

Cite as: *Size Appeals of DNT Solutions, LLC, and Alliant Solutions Partner, LLC*,
SBA No. SIZ-5962 (2018)

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

SIZE APPEALS OF:

DNT Solutions, LLC, and Alliant Solutions
Partner, LLC,

Appellants,

Appealed From
Size Determination No. 2-2018-272

SBA No. SIZ-5962

Decided: October 4, 2018

APPEARANCES

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DECISION¹

I. Introduction and Jurisdiction

These consolidated appeals arise from a size determination concluding that the challenged firm, Alliant Solutions Partner, LLC (ASP), is not a small business, but that, because the subject task order was not set aside for small businesses, ASP remains eligible for award. On appeal, ASP contends that offerors were not required to recertify size for this task order, so the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) should have dismissed the underlying size protest as untimely. The protester, DNT Solutions, LLC (DNT), also appeals the size determination, asserting that the Area Office clearly erred in finding that the procurement was not a small business set-aside and that ASP is eligible for award. Because the two appeals pertained to the same size determination and task order, the Office of Hearings and Appeals (OHA) consolidated the appeals.

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. No redactions were requested, and OHA now issues the entire decision for public release.

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. ASP and DNT filed their respective appeals within fifteen days of receiving the size determination, so the appeals are timely.² 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Solicitation

On September 25, 2017, the U.S. General Services Administration (GSA) Federal Systems Integration and Management Center (FEDSIM) issued Task Order Request (TOR) No. GSC-QF0B-17-3315 for Database and Middleware Services.³ The TOR was issued to contract holders under the Alliant Small Business (ASB) Government-Wide Acquisition Contract (GWAC). Proposals were due November 1, 2017.

The TOR made three references to small business certifications that offerors were to provide:

L.5.1.12 PASS/FAIL ELEMENTS (TAB L)

A failure on any single Pass/Fail criteria will make the proposal ineligible for award, with no further evaluation of the Technical and Cost/Price proposal accomplished by the Government. The offeror shall provide:

...

c. Awardee of the Master Contract: The offeror shall represent that it is an awardee of the master contract.

d. Small Business Certifications: The offeror shall submit all small business certifications.

...

M.1 METHOD OF AWARD

...

² The size determination at issue, No. 2-2018-272, was dated July 6, 2018, but was not received by ASP and DNT until July 13, 2018. (ASP Appeal at 2; DNT Appeal at 2.)

³ The CO issued an amended version of the TOR on October 18, 2017. Unless otherwise indicated, citations are to the amended TOR.

The small business certifications (Section L.5.1.1[2]) from each offeror will be considered as part of the Government's best value determination. This acquisition will have a strong preference for the specific Small Business concerns listed in FAR 19.203.

...

M.2 PASS/FAIL ELEMENTS

The Government will evaluate the following pass/fail elements. **A failure on any single Pass/Fail criteria will make the proposal ineligible for award, with no further evaluation of the technical and cost proposal conducted by the Government.**

Pass/Fail Elements:

The following will be evaluated on a Pass/Fail basis:

...

- c. The Government will reject any proposal where the offeror is not an awardee of the master contract.
- d. The Government will reject any proposal that does not provide evidence of the required small business certifications.

(TOR at L-7, L-8, M-1, M-2 (emphasis in original).)

The Contracting Officer (CO) invited ASB contractors to submit questions about the TOR by October 10, 2017. Question #6 referenced § L.5.1.12 of the TOR and inquired:

Bullet d. 'Small Business Certifications' states 'the offeror shall submit all small business certifications.['] We didn't see any specific small business representations and certifications in the TOR. A) Is the Government requesting that the offeror certify itself as a current ASB prime contract holder at the time of proposal submission or B) Is the Government requesting that the offeror recertify its small business size status at the time of the proposal submission?

(Q&A at 3.) The CO responded:

The answer to both questions A and B is "yes." These are both requirements expressed in Bullets "c" and "d[]" of this section.

