date to determine size. Appellant again argued FAR 19.816 required the Air Force to determine Ventech's size as of May 1, 2017, the date of FPR submission.

On June 22, 2017, the CO informed the Area Office:

(1) The Air Force did not at any time cancel or terminate the existing solicitation. The Corrective Action was completed under the same solicitation, FA8770-16-R-0002.

(2) As part of response to the initial protest to the GAO, the Air Force chose to take Corrective Action, specifically to reenter discussions with all

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2 FAR 19.816 did not go into effect until some 10 months after the RFP was issued on March 23, 2016. See 82 Fed. Reg. 4724, 4731 (Jan. 13, 2017).
offerors. As part of discussions (continuation of existing RFP), Offerors were
given ENs and a period of performance change (due to the delay of conducting
Corrective Action). Some Offerors chose to update their pricing based on
responses to ENs and this aforementioned period of performance change, but
were not required to by the Air Force.

(CO's email, June 22, 2017.)

On June 27, 2017, SBA's Columbus District Office informed the Area Office that
Ventech was an 8(a) participant in good standing on April 27, 2016, and graduated from the
program on September 24, 2016.

B. The Size Determination

On June 28, 2017, the Area Office issued Size Determination No. 04-2017-029, finding
Ventech is an eligible small business for this procurement. The Area Office stated that 13 C.F.R.
§ 121.404(a) sets the date to determine size as the date the concern submits its initial offer,
including price. (Size Determination at 1.) Next, the Area Office addressed Appellant's argument
that May 1, 2017 was the date to determine size. (Id. at 2-3.) First, the parenthetical “or other
formal response” in § 121.404(a) modifies the word “initial”; thus, the regulation could be
restated: “as part of its initial offer (or other initial formal response to a solicitation).” (Id.)
Appellant's reading, that the submission of any “formal response” to a solicitation sets a new
date for determining size, would do damage to the clear meaning of the regulation. (Id.)

Second, OHA has rejected the argument that FPRs constitute an “other formal response
to a solicitation” so as to change the date for determining size. (Id. at 3.) In support, the Area
Office cited Size Appeal of HBC Management Services, SBA No. SIZ-5686 (2015); Size Appeal
of BA Urban Solutions, LLC, SBA No. SIZ-5521, at 11 (2013); and Size Appeal of Ramcor
Services Group, Inc., SBA No. SIZ-5510, at 4 (2013). Here, the Air Force did not request
recertification of size with FPRs, and so the date to determine size is April 27, 2016. (Id. at 4.)

The Area Office also rejected Appellant's argument that Ventech's graduation from the
8(a) program causes it to be ineligible for the award here, citing the 8(a) program regulation at 13
C.F.R. § 124.507(d)(2). (Id. at 4.) Under this regulation, a participant concern may be awarded a
competitive 8(a) contract if it is eligible on the initial date specified for the receipt of offers, even
though its program term may expire after that date. (Id.) Thus, because Ventech is an eligible
8(a) concern on April 27, 2016, it is eligible for this award. (Id.)

Turning to Ventech's size, the Area Office then found that Mr. Ravi Kunduru controls
Ventech and three affiliate concerns. (Id. at 4-5.) Based upon Federal tax returns, the Area Office
found Ventech's receipts, combined with those of its three affiliates, are below the size standard
for this RFP. (Id. at 5.) Therefore, Ventech is an eligible small business. (Id.)
C. The Appeal

On July 12, 2017, Appellant filed the instant appeal. Appellant contends the Area Office clearly erred in finding Ventech eligible for award despite (1) its graduation from the 8(a) program before the date FPRs were due, and (2) the fact its receipts exceed the size standard as of that same date. (Appeal at 2.) Appellant maintains Ventech’s 8(a) eligibility and size status should have been determined as of May 1, 2017, the date it submitted its FPR, rather than as of April 27, 2016, the date it submitted its initial proposal including price.

Appellant argues the Area Office erred in ignoring the RFP terms that require the procuring agency to verify Ventech’s size and 8(a) status before award. The Air Force took corrective action in response to a GAO protest by reopening the solicitation, requesting FPRs, and making a new evaluation and award determination based on the FPRs, but the Air Force did not amend RFP § L.3.4 requiring the Air Force to validate an offeror’s 8(a) status at the time of submission of its offer and prior to award. (Id. at 6-7.)