(*Id.*)

Question #40 referenced § M.1 of the TOR and inquired:

FAR 19.203 refers to [the] 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14), or the Women-Owned Small Business (WOSB) Program. Given this procurement is being acquired under the [ASB] vehicle which already has down selected and vetted small business, this strong preference could lead to limited competition among only these socio-economic classes. It is requested that this preference be lifted to allow fair and open competition[.]

(*Id.* at 11.) The CO responded:

Fair opportunity to compete has been provided to all [ASB] vendors, therefore this preference will remain. This is not a down-select.

(*Id.*)

The TOR did not specifically state whether the task order was set aside for small businesses. The TOR incorporated by reference various standard Federal Acquisition Regulation (FAR) clauses. FAR clause 52.219-8, Utilization of Small Business Concerns (NOV 2016), was the only FAR clause pertaining to small business participation incorporated into the TOR. (TOR at I-1.)

B. Procedural History

On February 14, 2018, the CO announced that ASP was the apparent awardee. On February 21, 2018, DNT, an unsuccessful offeror, filed a size protest challenging ASP's size. The CO forwarded the protest to the Area Office for review.

On March 9, 2018, the Area Office issued Size Determination No. 2-2018-238, dismissing DNT's protest. The Area Office found the protest untimely because the TOR did not require offerors to recertify size. The Area Office based its decision on an e-mail from the CO in which he stated:

[I]t was never my intent to initiate an official size re-certification (as described in the basic [ASB] ordering guide) for any offeror at the task order level under this procurement. The [TOR] required offerors to submit small business certifications verifying that they met the appropriate size standard for the procurement, which simply consisted of the pertinent small business size information pulled from the System for Award Management, which both [ASP and DNT] submitted in response to the TOR. An actual size re-certification imposed as a condition of task order award has very explicit language that must be incorporated in the solicitation per the terms and conditions of the [ASB] contract, and no such language was included in the [TOR]. Additionally, DNT's assertion that such a size re-certification was in fact a requirement relies on a two-part question and corresponding answer the Government provided in the TOR

Amendment 1 Question and Answer document (see page 4 of the protest). I believe the “yes” answer to this question was an administrative error on the Government's part (i.e. we did not convey our response as clearly as we could have) but was also taken out-of-context and that DNT is simply twisting the definition of “certification” in this instance to suit their purposes. I would also submit that if an official size re-certification were truly the intent here, I would most certainly have amended the TOR to include the required information to make this abundantly clear which did not occur.

(E-mail from B. McDonough to H. Goza (Mar. 8, 2018).)

DNT appealed Size Determination No. 2-2018-238 to OHA, and on April 19, 2018, OHA granted the appeal, vacated the size determination, and remanded the matter to the Area Office for further investigation. *Size Appeal of DNT Solutions, LLC*, SBA No. SIZ-5900 (2018). OHA explained that the Area Office improperly accepted “the CO's *post hoc* assertions” that recertification was not required, when the response to Question #6 “appear[ed] to do just that”. *DNT Solutions*, SBA No. SIZ-5900, at 6. OHA directed the Area Office to explore whether Question #6 and the CO's answer “amount to an amendment of the subject solicitation” and “whether any actual offerors recertified in reliance on the CO's purportedly erroneous answer.” *Id.* at 6-7. OHA further found that the Area Office did not adequately address the CO's assertion that the TOR omitted language that would have been included if recertification had been sought. OHA instructed the Area Office to “obtain the underlying [ASB] GWAC contract from the CO and determine whether that document requires explicit language for requesting recertification with a task order request.” *Id.* at 7.

During the remand, the Area Office obtained a copy of the ASB contract as well as a “Small Business [GWAC] Ordering Guide” pertaining to the ASB contracts. According to the Ordering Guide:

[Ordering Contracting Officers (OCOs)] have the discretion to require a re-representation of the [prime contractor's] size status as a condition of task order award. If an OCO intends to require a task order level size re-representation as a condition of task order award, they should explicitly make that assertion in the task order request by following the guidance in Appendix X.

(Ordering Guide at 21.) Appendix X of the Ordering Guide, entitled “Task Order Size Rerepresentation”, includes a sample provision, “Notice of Order Size Rerepresentation (OSR) at the Order Level”, which “[a]n OCO may incorporate . . . into task order requests in order to require rerepresentation as a condition of order award.” (*Id.* at 46.)

C. Size Determination No. 2-2018-272

On July 6, 2018, the Area Office issued Size Determination No. 2-2018-272, sustaining DNT's protest. The Area Office found that DNT's protest was timely because it was filed within five business days after award of a task order which required recertification. (Size Determination at 8.)

The Area Office first determined that the TOR was not a small business set-aside. The TOR contained no provisions restricting competition only to small businesses, and the fact that the procurement was conducted through the ASB GWAC did not automatically render the procurement a set-aside. (*Id.* at 2.) Furthermore, § M.1 of the TOR stated that small business status would be considered as a part of the best value determination, thereby suggesting that large businesses were not barred from competing. (*Id.*)

The Area Office next addressed whether the TOR required recertification. The Area Office found that “[n]either the word ‘new’ nor the word ‘recertify’ are used anywhere in the TOR.” (*Id.* at 8.) Although DNT argued to the Area Office that recertification was required, “DNT did not take actions consistent with [this] understanding insofar as [DNT] did not provide explicit recertification.” (*Id.* at 6.) ASP also did not recertify size, consistent with its position that recertification was not required. (*Id.* at 6-7.) Furthermore, the CO too acted as if recertification was not required. The Area Office noted that the CO considered both ASP's and DNT's offers acceptable “without either containing an explicit recertification. If the sections of the TOR requiring ‘small business certifications’ on pages L-8 and M-2 of the TOR actually required recertification, both firms' offers should have been rejected.” (*Id.* at 5.) The Area Office concluded that “the actions taken by all parties would all seem to indicate that recertification was not a requirement”. (*Id.* at 7.)

The Area Office found that, in his response to Question #6, the CO stated that recertification was required. This response, though, was not incorporated into the TOR. According to the Area Office, “it would be both inconsistent with the general principles of contract law and unreasonable to not allow offerors to rely on the final version of the TOR as issued and instead require them to dig through all Q&As and interim materials to determine whether or not they are able to make an offer due to some prior supplement or Q&A deemed to constitute an amendment despite its non-inclusion in the final version that they may or may not be aware of.” (*Id.*)

The Area Office determined that “any newness or recertification requirement was not explicit as it is not clearly stated in the final version of the TOR, or stated anywhere aside from as a ‘yes’ response in the superseded Q&A, and that there is obviously considerable room for doubt.” (*Id.* at 8.) The Area Office continued:

In the absence of clarity, and because the only use of the small business certification is to affect the best value determination, the Area Office concludes that the most logical interpretation is that recertification was required as otherwise there would be no purpose to requesting it. The [TOR] was limited to [ASB] GWAC holders; without a recertification requirement all firms would get the same benefit, effectively making it moot.

(*Id.*) Because the TOR did require recertification, the Area Office found DNT's size protest timely pursuant to 13 C.F.R. § 121.1004(a)(3)(iii). (*Id.* at 3.)

The Area Office explained that ASP did not produce tax returns and other information necessary for the Area Office to ascertain whether ASP is a small business. As a result, the Area Office drew an adverse inference that the missing information would have shown that ASP is not small. (*Id.* at 8-9.) The Area Office reiterated that the TOR was unrestricted, so although ASP is not a small business, ASP is eligible for award of the instant task order. (*Id.* at 10.)

D. ASP's Appeal

On July 27, 2018, ASP appealed Size Determination No. 2-2018-272 to OHA. ASP asserts that the size determination must be vacated because the TOR did not require recertification, and as a consequence, DNT's size protest was untimely and should have been dismissed.