Appellant argues that Ventech is ineligible for award under FAR 19.816, maintaining Ventech graduated from the 8(a) program well before the due date for FPRs and the award. FAR 19.816(c), however, allows an offeror who has completed participation in the 8(a) program to still receive a competitive 8(a) contract, but only if the contractor continues to meet all other applicable eligibility criteria. Ventech does not, because its SBA Profile, as of July 2017, describes it as not small for NAICS code 541511. (Id. at 8-9.)

Appellant further maintains that the OHA decisions the Area Office relied on are inapposite because the Air Force’s corrective action process here was tantamount to a new procurement. (Id. at 9.) First, BA Urban is inapposite because it did not involve a procurement where the CO reopened bidding, sought FPRs, and made a new award determination based upon the solicitation’s terms. Here, there was a wholly new evaluation and award determination. In BA Urban, OHA found the procuring agency did not significantly alter the competitive landscape. Here, the Air Force did so: It first announced Appellant as the awardee, and then took corrective action after a GAO protest by reopening the procurement and requesting FPRs. (Id. at 9-10.) Further, the Air Force informed offerors here that an award would be “in accordance with the Solicitation’s terms” by which the Air Force is required to validate 8(a) status at the time of submission and prior to award. (Id. at 10-11.)

Ramcor also did not involve a procurement that was reopened after an initial award and protest, nor did the procuring agency perform a new evaluation or make a new award determination. Therefore, the case is inapposite here. (Id. at 11.) Likewise, HBC did not involve facts similar to those here. The RFP was materially different, and while the procuring agency took corrective action, it had not yet made an award, not did it reopen a procurement to make a new evaluation. (Id.) Appellant argues BA Urban, Ramcor, and HBC merely involve circumstances where the agency sought revised proposals before award. Here, in contrast, corrective taken was taken in response to a protest alleging the Air Force erred in its initial award determination. After announcing the award to Appellant, the Air Force reopened the procurement by requesting new proposals, performing a new evaluation, and making a wholly new award determination. RFP § L.3.4 required the agency to validate eligibility before final award. Even if
OHA determines the Air Force did not request size recertification at the time of the FPRs, the RFP required the agency to assess offerors' 8(a) eligibility at the time of award. The Air Force failed to do so here. (Id. at 11-12.)

D. The Supplemental Appeal

On July 31, 2017, after reviewing the Area Office file under the terms of an OHA protective order, Appellant filed a Supplemental Appeal (characterized as a “Response to Protected Appeal Record”).

Appellant maintains Ventech's initial proposal was no longer a valid offer which the Air Force could accept. The RFP provided that proposals would be valid for 180 days. (RFP § L.2) Ventech's initial offer was therefore no longer valid as of May 1, 2017; it had expired and the Government was barred from accepting it. (Supplemental Appeal at 2, citing Nat'l Air Cargo, Inc. v. U.S., 126 Fed. Cl. 281, 298 (2016).) Therefore, Ventech's FPR must be viewed as a new offer and any 8(a) and size status determination had to be based on the FPR due date. (Id.)

Appellant argues this makes sense under the applicable regulations because offerors submitted substantial revisions following the Air Force's corrective action, and because the original GAO protest was not filed in time for a stay pursuant to the Competition in Contracting Act, 31 U.S.C. § 3553. (Id.)

Appellant further argues Ventech's FPR was a new offer and contained substantial revisions, and the Air Force and the Area Office should have used May 1, 2017 as the date to determine size and eligibility. (Id. at 3.) Appellant discusses the Area Office's email communications with Ventech at length, which inquired as to whether the Air Force had cancelled or terminated the procurement or whether Ventech changed anything in its offer. (Id. at 3-4.) Appellant reiterates its argument the RFP required verification of Ventech's eligibility prior to award. (Id. at 5.)

E. Ventech's Response to the Appeal

Also on July 31, 2017, Ventech filed its Response to the Appeal. Ventech first asserts OHA lacks jurisdiction over this appeal, because it involves 8(a) eligibility issues, and OHA's jurisdiction over 8(a) matters is limited to denial of program admission and program suspension. (Ventech Response at 2, citing 13 C.F.R. § 134.102(j).)

Ventech further argues its graduation from the 8(a) program after submission of its proposal does not invalidate its small business status. FAR 19.816(c) provides that an 8(a) participant which was eligible for award of a contract on the initial date specified for receipt of offers remains eligible even when it has completed its program participation prior to contract award. (Id. at 3.)

Further, Ventech argues OHA has rejected Appellant's argument before in Ramcor, BA Urban, and HBC, determining that the date for determining a concern's eligibility is the date of the initial offer. (Id. at 4-5.) Finally, Ventech argues that the RFP § L.3.4 can only be interpreted
as requiring the procuring agency to validate offeror status at time of award in accordance with SBA criteria of determining eligibility. (Id. at 5-6.)