ASP argues that the TOR neither requested nor required recertification. Indeed, the Area Office made “a litany of findings” that support this conclusion, including: that all parties behaved as if recertification were not required; that the CO's response to Question #6 was never incorporated into the TOR; and that any recertification request was, at a minimum, “not clearly stated” and “not explicit.” (Appeal at 8-9, quoting Size Determination at 8.) The only rationale offered by the Area Office for concluding that recertification was required was that “otherwise there would be no purpose” to the certification information requested in the TOR. (*Id.* at 9, quoting Size Determination at 8.) The Area Office's reasoning is flawed, ASP maintains, because the TOR stated that offerors participating in the small business programs identified at FAR 19.203 would be given preference in the best value analysis. (*Id.* at 10.) The programs discussed at FAR 19.203 include the 8(a) Program, the HUBZone program, the Service-Disabled Veteran-Owned Small Business Concern program, and the Women-Owned Small Business program. (*Id.* at 11.) As a result, the information requested in the TOR served as a basis to distinguish between ASB prime contractors for purposes of determining best value, but did not constitute a recertification request. (*Id.*)

ASP contends that, to the extent the Area Office based its decision upon the CO's response to Question #6, this was clear error. (*Id.* at 12.) The Area Office itself found that this response was never incorporated into the TOR. (*Id.*) Moreover, the CO made clear that the response to Question #6 was erroneous and that he did not intend to request recertification. (*Id.* at 12-13.) ASP insists that, under OHA precedent, it is appropriate to defer to the CO in determining whether recertification was sought. (*Id.* at 14, citing *Size Appeal of Orion Mgmt., LLC*, SBA No. SIZ-5853 (2017); *Size Appeal of Platinum Bus. Servs., LLC*, SBA No. SIZ-5800 (2016); *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720 (2016); and *Size Appeal of Research and Dev. Sols., Inc.*, SBA No. SIZ-5626 (2014).)

ASP alleges that the Area Office erred in suggesting that a recertification request need not be explicit. SBA regulations and OHA case law confirm that any recertification request must be explicit. (*Id.* at 15, citing 13 C.F.R. § 121.404(g)(3)(v) and *Size Appeal of Advanced Mgmt. Strategies Group, Inc./ ReefPoint Group, LLC*, SBA No. SIZ-5905 (2018).)

ASP highlights that the protester, DNT, did not recertify with its offer, although DNT now claims that recertification was required. (*Id.* at 16.) Instead, both ASP and DNT provided

their then-current SAM.gov profiles, not a recertification. (*Id.*) In addition, the TOR contained no language directing that offerors recertify size as of a particular date, another indication that there was no recertification request. (*Id.* at 17.)

ASP insists that, because recertification was not requested or required, DNT's size protest should have been dismissed as untimely. (*Id.* at 18.) As a result, the Area Office had no valid basis to conduct a size determination of ASP. (*Id.*)

E. DNT's Appeal

On July 26, 2018, DNT appealed Size Determination No. 2-2018-272 to OHA. DNT maintains that the Area Office was correct in finding that the TOR required recertification and that ASP is not a small business. According to DNT, however, the Area Office erred in concluding that the procurement was not set aside for small businesses. In addition, the Area Office wrongly found that DNT did not recertify its size.

DNT contends that “the fact that the GSA required recertification in a task order request issued only to holders of the [ASB] contract is strong evidence that the DMS procurement was a set aside.” (*Id.* at 9.) Further, the TOR and the CO's response to Question #6 are “unmistakable textual evidence” that the CO intended to conduct the procurement as a small business set-aside. (*Id.* at 10.) This textual authority is bolstered by the parties' conduct. Indeed, until Size Determination No. 2-2018-272 was issued, none of the relevant parties — the CO, offerors, and the Area Office — questioned that the TOR was a small business set-aside. (*Id.*) In DNT's view, “[t]he late-breaking contention of the [Area Office] that the DMS procurement was not a small business set-aside— and thus that ASP, now ruled to be other than small, remained eligible for the award—is untenable.” (*Id.* at 12.)

DNT also argues that, contrary to the size determination, DNT did recertify its size. DNT highlights that its proposal provided a screenshot of its then-current System for Award Management Representations and Certifications showing DNT is small for the relevant North American Industry Classification System (NAICS) code. (*Id.* at 11.) Because the TOR did not specify any particular wording or method of recertification, DNT concludes that the screen shot “was reasonable and compliant.” (*Id.*)

F. SBA's Response

On August 13, 2018, SBA responded to the appeals. SBA asserts that the TOR required ASB contract holders to submit new size certifications, and stated that GSA would consider the new certifications in the best-value analysis, rather than restricting competition only to small businesses. (SBA Response at 1.) “Therefore, the TOR was not a set-aside, even though recertification was required. Because the Area Office was correct on both issues, OHA should deny the appeals.” (*Id.*)

SBA observes that on a Multiple Award Contract, an awardee that was small at the time of its initial offer is normally treated as small for the life of the contract, unless the contracting officer requests a new size certification in connection with a specific order. (*Id.* at 1-2, citing 13

C.F.R. § 121.404(g.) Under the general rule, SBA will determine size as of the date of the offer on the Multiple Award Contract. (*Id.* at 2.) If, however, there is a request for size certifications in connection with an order, SBA determines size “as of the date the concern submits its self-representation as part of its response to the solicitation for the order.” (*Id.*, citing 13 C.F.R. § 121.404(g)(3)(v).) SBA highlights that, when there is a request for size certifications in connection with an individual order, the five-day window for filing a size protest begins from the date of notification of award of the order. (*Id.*, citing 13 C.F.R. § 121.1004(a)(3)(iii).) According to SBA, there is no specific language in the regulations for requesting recertification, but OHA case law suggests that “a task order solicitation requirement for a ‘size certification’ suffices.” (*Id.*, citing *Size Appeal of U.S. Information Technologies Corp.*, SBA No. SIZ-5585 (2014) and *Size Appeal of Research and Development Solutions, Inc.*, SBA No. SIZ-5626 (2014).)

SBA points to three sections in the TOR (§§ L.5.1.12; M.1; and M.2) that referenced size certifications. (*Id.* at 3.) Through these three provisions, SBA argues, “the TOR required the submission of small business certifications with the task order proposal.” (*Id.*) Therefore, DNT's size protest was timely under 13 C.F.R. § 121.1004(a)(3)(iii). (*Id.*)

SBA contends that, contrary to ASP's arguments, the request for “certifications” in the TOR was explicit, and there is no difference between “an agency using ‘certify’ as a verb and an agency seeking ‘certifications’ in the noun form.” (*Id.* at 4.) SBA observes that the protest timeliness rule at § 121.1004(a)(3)(iii) refers to “certifications,” as did the TOR, while § 121.404(g) uses the verb form. (*Id.*)

SBA further asserts that the response to Question #6 set the requested certification as of the date of proposal submission, and there is no such thing as an old small business certification, as any certification must be current on the date it is submitted. (*Id.* at 5.) There should be no distinction between a new certification and an old certification, as that would add a layer of complexity to recertification rules. (*Id.*) SBA posits that because there is no basis to distinguish between a new and old certification, “the TOR's explicit requests for small business certifications triggers the recertification exceptions in SBA's regulations.” (*Id.*) Consistent use of the word “certification” shows that contractors were expected to recertify as of the date of their proposal submissions. (*Id.*)

SBA contends that the procurement was not a small business set-aside, but that small business certifications were requested for the best value determination. (*Id.* at 6-7.) SBA also notes that the TOR did not contain a set-aside clause, or include any restriction that the awardee be small to receive an award. (*Id.* at 7.) SBA disputes DNT's argument that a request for certification necessarily limited the award to small businesses, because the TOR stated that there would be a “strong preference” for small businesses and indicated that the recertification request would be considered in the best value analysis. (*Id.*) Finally, SBA points out that while DNT maintains that the parties conducted themselves as if the TOR was a set aside, the parties' conduct does not change the explicit language of the TOR. (*Id.*)

G. DNT's and ASP's Responses

On August 14, 2018, DNT responded to ASP's appeal. DNT highlights that ASP does not, and cannot, dispute that it is not a small business. (DNT Response at 1.) DNT reiterates its position that the TOR explicitly required recertification and that the CO confirmed that recertification was required in his response to Question #6. (*Id.*) Therefore, DNT's protest was timely filed within five business days after award of an order that required recertification.