F. SBA's Response to the Appeal

On July 28, 2017, SBA responded to the appeal. SBA asserts that the D/GC properly determined Ventech's size as of the date of its initial offer, including price. This date does not change, even when the procuring agency seeks revised proposals. (SBA Response at 2.)

SBA maintains this is consistent with FAR 19.805-2(b), which provides that eligibility will be determined by SBA as of the time of submission of initial offers which include price. (Id. at 3.) Appellant wrongly relies on a provision of the RFP to support its preferred date for determining size. The Small Business Act gives SBA conclusive authority to determine size, and therefore SBA's regulations control, regardless of the provisions of the RFP. (Id. at 3, citing 15 U.S.C. § 637(b)(6).)

Further, the RFP language Appellant relies on is more reasonably interpreted to mean that a procuring agency will request an 8(a) eligibility determination on an apparent successful offeror prior to award. SBA will then determine eligibility as of the date of the offeror's submission of its initial offer including price. (Id. at 3-4, citing FAR 19.805-2(b).)

SBA asserts the Small Business Act, 15 U.S.C. § 637(a)(1)(C), permits a contract award to a graduated 8(a) participant if it was eligible “on the date for receipt of offers.” (Id. at 4.) A procuring agency's solicitation cannot conflict with this statutory provision. (Id.)

SBA maintains the intent of this provision was to spare 8(a) firms the expense of submitting offers and then being found ineligible for award because they had graduated during evaluation. SBA points to the legislative history of the Small Business Act as supporting its position. (Id. at 5-6, citing 136 Cong. Reg. S17648 (Oct. 27, 1990); S. Rpt. 102-35 (April 9, 1991).)

SBA has crafted a regulatory scheme which permits graduated 8(a) firms to receive award of a competitive 8(a) contract if they were eligible as of the initial date for receiving offers. (Id. at 6-8, citing 13 C.F.R. § 124.507(d); Size Appeal of HBC Management Services, LLC, SBA No. SIZ-5686 (2015); Gutierrez-Palmenberg, Inc., B-255797.3,.4,.5, August 11, 1994, 94-2 Comp. Gen. Proc. Dec. ¶ 158.)

Finally, SBA argues that, under 13 C.F.R. § 124.517, Ventech's 8(a) eligibility cannot be challenged through a size protest or appeal. (Id. at 8-9.) Also, under 13 C.F.R. § 134.102, OHA lacks jurisdiction over 8(a) eligibility determinations in connection with a contract award. (Id.)
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

Appellant's arguments largely go the question of whether Ventech is eligible to receive the award by Air Force of this 8(a) procurement. However, this question is beyond OHA's jurisdiction. The regulation provides:

The eligibility of a Participant for a sole source or competitive 8(a) requirement may not be challenged by another Participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest.

13 C.F.R. § 124.517(a).

Further, OHA's jurisdictional regulation does not include adjudicating the eligibility of 8(a) concerns for 8(a) awards. OHA's jurisdiction over 8(a) matters is limited to questions of denial of program admission, termination, suspension, and certain waivers, none of which is at issue here. 13 C.F.R. § 134.102(j). Regarding 8(a) contract awards, OHA has recognized that it has jurisdiction only over questions relating to a concern's size, and not to its 8(a) status. Size Appeal of Santa Fe Protective Services, Inc., SBA No. SIZ-5312, at 12 (2012). In Size Appeal of HBC Management Services, SBA No. SIZ-5686 (2015), OHA considered the question of when an 8(a) concern's size is to be determined, but did not consider whether the protested concern was an eligible 8(a) concern. Accordingly, the Area Office erred in making a determination as to Ventech's eligibility for award, although because it found Ventech eligible, the error is harmless. Size Appeal of OSG, Inc., SBA No. SIZ-5718 (2016). I will not consider the issue of whether Ventech is eligible as an 8(a) concern to receive the award here, because it is not within OHA's jurisdiction.

Nevertheless, Appellant also maintains that Ventech is not a small business under the applicable size standard. In order to adjudicate that issue, I must decide whether the Area Office used the correct date to determine Ventech's size.

SBA has promulgated regulations which govern the size determination process under the Agency's statutory authority. 15 U.S.C. § 637(b)(6). SBA's regulation provides that:
SBA determines the size status of a concern, including its affiliates, as of the date the concern submits a written self-certification that it is small to the procuring activity as part of its initial offer (or other formal response to a solicitation), which includes price.