Also on August 14, 2018, ASP responded to DNT's appeal. ASP argues that DNT's appeal is meritless because the TOR, based on its plain language, was not a small business set-aside. (ASP Response at 2-3.) As for recertification, the Area Office “admitted that no request for recertification was explicit in the TOR.” (*Id.* at 6.) Although the size determination suggests that recertification was the only reason why certification information might have been requested in the TOR, this is plainly incorrect because “the TOR's references to small business certifications assisted the [CO] in distinguishing between certain socioeconomic categories and other small businesses for the purposes of applying a preference in the TOR.” (*Id.*) ASP highlights that the Ordering Guide identified particular language for requesting recertification with a task order, yet “[t]his carefully prescribed language appeared *nowhere* in the TOR.” (*Id.* at 7, emphasis ASP's.)

H. Motion to Reply

On August 14, 2018, ASP moved to reply to SBA's Response and submitted its proposed Reply. A reply is warranted, ASP argues, to address new arguments raised in SBA's Response. Specifically, according to ASP, “[SBA] contends for the first time that the fact that the TOR included a requirement for a 'certification' necessarily meant that the TOR explicitly required a 'recertification,' which the SBA distinguishes from a request for a 'representation' or 'status' with respect to size.” (Motion at 1.) ASP also objects to SBA's “conflation of the terms ‘certification and recertification.’” (*Id.* at 2.) SBA and DNT take no position on ASP's Motion to Reply. (*Id.* at 7.)

Under applicable regulations governing size appeals, a reply to a response is not permitted unless OHA so directs. 13 C.F.R. § 134.309(d). No such direction occurred here. Furthermore, while it is true that SBA's arguments on appeal differ to some extent from the reasoning of the Area Office, the ultimate conclusion that the TOR required recertification is not new, and thus does not merit a reply. Accordingly, ASP's Motion is DENIED.

III. Discussion

A. Standard of Review

As the Appellants, DNT and ASP have the burden of proving, by a preponderance of the evidence, all elements of their respective appeals. Specifically, Appellants must prove that 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

The key question presented here is whether the TOR required ASB contractors to recertify size for the instant task order. The issue is critical because it is well-settled that a size protest against an order under a long-term contract is timely only if the CO requested recertification in conjunction with that order. 13 C.F.R. § 121.1004(a)(3)(iii); *Size Appeal of Unissant, Inc.*, SBA No. SIZ-5871, at 4-5 (2017); *Size Appeal of Platinum Bus. Servs., LLC*, SBA No. SIZ-5800, at 5 (2016); *Size Appeal of Oxford Gov't Consulting, LLC*, SBA No. SIZ-5732, at 2 (2016). In the instant case, I agree with ASP that the TOR clearly did not request, or require, recertification. As a result, DNT's protest was untimely and should have been dismissed. OHA will vacate a size determination issued in response to an untimely protest. *E.g.*, *Size Appeal of Quantum Profl Servs., Inc.*, SBA No. SIZ-5207 (2011), *recons. denied*, SBA No. SIZ-5225 (2011) (PFR). Accordingly, ASP's appeal must be granted and Size Determination No. 2-2018-272 vacated. Vacating the size determination renders DNT's allegations of error in that size determination moot. DNT's appeal must therefore be dismissed. *See* 13 C.F.R. § 134.316(c) (OHA will not adjudicate matters which have “become moot”).

As ASP observes in its appeal, the Area Office made numerous factual findings in Size Determination No. 2-2018-272 which indicate that the TOR did not require recertification. The Area Office noted, first, that the TOR contained no language calling for a “new” size certification or a “recertification”. Section II.C, *supra*. Further, the Area Office found, any recertification request was “not explicit” and indeed was not “stated anywhere” in the TOR. *Id.* The CO informed the Area Office that he did not intend to request recertification, and that “[a]n actual size re-certification imposed as a condition of task order award has very explicit language that must be incorporated in the solicitation”. Section II.B, *supra*. Such language was absent from the TOR. *Id.* In addition, the Area Office determined, all relevant parties comported themselves as if recertification were not required. According to the Area Office, neither ASP nor DNT recertified with their respective offers. Section II.C, *supra*. The CO likewise did not reject either proposal for failure to recertify, notwithstanding that the TOR had warned that “[t]he Government will reject any proposal that does not provide evidence of the required small business certifications.” The Area Office thus found that “[i]f . . . the TOR actually required recertification, both firms' offers should have been rejected.” *Id.*

Several of the above facts are strong evidence that the TOR did not require recertification. Under a long-term, multiple-award contract, the decision to request recertification for a particular order is reserved to the discretion of the CO. *See generally* 13 C.F.R. § 121.404(a)(1)(i); *Size Appeals of Safety and Ecology Corp.*, SBA SIZ-5177, at 22 (2010). As a result, OHA affords considerable weight to the CO's view as to whether recertification was requested. *Size Appeal of Advanced Mgmt. Strategies Group, Inc./ ReefPoint Group, LLC*, SBA No. SIZ-5905, at 6 (2018); *Size Appeal of CodeLynx, LLC*, SBA No. SIZ-5720, at 6 (2016). Here, both the CO's statement and his actions during the procurement support the conclusion that recertification was not required. The Area Office's findings that the TOR did not expressly require recertification, and that any recertification request was “not clearly stated” and “not

explicit,” are also strong indications that there was no request for recertification. SBA regulations at 13 C.F.R. § 121.404 (g)(3)(v) state that a recertification request must be made “explicitly”, and the Ordering Guide applicable to the ASB contracts likewise contemplated that “[i]f [the CO] intends to require [recertification], [the CO] should explicitly make that assertion in the task order request. . . .” Section II.B, *supra*. The absence of language requesting a “new” certification or a “recertification” is also significant. According to SBA regulations, “[a] concern that represents itself as a small business and qualifies as small at the time of the initial offer . . . is considered to be a small business throughout the life of that contract . . . [and] for each order issued against the contract . . . unless a contracting officer requests a new size certification in connection with a specific order.” 13 C.F.R. § 121.404(g). The regulations elsewhere use the term “recertification” when referring to a new certification. *Id.* The fact that the TOR did not utilize terminology normally associated with recertification again suggests that recertification was not required.

Apart from the factual findings in Size Determination No. 2-2018-272, the procedural history of this case further bolsters the notion that the TOR did not require recertification. In its original size determination, No. 2-2018-238, the Area Office concluded, based on the language of the TOR and the CO's statement, that recertification was not required. Section II.B, *supra*. OHA then remanded the matter to the Area Office with instructions to reexamine two issues: (1) whether the CO's response to Question #6 “amount[ed] to an amendment of the subject solicitation”; and (2) whether the TOR omitted language that would have been included if recertification had been sought, as the CO had asserted in his statement. *Id.* On remand, the Area Office found that the response to Question #6 did not constitute an amendment to the TOR, and noted that the Q&A document was never incorporated into the TOR. Section II.C, *supra*. In fact, the TOR was amended after the Q&A document was issued without any change in the pertinent language. *Id.* During the remand, the Area Office also obtained a copy of the ASB contract and the accompanying Ordering Guide. Section II.B, *supra*. Consistent with the CO's statement, the Ordering Guide includes a sample provision, “Notice of Order Size Rerepresentation (OSR) at the Order Level”, which may be added to a task order solicitation “to require a task order level size re-representation as a condition of task order award”. Section II.B, *supra*. The instant TOR did not contain this provision. Section II.A, *supra*.