13 C.F.R. § 121.404(a).

The regulation sets out further rules for certain cases; for example, for purposes of compliance with the nonmanufacturer or ostensible subcontractor rules, size is to be determined as of the date of final proposal revisions (13 C.F.R. § 121.404(d)), but the rule otherwise is clear: SBA determines a concern's size as of the date of its initial offer, including price.

The question has arisen as to whether the parenthetical phrase “or other formal response to a solicitation” means that the date of an offer submitted after the initial offer, or the date of final proposal revisions should be used in determining a concern's size. OHA has answered this question with an emphatic “No”:

Appellant's argument would mean that any formal response to the solicitation should establish a date to determine size. The problem with Appellant's position is that it sets no definite date for determining size for a procurement. Every procurement has an initial offer, but many will have final proposal revisions and some will have several rounds of offers submitted. All of these are formal responses to the proposal. Appellant's argument provides no basis for determining which of these formal responses to the solicitation should be used as the date for determining size. Appellant's argument would leave area offices with no clear basis for selecting a date on which to determine size. By contrast, the rule that an initial offer including price must be used, except in certain definite cases enumerated in the regulation or where the initial response did not include price provides the area office with a clear rule to apply in selecting the date to determine size. Appellant's argument, if adopted, would leave too much uncertainty in the size determination process.


Appellant argues that the posture of this case mandates a different result, where the Air Force made an award (to Appellant), a GAO protest was filed, the Air Force undertook corrective action, reopened discussions, and sought FPRs from the offerors. However, the Air Force did not cancel or terminate the solicitation. Rather, it sought FPRs under the existing solicitation. Appellant may argue this action was tantamount to a new procurement, but it was not, in fact, a new procurement, and therefore the rule that size must be determined as of the date of initial offers remains applicable.

Appellant can point to no authority which supports its argument that the facts here mandate the use of the date of the FPRs to determine size. The regulation is clear, and there is nothing in it which provides for the use of a different date under the circumstances which apply in this case. Appellant points to the RFP's provision that initial offers may only be accepted for
180 days as supporting its contention. But this does not alter the regulatory requirement that size be determined as of the date of the initial offer. If the initial offer may no longer be accepted, that does not change the fact that the regulation mandates the use of its date to determine size. As noted in Ramcor, submission of FPRs, or any other offer after the initial offer including price, does not vary the date to determine size.

Appellant argues repeatedly that the RFP mandates that the date of the FPR be used to determine size. The cited section provides the CO “will validate 8(a) status upon receipt of proposal(s) and prior to award.” RFP § L.3.4. I disagree with Appellant.

This RFP provision does not alter in the slightest the date for determining size in this case. First, OHA is reviewing the actions of the Area Office, and this provision gives direction to the CO only, and not to anyone at SBA. Second, nothing in RFP § L.3.4 mandates the use of the date of the FPRs for validation of 8(a) status; this validation properly could be done under this section as of the date an offeror submitted its initial offer, including price, as required by the regulation. Finally, nothing in the RFP can override the requirements of the regulations that govern size determinations, which require that size be determined as of the date of an offeror's initial offer, including price.

Accordingly, I conclude the Area Office correctly used April 27, 2016, the date Ventech submitted its initial offer, including price, as the date for determining Ventech's size for this procurement. The Area Office properly used Ventech's Federal tax returns for the years 2013, 2014, and 2015 to determine its annual receipts. 13 C.F.R. § 121.104(c)(1). Upon a review of these returns, I find that the Area Office did not err in finding that Ventech's annual receipts, combined with those of its affiliates, were within the size standard. Appellant offers no argument in its appeal to support its contention Ventech's annual receipts exceed the size standard, only its mere assertion that they did. Appellant refers to Ventech's SBA Profile, but this is dated as of July 19, 2017, and is thus not relevant here. Appellant's protest relied upon information gleaned from the Internet to support its contention. SBA will rely upon the information in a concern's tax returns to determine its annual receipts, and will give greater weight to signed, specific factual evidence rather than unsupported allegations or opinions. Size Appeal of Financial & Realty Services, LLC, SBA No. SIZ-5719 (2016).

Accordingly, I conclude Appellant has failed to establish clear error in the size determination, and therefore I must deny the appeal and affirm the size determination.

IV. Conclusion

Appellant has failed to demonstrate that the size determination is clearly erroneous. Accordingly, the appeal is DENIED, and the size determination is AFFIRMED.

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

CHRISTOPHER HOLLEMAN
Administrative Judge