Against this array of evidence, the only rationale offered by the Area Office for reversing its position in Size Determination No. 2-2018-238 and concluding that the TOR did require recertification was that “otherwise there would be no purpose” to the certification information requested in the TOR. Section II.C, *supra*. As ASP correctly observes, however, the Area Office's reasoning is flawed because § M.1 of the TOR stated that certain categories of small businesses would enjoy a “strong preference” in the source selection. More specifically, § M.1 stated that the types of small businesses identified at FAR 19.203 (*i.e.*, concerns participating in the 8(a), HUBZone, SDVOSB, and WOSB programs) would be preferred over other types of small businesses in determining best value. Section II.A, *supra*. The CO confirmed this evaluation preference in his response to Question #40. *Id.* Contrary to the size determination, then, the certification information sought in the TOR was not a request for recertification, but rather enabled the procuring agency to ascertain which, if any, ASB prime contractors were eligible for the evaluation preference at § M.1. The Area Office therefore clearly erred in assuming that recertification must have been requested or required.

In their respective pleadings, SBA and DNT argue that provisions in the TOR directing that offerors submit “small business certifications” and “evidence of the required small business certifications” should be understood as a request for recertification. Section II.A, *supra*. The principal problem with these arguments is that the TOR, by itself, simply is not clear as to whether it was seeking recertification at the task order level, or whether such language instead was requesting evidence of existing, contract-level certifications. The TOR's lack of clarity is illustrated by the Area Office's own inconsistent findings. Thus, in its first size determination, the Area Office concluded that recertification was not required, and in its second size determination, the Area Office found that recertification was required but was not explicit, based on the same TOR provisions that SBA and DNT now assert were a request for recertification. Similarly, in *Size Appeal of DNT Solutions, LLC*, SBA No. SIZ-5900 (2018), OHA did not find the language of the TOR conclusive, but rather remanded the matter for further investigation of the surrounding factual circumstances. Section II.B, *supra*. Viewing the language of the TOR in connection with the remainder of the record, including the factual findings in Size Determination No. 2-2018-272, it is evident that the TOR did not seek recertification.

SBA and DNT also point to the CO's response to Question #6 in contending that the TOR did request recertification. The CO explained in his statement, however, that the response to Question #6 was “an administrative error”, perhaps stemming from the convoluted phrasing of the original question. Section II.B, *supra*. Moreover, the Area Office determined in Size Determination No. 2-2018-272, and no party disputes, that the response to Question #6 was never incorporated into the TOR. Section II.C, *supra*. This latter point is significant because OHA remanded the first size determination, in part, for the Area Office to investigate whether the response constituted an amendment of the TOR. Section II.B, *supra*. Given, therefore, that the response to Question #6 was not a solicitation amendment, and was not actually treated as a request to recertify by the CO or by ASB contractors, the response to Question #6 does not establish that the TOR requested or required recertification. *Size Appeal of Metters Indus., Inc.*, SBA No. SIZ-5456, at 10 (2013) (questions and answers, which were not incorporated into the task order solicitation, did not determine whether recertification was required).

Under SBA regulations, a size protest on a long-term contract may be filed within five business days after any of three events: when the contract is initially awarded; when an option is exercised; or when there is a request for recertification in connection with an individual order. 13 C.F.R. § 121.1004(a)(3); *Platinum*, SBA No. SIZ-5800, at 5; *CodeLynx*, SBA No. SIZ-5720, at 6. None of these situations was present here. ASP most recently recertified for the ASB contract in 2014, and the instant TOR did not require recertification. Therefore, DNT's protest, filed in February 2018, was untimely.

IV. Conclusion

ASP has demonstrated that Size Determination No. 2-2018-272 is clearly erroneous, as DNT's size protest was untimely and should have been dismissed. Accordingly, ASP's appeal is GRANTED, and Size Determination No. 2-2018-272 is VACATED. In light of this outcome, DNT's appeal is moot and is therefore DISMISSED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge